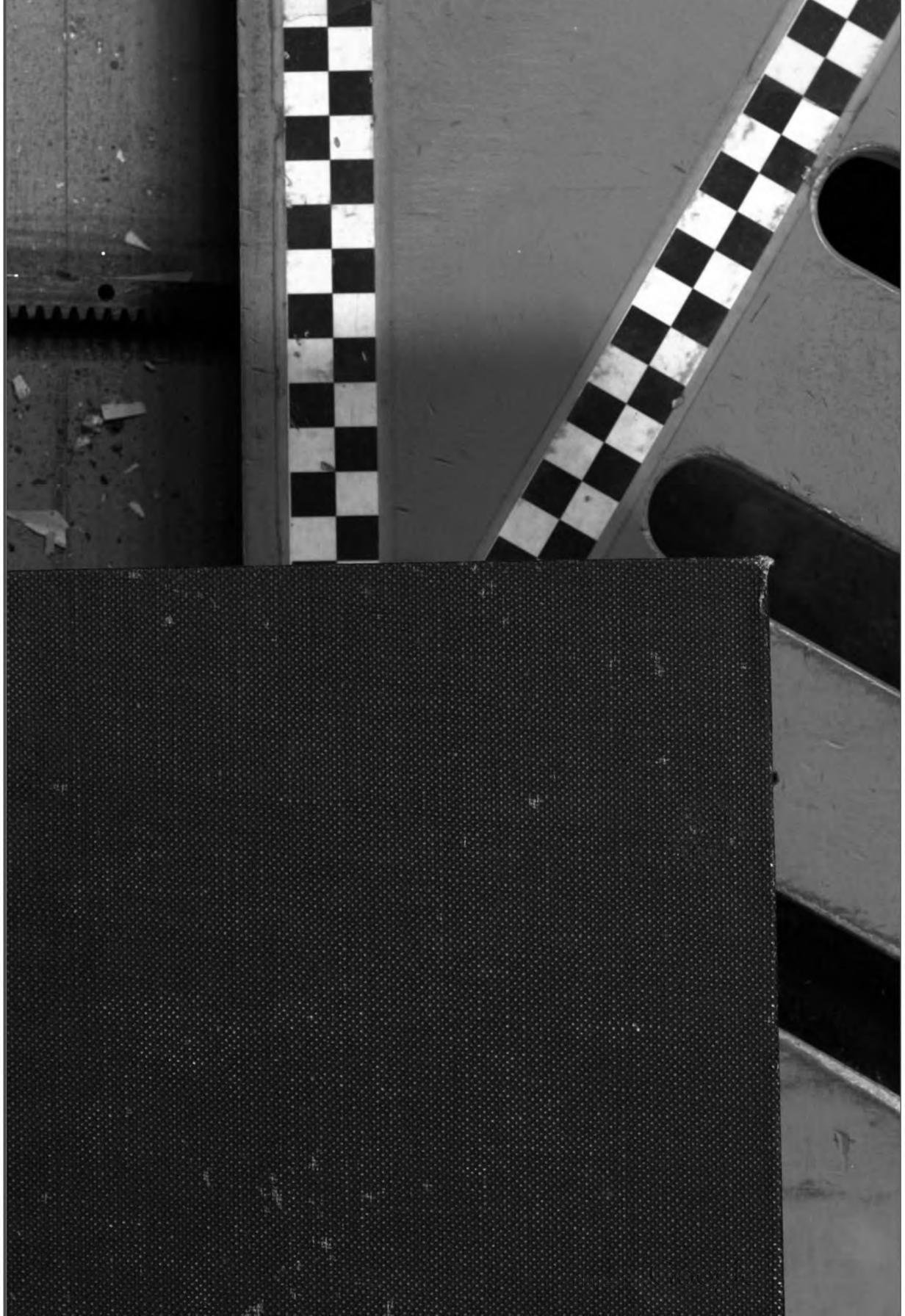

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EDITED BY ARTHUR W. SPENCER

VOLUME XXIII
COVERING THE YEAR 1911



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ROBERT ROBERTS BISHOP

**LATE JUSTICE OF THE MASSACHUSETTS
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Judge Robert Roberts Bishop

BY JOSEPH T. BISHOP, OF THE MASSACHUSETTS BAR

JUDGE BISHOP'S long life afforded many more than the ordinary number of noteworthy experiences, yet while his colleague, Judge Sherman, in his "Recollections of a Long Life," has placed on record reminiscences of much interest to the public, Judge Bishop did not leave even a brief autobiographical sketch. His traits, however, will long be recalled, and his memory cherished by friends who once knew and loved him.

Born in 1834, in the town of Medfield, Massachusetts, his father was a lawyer and skillful practitioner, who, coming from Connecticut, married in 1817, Eliza, the only child of Moses Bullen Harding. He successfully practised in Maine and Illinois, and there are those still living who recall pleading in Medfield, before the elder Bishop sitting as a justice of the peace.¹ The legal atmosphere of the retired country home early had its effect upon the boy, and after obtaining a preliminary education he determined to read law; even at the immature age of sixteen years he argued cases in behalf of clients. To the study of the law and to its sound application he gladly gave his mature years. Indeed so constant were his efforts that if less broadminded he might have become too technical to be highly efficient; but

breadth of view and faith in his fellows kept Judge Bishop intensely human and his close friendships and wide acquaintance made him in the best sense a practical man.

The Judge's life began during an important period of transition in our country's history; a time of rapid development. Whole groups of states were then unknown and their resources unappreciated, but others were swiftly turning from rugged, often violent frontier settlements into bustling yet stable sections of country. The population, numbering between twelve and fifteen millions, was becoming less shifting and more steady of purpose, and as a result there arose a desire which speedily led to open agitation in behalf of better political and economic conditions. On the one hand was the new Whig party, bitterly opposed to the financial views of Jackson and to his methods of political preferment; on the other hand, agitation against slavery began, and this movement later crystallized into the Free Soil or Republican party. George Thompson, the English agitator, was beginning his lectures in New York, and friends of internal improvements argued the relative merits of canals, railroads, and the turnpike system, their views sounding strangely primitive today.

¹ Judge Ely of Boston Municipal Court.

Such were the topics discussed during the Judge's boyhood years. His grandfather, on an adjacent farm, upheld with vigor the principles of a lifelong Jacksonian Democrat; his father was a Whig and later a member of the Free Soil party. His father believed in internal improvements and stood as an opponent of slavery and of the intemperance of his time, and as a boy had broken in pieces a stone jug rather than be forced to buy New England rum for some of his associates. In 1848 his townsmen chose him their advocate in the legislature to forward there a prospective railway line favorable to the interests of the town, and again in 1851, during which time Mr. Bishop voted on twenty-six ballots for the election of Charles Sumner, and against Robert C. Winthrop, both Senatorial candidates for the seat left vacant by Webster. This election has been termed by Von Holst "a boundary mark in the history of the United States."² The controversy in the Massachusetts legislature lasted three months and of the many persons who of right may claim the deciding ballot Mr. Bishop was one. He often alluded to his vote for Mr. Sumner on every roll-call.

Medfield is an historic town; the spoil of King Philip in 1675; the town nearest to Boston which that daring chieftain burned during the bloody war bearing his name. Judge Bishop's early years were spent upon the farm, through the meadows of which the river Charles at first winds tranquilly enough, then later foams and rushes between two rocky barriers, "The Narrows," until it again becomes quiescent in the placid water farther down. "Here he grew up a farmer's boy with all that that implies." He attended the schools of the town and then went to Holliston, and later

studied at Worcester Academy and at Phillips Academy, Andover, remaining here three years. Here he met such men as Edwards A. Park and Professor Phelps, and came under the instruction and guidance of Samuel Taylor, known to the boys of that day as "Uncle Sam," a man perhaps never excelled as principal of a preparatory school and well worthy to rank with the great masters of Rugby and Eton. Dr. Taylor made a strong and lasting impression upon the plastic mind of his pupil. At Andover, as he often said, he learned the real meaning of the term "scholarship," but more than this he studied under one who molded character and developed manhood. "It was at Andover," he remarked, "that I determined what kind of a man I would be." A line marked by him in a favorite book of the period, Horace Mann's *Essay to Young Men*³ shows his ideal. It reads, "If you cannot live with perfect honesty then starvation becomes more honorable than any martyrdom of fire."

He worked his way through the school, graduating in 1854, but was prevented from entering Harvard College, as he had intended, partly through ill health and partly from lack of means. Instead, he began at once the study of law, first with Brooks & Ball, then continuing with Peleg W. Chandler, a stanch old gentleman of the elder school whose friendship and counsel proved most helpful, and in 1857 he graduated from the Harvard Law School, and while there assisted Professor Parsons in preparing the third edition of the latter's work on Contracts. While with Mr. Chandler he acted as law reporter for the *Boston Daily Advertiser*. In 1857 he married Mary Helen Bullard,

³ This lecture is entitled, "A few thoughts for a young man," and was delivered before the Boston Mercantile Library Association in 1849.

² History of the United States, vol. 4, pp. 42, 43.

daughter of Elias Bullard of Holliston, a young woman whose dignity of character and sweetness of disposition filled Judge Bishop's home with light and contentment for nearly fifty years thereafter.

During these early years of professional life, political controversies changing year by year had slowly narrowed down to but a single issue, which the struggle between the states in the civil war was to decide. There can be no doubt as to where he stood upon this vital issue. A few years since, in alluding to the sentiments which those times inspired, he said:—

To one who came to years of maturity before the war and lived as a young man in the time when American slavery was a reality and when it was extending itself with deadly grasp over the territories of the West and acquiring new territory for that purpose, when a large section of the North was bowing down to it from commercial reasons, since Cotton was King, and when the leading northern statesmen were bowing down to it for even a worse reason—because no Northern man could be President unless he was (what the younger portion of this company do not understand the meaning of) a dough face—to one I say who lived in that time, and has since seen the emancipation and all that has followed, it might be pardoned if he were an optimist, and blindly so, the rest of his days. A younger person cannot realize the sense of degradation under which an ardent young Massachusetts man of that day was obliged to remember that wheresoever the foot of a slave should tread upon English soil he was from that moment a free man, for said Lord Holt, "There is no such thing as a slave by the law of England," and then to think that he himself must live and die in a country under whose flag there were in bondage three millions of slaves!⁴

Yet in this contest Judge Bishop took no active part, continuing at home, nursing his young wife's delicate health, and slowly gaining a foothold in the

⁴ *Essay*, "Are we getting better or worse?" read before the Neighbors' Club.

practice of his profession. But, although not personally engaged in the country's conflict, life for him proved very active and laborious. One of the earliest of his legal battles he fought against Benjamin F. Butler, and a letter from a friend dated at Rome, January 18, 1859, alludes to this case, speaking of Butler as a "most disagreeable antagonist,"⁵ and so he ever proved.

Another and more important suit arose in a petition brought by the holders of the "Burdell Bonds" against the Boston, Hartford & Erie R. R., to have the road declared bankrupt. The policy pursued in railroad management varied much up to 1870. In the beginning (1830–1850) promoters built short lines to accommodate local business, it being believed that long lines must prove impracticable.⁶ The Civil War also checked the tendency toward railroad consolidation which had begun between 1850 and 1860, but after the war the older corporations continued the process of unification and new trunk lines were constructed in different sections and across the continent. To organize the Boston, Hartford & Erie R. R., its promoters bought out several small lines, most of which were already heavily mortgaged.⁷ In addition they gained control of the tract of land at the foot of Summer street, Boston, where the present South Station stands, and by further negotiation acquired rights by virtue of which the promoters hoped to operate a line connecting Boston and Providence on the east, and running through to the Hudson River at Fishkill on the west, and

⁵ Letter from John Albee.

⁶ In 1850, although the United States had more miles of track than both England and France, no line of five hundred miles came under a single management. See Pierre Leroy Beaulieu's *United States in twentieth century*, p. 338, and Ernest Ludlaw Bogart's *Economic History of United States*, p. 309.

⁷ Chartered in 1863. The stock of one of these lines, Hartford, Providence & Fishkill R. R., sold in 1863 at one dollar per share, so low had it fallen.

there meeting with the Erie R. R. at its eastern terminus in Newburgh on the opposite shore. To carry out this project large sums were borrowed in addition to the outstanding debts of the smaller lines which the new corporation had to assume. The Commonwealth lent its aid in 1867 and 1869.⁹ It had also been arranged that all underlying mortgages having been disposed of, bonds to the amount of \$20,000,000 should be issued. These were known as Burdell Bonds.⁹ With the money thus raised the Boston, Hartford & Erie went on to finish, if possible, its through line—really a rival of the Boston & Albany which was a similar consolidation of smaller lines. The Boston & Albany proved successful, but the Boston, Hartford & Erie, unable to secure further aid either from the Commonwealth or from private sources, failed, and, acting upon the advice of their counsel, the bondholders filed a petition in bankruptcy to protect their interests as against the railroad.¹⁰ It finally became necessary for the mortgagees to take over the property and continue the maintenance of the road, and in this way the interests of the holders became secure, though not until a tedious and complicated suit had been disposed of. The dubious condition in which the bondholders at first found themselves may be realized by referring to the petition for the decree of

transfer.¹¹ It is stated that the indebtedness on the Burdell Bonds amounted to three times the value of the railroad property, and that the interest alone which had accrued since the appointment of the trustees was greater than their market value.

From an economic point of view the failure of this corporation appears as but one result of those financial disturbances which, spreading throughout the country, ended in the panic of 1873.¹² The country had passed through the Civil War, but it had never known such a financial breakdown. In this particular instance, whatever was saved for the bondholders was due to the care of the trustees and the skill of the attorneys. The protection of the \$20,000,000 worth of bonds brought to Mr. Bishop and his associates a very considerable reputation and led to his being frequently employed by railroad interests.

Besides railroad litigation his time was largely occupied in the varied concerns of a general practice. The stockholders of the Newton National Bank employed him to recover if possible a large sum lost through defalcation of the bank officials. These officers had secretly agreed with certain men in the United States sub-treasury in Boston to cover up a deficit by bringing securities from the bank to the sub-treasury during an investigation by treasury officials sent on suddenly from Washington. The movement was hurriedly planned; some one let the secret out and the United States government at once seized the securities and refused to refund.

⁹ Massachusetts was the only New England state to aid such enterprises. This and Hoosac Tunnel, 1862, 1863, 1875, are instances of note. Rhodes' *History of United States*, vol. 7, p. 77, speaks of railroad mania and loan of \$5,000,000 by Massachusetts to Boston, Hartford & Erie, 1867 and 1869. *Acts and Resolves*, years 1867, ch. 234, 1869, ch. 450.

¹⁰ This mortgage was made to R. H. Burdell, president of the Erie R. R., and D. S. Gregory and T. C. Bancroft Davis of the Erie R. R., indorsed \$4,000,000 worth. Date of mortgage March 19, 1866, recorded Mass. Suffolk Registry, libro 884, folio 273. The Boston and Albany line was secured by the commercial interests of Boston against the strenuous opposition of western Massachusetts, which regarded the railroad as a dangerous monopoly.

¹⁰ Boston, Hartford and Erie declared bankrupt in Massachusetts, March 2, 1871.

¹¹ Filed by the assignees June 4, 1875.

¹² The war tariff and consequent high prices caused expansion in all lines with the cessation of hostilities; unwise borrowing and speculation followed. Rates of interest ran high. Five thousand failures occurred during the panic year and during six years forty-seven thousand failures took place. *Coman's Industrial History*, p. 286 and p. 288. Railroads built from 1867 to 1873 exceeded in mileage the total existing in 1859; cost of additions in 1871 doubled that spent in 1857.

To win this claim for reimbursement an Act of Congress was required, and many trips to Washington were taken and several years spent before it could be secured. Sometimes the point would almost be gained and then Congress would adjourn. Time after time he returned home discouraged. Finally he succeeded and came back with a treasury check for \$260,000 in his pocket.¹³

During these first few years his professional career consisted of a steady uphill fight for a livelihood and a reputation, but increasing knowledge of the law and tact in the conduct of cases, united with sterling honesty and boundless energy, turned the tide in his favor. He now had well passed the stage of inexperience, and from 1874 on appears as an attorney of recognized ability, with a constantly increasing practice, who also was recognized by the Commonwealth as well fitted for public service.

In 1877 he with two other gentlemen constituted the Water Board of Newton, which reported the completion of the system of water works that has for thirty years supplied the city with water of the purest quality. The Commission, appointed for three, finished its work in two and a half years, and returned to the city \$83,842.78 unexpended from an appropriation of \$850,000.00, after having provided an equipment with a pumping capacity one-fifth, and a storage reservoir one-half larger than that originally contemplated.¹⁴

In 1874 he was elected to the Massachusetts House of Representatives but declined a re-election that he might serve on the Water Commission. He became a state senator in 1878, was re-elected for four succeeding years, being in 1879 President of the Senate, and

so continuing while a member of that body. The political questions of the period from 1874 to 1880 were foreshadowed by the elections of 1874. Contrary to Blaine's predictions, New York elected Samuel J. Tilden Governor by fifty thousand majority, and Massachusetts chose William Gaston by seven thousand. The Democratic party obtained a majority in the national House of Representatives against a two-thirds Republican majority in 1872. General Butler was elected a Representative from Massachusetts, as was Julius Seelye on an independent ticket; Carl Schurz was defeated for Senator in Missouri; while W. W. Phelps lost his election in New Jersey by the revolt of six hundred negro voters.¹⁵ These political disasters arose in part from the bitter contest within the ranks of the dominant party itself, between the "stalwart" supporters of President Grant and his "progressive" opponents. Discontent was felt over the failure of the Republican reconstruction policy in the South and blame fell upon the administration for the Credit Mobilier, the Sanborn Contracts, the Belknap scandals, and many justly blamed Congress for its lack of support of President Grant's Civil Service policy. In Ohio the "Greenback" and "Rag Baby" craze swept the state, Hayes and Garfield being the only leaders who stood firm for hard money, and for a time this popular delusion seemed to control Congress.¹⁶ Corruption and extravagance appeared not to be confined alone to the national government, but states and cities upon investigation exhibited symptoms of reckless and extravagant management. One of Til-

¹³ Later he recovered the additional sum of \$111,025, a total of \$371,025. This was the exact amount of the defalcation.

¹⁴ *Boston Advertiser*, Dec. 5, 1877.

¹⁵ Six hundred negroes became incensed at Phelps' vote on the Civil Rights Bill, bolted the ticket and the Democratic candidate won by a majority of seven votes. Rhodes' *History of United States*, vol. 7, p. 68.

¹⁶ Act of Feb. 4, 1868, forbidding reduction of greenbacks below \$350,000,000 repealed a year later.

den's greatest services while Governor was to rout the Tweed ring in New York City.¹⁷

Massachusetts faced problems not unlike those in other sections, and Mr. Bishop's connection with the State Senate becomes of interest, because through his influence measures were enacted important to the welfare of the Commonwealth, and because his career led to the memorable gubernatorial campaign of 1882, in which national as well as local issues prominently appear.

For instance, during his first year as senator, a bill was introduced to amend the charter of the Evangelical Baptist Benevolent and Missionary Society, a corporation which always has owned Tremont Temple in Boston, and having been favorably reported by the proper committee, the bill came up for a third reading.¹⁸ Contrary to the settled rule of Massachusetts the charter gave to the Society the right to invest funds up to \$350,000 and derive an income therefrom free from taxation. The bill to amend this provision in the charter seemed likely to pass. In a dissenting speech he discussed the question and compared it with the decision in the *Dartmouth College* case,¹⁹ and urged that it was there held that the legislature ought not to alter a charter already granted, if contrary to the wishes of the corporation, except where both of two conditions exist, namely, where the legislature has the legal right as in the present instance, though not in the *Dartmouth College* case, and where the corporation has failed in the performance of its part of the contract or the legislature has in some way a moral duty to perform; adding that however unwise might seem the grant of 1857, the legis-

lature of that year having passed upon the question of advisability, and having deliberately decided to make an exception to an established rule, the question could not properly be revived by a succeeding legislature.²⁰ The bill to amend was later disposed of on a point of order,²¹ and the Society still holds property under its Charter of 1857 up to the amount of \$350,000 exempt from taxation.

While a member of the Senate, he served upon several important committees. The chairmanship of the Retrenchment Committee, which he held, was aptly described by an associate as the "most important and disagreeable position in the state government." During the campaign of 1878 the Democrats brought forward the charge that mismanagement and gross extravagance in the administration of state affairs existed, and although beaten at the polls their statements were doubtless well founded. Governor Talbot consequently in his inaugural address recommended radical changes which the Legislature at once undertook to carry out, and to this end selected the joint special committee above referred to. "Bills were drawn by or under the thoughtful and able guidance or direction of the chairman in such a way that very few of them failed to pass through both branches without amendment or modification. The work done that winter by the chairman of the Retrenchment Committee will be remembered by every member of that committee as most careful and arduous."²² By the Committee's work the Commonwealth was enabled to save annually many hundreds of thousands of dollars.

²⁰ Compare a recent decision in which the court upheld the right of this Society to hold property to this amount. *Evangelical Baptist, etc., Society v. City of Boston*, 204 Mass. 28.

²¹ Senate Journal, 1878, p. 178.

²² *Boston Herald*, July 9, 1882, letter of T. C. Bates, one of the Committee.

¹⁷ From 1869 to 1872 Tammany leaders filched from the city about \$100,000,000.

¹⁸ Senate Journal, March 7, 1878.

¹⁹ 4 Wheaton 518.

In 1874 voters paid \$2,000,000 taxation; in 1878, by the elimination of needless offices and a liberal use of the pruning knife in all remaining departments, the same tax was reduced to \$500,000.

During his service the General Court authorized the codification of the statutes of the Commonwealth.²³ In this work Mr. Bishop took great interest and did much to make the Public Statutes of 1882 a most useful and complete revision.²⁴

As President, he presided for three years, and his last official act shows his devotion to the welfare of the taxpayer and his loyalty to the state, even when the interests of the Commonwealth were opposed to his own. His vote as presiding officer defeated a salary grab which interested parties almost succeeded in pushing through during the closing hours of the session. A majority in the lower house and a tie vote in the Senate had been reached. Amid great excitement and the utmost pressure from both sides the President calmly voted "No." That night amid jeers and shouts of anger in the lobbies he came home feeling that so many enemies had been made that his political future was blighted beyond question, and this act among many others doubtless contributed its share to his defeat in the ensuing campaign against General Butler.

In reviewing the gubernatorial contest of 1882, it is difficult for those not conversant with the politics of the time to realize the complexity of the issues and the bitterness of the fight. During the summer it appeared that four men were being pushed by their several friends as possibilities for the Republican nomination. They were Governor Long, Mr.

Noyes, recently Speaker of the House, Congressman Crapo of New Bedford and Mr. Bishop. Governor Long already had served three terms and might have been re-nominated if in the early stages of the campaign he had unhesitatingly expressed his desire to serve again. He seemed, however, to halt between state and congressional honors and this indecision resulted in his elimination as a candidate. Moreover, Mr. Noyes soon passed from a gubernatorial possibility to an aspirant for second place honors. This left the field open for the two ultimate candidates, Mr. Bishop and Mr. Crapo.

Mr. Crapo was the better known throughout the state, for after many years of political work he naturally had made more allies than Mr. Bishop, whose career had been comparatively short and whose friends for the main part had been recently made in the legislature. It was felt by many that Mr. Crapo had worked hard and long for the party and that he and not Mr. Bishop stood first in line for promotion, but Mr. Crapo's record was thought by many to have been clouded by his recent vote in favor of the "River & Harbor Bill." This enactment which Congress passed over the veto of President Arthur provided for the expenditure of several millions in improving the Mississippi River and the harbors along the coast, and while popular in and about New Bedford, from which district Mr. Crapo came, voters in other parts of the state regarded it as a piece of reckless extravagance and condemned it accordingly. This, and perhaps a desire to balk the combination headed by Senator Hoar, together with the earnest work of a few friends, gave to Mr. Bishop a decisive victory in the Worcester Convention.

Naturally Mr. Bishop felt elated.

²³ Acts and Resolves, 1880, ch. 46. Acts and Resolves, special session 1881, ch. 92.

²⁴ See preface to Public Statutes.

With the exception of 1874, when Gov. William Gaston defeated Thomas Talbot, Massachusetts had gone solidly Republican since the days of the party's inception and the great battle between Winthrop and Andrew. On the other hand, General Butler, the present nominee of the Democratic party, had several times been defeated, and there is little doubt that at the outset the friends of the Republican nominee were overconfident. They overestimated their own prestige and underestimated their opponent's growing popularity. What at first appeared to be an easy victory soon proved one of the most heated political contests Massachusetts has ever seen, with the result that General Butler polled 133,946 votes to Mr. Bishop's 119,997.²⁵

Many circumstances tended to make the nominee's task difficult; some conditions seem strangely irrelevant to the real issues; others seemingly worked exactly contrary to the logic of the situation. For instance, Mr. Bishop, while in the Legislature, strongly favored local option but not prohibition, the temperance question being then quite a vital issue. The platform adopted at Worcester said nothing as to the party's attitude, but the Democratic party inserted a temperance plank. To the credulous this would seem to place General Butler in the forefront as a temperance candidate, especially as the temperance element in the Republican constituency was not placated by rallies and through the press. The liquor dealers themselves, however, knew better; and the Republicans lost at both ends.

Again no state had done more creditable work than Massachusetts in eliminating the evils growing out of political patronage and suppressing public extravagance. Yet the outcry against the

gross abuse of political power in outside states and in the national government resounded and was echoed and re-echoed by the Democratic papers. The movement toward civil service reform so properly pressed forward by George William Curtis had aroused thoroughly the honest sentiment of the country. People were daily shocked to hear of the open assessments to be used for campaign purposes levied on even the pettiest office holders,²⁶ and the bullet of Guiteau had recently given to the public as many believed a shocking illustration of the workings of the spoils system. As a result Massachusetts Republicans suffered for the sins of the party in other states.

Again the tariff, that ever-recurring subject of contention, made its presence felt. One side urged that the protective system upheld and increased the wages of labor, the other that it augmented the cost of commodities upon which the laboring man must live.

The unfortunate financial condition of the nation created a feeling of hardship and discontent which in politics always works against the party in power. The recent resumption of specie payments had necessarily borne heavily upon the debtor and laboring classes. Persons who had contracted bills upon the basis of a depreciated currency were now obliged to pay both principal and interest in the equivalent of gold, at the same time that wages were being reduced to meet the new currency standard.

These extraneous factors influencing the public preferences, coupled with none too good feeling within the party itself, daily made the result more and more doubtful. The candidate and his

²⁶ Two per cent was levied in New York toward the general campaign fund besides that demanded by ward bosses.

²⁵ Manual of the General Court, 1883, p. 270.

friends made every effort along a high plane of argument to show the true status of the party in Massachusetts, and to place before the people the benefits it had conferred in contrast with the mistakes and errors which seemed apparent to many voters. Senator Hoar, who, previous to the nomination, had favored Mr. Crapo, at once turned to and did his utmost in this direction, but in many quarters leaders proved lukewarm and toward the end a very considerable number of votes were "traded" with a view to help General Butler.

His opponent attracted to himself every possible vote from the members of every party to which he had ever belonged — Republican, Democratic, Greenback. Probably in 1882 he preached socialistic doctrines more than anything else. He advocated a renovation in all departments and the issuance of an unlimited supply of paper money. A large class listened eagerly and voted accordingly. Many felt curious "to see what the old man would really do," and, as was once said of Blaine when he became Speaker in Congress, "he won because he proved better at making promises." Butler pointed out that there had never been a soldier Governor since the war, and a rumor was started in Cohasset that if Mr. Bishop were elected he would abolish state and military aid to veterans. The word "contraband" was dinned into the ears of the negroes, but otherwise General Butler's war record was ignored as much as possible.

In the end Suffolk county decided the election. Here in Boston, through money furnished by Butler, twelve thousand names had been placed upon the voting list, and here on the evening of November 7, after the results had become known, General Butler came and

delivered a speech to his constituents, the keynote of which he announced as "the stone which the builders rejected has become the headstone of the corner."

Although General Butler owed his triumph to the so-called tidal wave of 1882, which swept over the entire country, elevating Grover Cleveland to the Governorship in New York and deposing Cameron in Pennsylvania, and although Mr. Bishop shared the fate of Republican nominees in twenty-six other states, yet he felt his defeat most keenly. Probably no man, with the possible exception of Governor Long, could have defeated Butler in 1882, yet "the will of the people," as Mr. Bishop termed it, seemed to him most humiliating. After this contest he did not again enter politics, but returned for a time to the private practice of the law, and in 1888, after having once declined a similar honor, he became Associate Justice of the Massachusetts Superior Court.²⁷ Here he entered a congenial field of work better adapted to his temperament, and here he remained until his death, October 7, 1909.

A judgeship since the earliest days has been rightly esteemed a high honor in Massachusetts. For this Lemuel Shaw gave up a practice netting him from \$15,000 to \$20,000 a year to become Chief Justice of the Supreme Judicial Court at a salary of \$3,000. On the bench have sat Justices Bigelow, Horace Gray, Devens, Morton, Colt and others of juristic repute. In early times this bench constituted the only appellate court within the Commonwealth, but in 1859²⁸ the Superior Court was established,

²⁷ Judge Bishop received his appointment March 7, 1888, from Oliver Ames, the successful candidate for Lieutenant-Governor in 1882, later Governor. See *History of the Judiciary in Massachusetts*, William F. Davis, p. 263.

²⁸ Acts and Resolves, 1859, ch. 196. See also "The New England States," William F. Davis, vol. 3, chapter on the Massachusetts Judiciary by Albert Mason, C. J.

superseding the Court of Common Pleas, to which, besides its original jurisdiction, appeals may be taken from trial justices, police, district and municipal courts, and in certain cases from the Probate Court. Comparatively few cases out of the whole number tried are referred to the Supreme Judicial Court, and only those involving doubtful questions of law, and while not a court of last resort, yet since its creation the Superior bench has borne substantially the brunt and burden of the routine work of trials.

Judge Bishop's service covers a period of twenty-two years, and it is estimated that about forty-five hundred different cases were tried before him. His decisions uniformly were reached as a result of the same careful consideration and study which in earlier years characterized his work as an attorney and legislator. The present generation of lawyers remember little of his former career; to them he is best known as a judge, considerate of the opinions of counsel and uniformly courteous to the younger and less experienced members of the bar. Although careful of legal principles and procedure, his attitude was far from technical, his aim being to work out substantial justice through lines laid down by law. Aside from his strictly judicial work, his opinion was many times requested by the Executive regarding appointments and matters of policy relating to the Superior bench, and several times in his later years his name was suggested for promotion to the Supreme Judicial Court, to which, however, his advanced age presented a serious objection.

In 1891 a cause came before the Supreme Judicial Court which very deeply concerned Judge Bishop, although standing entirely outside the scope of his regular court work. This was the so-called Andover controversy, and related

to the right of a board of visitors to remove a duly appointed professor on the ground of heterodoxy without allowing the administrative board, namely, the trustees, the right to be present at the trial and present arguments for his retention.²⁹ Previous to the Supreme Court's decision in the Andover case the scope and limits of visitatorial power had never been defined in America. Such boards are not common among us, yet they were well known in England during our Colonial period. In 1808 the Andover Board of Visitors was created in accordance with the wishes of the benefactors of the seminary³⁰ and the Associate Statutes of that year give to this board the power "to admonish or remove him (a professor) for misbehavior heterodoxy, incapacity or neglect of the duties of his office."³¹

To discover the legal interpretation of this passage Judge Bishop spent several months abroad, including a considerable time in research work at the Bodleian Library at Oxford,³² his studies there being supplemented by further investigation after his return home. His work was of material assistance to counsel in the presentation of arguments against the action of the visitors. The decision of the court proved entirely satisfactory to the trustees,³³ and the former action of the visitors being declared void, the accused professor was continued in his position at the seminary.

The fallacy which misled the visitors

²⁹ Two cases were tried as one: (1) *Egbert C. Symthe v. Visitors of Andover Theological Seminary*, an appeal from decision of this board to the Supreme Court, as provided by law, and (2) *Bill in Equity, Trustees of Phillips Academy v. Attorney General et al.*, for instructions as to validity of the decree of visitors, 154 Mass. 551.

³⁰ Moses Brown and others.

³¹ Associate Statutes, Act. 20.

³² See *Andover Review*, vol. 16, no. xcvi, p. 609, mention of Judge Bishop's examination of English statutes and cases.

³³ Judge Bishop had long served as a trustee.

seems to have been their literal interpretation of the statutes of the seminary without paying proper attention to former prevailing customs and to precedents regarding similar boards. The court held the function of visitors to be judicial and that in passing upon the acts of the trustees as the administrative board, or their agents who were the professors, such board necessarily is a party to the proceedings and must be granted a hearing.³⁴

This decision defining the function of a visitatorial board, while a distinct addition to our jurisprudence, effected a far greater result. An acrimonious discussion between discordant factions for several years had been waged at Andover, and the right to freedom of thought and reasonable utterance of views on religious topics won a signal triumph. All denominations throughout the country watched the progress of this controversy with interest, and it was felt that the result would not be without influence upon other institutions of sacred learning, and so it proved. To-day probably no similar contention could be begun with any hope of success, so rapidly has tolerance of different religious opinions spread throughout the country.

Considering the number of cases tried before him, remarkably few were ever appealed or overruled. The instance of the *East Boston Company, petitioner, v. Commonwealth of Massachusetts*, may be cited.³⁵ This case involved the question of ownership in certain flats containing about forty acres and running from East Boston out into Boston harbor in the direction of Apple Island. In 1640 East Boston was called Noddle's Island and so continued to be known

until 1833, when the East Boston Company acquired the property and began its enterprise of transforming the existing farm with its one house and some outbuildings into a residential section of the city. In 1640 the settlers in this vicinity gathered from the flats in question great quantities of oysters and other shellfish, and several times famine in the little colony was staved off by this means. During 1640 a colony order fixed the ownership of the flats in one Samuel Maverick "to the ordinary low water mark,"³⁶ and in later years much turned on the construction of this phrase. If in 1640 "ordinary low water mark" meant an average low tide, neither very high nor very low, the flats in question belonged and still belong to the Commonwealth, but if in 1640 the parties to the grant understood the term to mean dead low water, that is, the lowest of the monthly tides unaffected by storms or accidental causes, then the flats would belong to the East Boston Company as successors of the original grantee.³⁷

In 1895 it seemed best that the location of proposed docks and watercourses about Boston be considered by a special legislative commission, and in accordance with its report the Commonwealth undertook to seize large tracts of land including that along the East Boston shore. Hence arose the question of what portion of these flats were private, what public property.

In presiding at the trial, important because of the time involved and the novelty of the questions considered, as well as the amount of property at stake and the difficulty of obtaining and properly presenting a great mass of evidence to the jury, Judge Bishop ruled on questions of jurisdiction, of evidence and

³⁴ Sir Frederick Pollock submitted an opinion for the court's consideration. James Bryce also agreed that the finding was correct in point of law.
³⁵ Superior Court Suffolk, 37, 106, third jury session, March, 1907.

³⁶ Act of May 13, 1640.

³⁷ The dispute did not affect flats within the 100-rod limit.

as to what issues of fact should go to the jury; and though counsel took numerous exceptions,³⁸ yet after the verdict they decided not to present them to the Supreme Judicial Court, having been entirely satisfied with his rulings on the numerous and difficult points of law which arose during the trial.³⁹

One instance in which the Supreme Judicial Court overruled Judge Bishop is *Martell v. White*.⁴⁰ An association of granite workers in Quincy sought to impose a fine upon a member of the association for continuing, contrary to a by-law, to purchase granite of the plaintiff, who was an outsider. The plaintiff sought to enjoin the defendant association from imposing the fine, and Judge Bishop on motion ordered a verdict for the defendant, holding that no conspiracy had been shown and that the means used to enforce the by-laws were permissible. This ruling the Supreme Judicial Court reversed, but decided that fines amounting to coercion may be an unlawful interference with the rights of a third party, even although no contractual relations exist between the third

³⁸ Nathan Matthews and W. G. Thompson appeared for the East Boston Company, R. G. Dodge and J. F. Curtis for the Commonwealth. The finding of the Land Court and the Auditor were confirmed.

³⁹ This case, however, was appealed on rulings in the Land Court. See 203 Mass., p. 68.

⁴⁰ 185 Mass. 255.

party and the person fined, and that the third party's right to a reasonably free market in which to sell his products and hire labor had been unlawfully interfered with. Nevertheless, Judge Bishop always thought his ruling right in principle.⁴¹

But it is not the number of times that a trial judge is overruled or sustained by an appellate court which measures his capacity as a competent and satisfactory magistrate. If the judge is not impartial and single minded, no matter how extensive his learning and how great his dialectical skill, he is "no well-tuned cymbal," and suitors in his court soon realize that while appearances may be imposing justice halts. In the performance of his duties always solicitous not "to wound the law," his judicial ideal was "above all things justice." Knowing no distinction of persons, the humblest suitor and the youngest or most inexperienced counsel received the fullest consideration where he presided, and if the Commonwealth of Massachusetts owes much to her judiciary, as no one will deny, Judge Bishop ranks in the roll of its members as an excellent lawyer, an incorruptible magistrate, and a Christian gentleman.

⁴¹ Compare *Willcutt & Sons Co. v. Driscoll*, 200 Mass. 116.

Some Reflections on the Crippen Trial

THE trial of Dr. Crippen in England, for the murder of his wife, has attracted a great deal of attention in the United States, and the celerity, as well as the general character, of the proceedings have been favorably commented upon by the leading newspapers

in many cities. A careful examination of the report of the trial, and of the subsequent appeal, discloses certain differences between the practice in England and in America in murder trials, which, if more widely known, would cause a very general commenda-

tion of the English procedure, both among lawyers and laymen.

The fact that Crippen was an American subject, that after the disappearance of his wife he fled with a paramour dressed in boy's clothes to Canada, that his presence on the ship in which he took passage was disclosed to the police by wireless telegraphy, that he was arrested at the first port at which the ship landed in Canada and that he was returned to England from Quebec without extradition being required, caused a wide interest in the case among many people on both sides of the Atlantic who do not generally follow the sordid details of murder trials. The mystery surrounding the crime was heightened by the fact that certain portions of a human body, alleged to be that of the victim, were found in the cellar of Crippen's residence, but in such a state as to make it difficult to prove that the remains were those of a human being, and, if that point could be established, if they were the remains of a male or a female. Evidence of these facts and of the identity of the *dissecta membra* with the missing Mrs. Crippen was based almost entirely upon the testimony of medical experts. Those called for the Crown insisted that a portion of the remains revealed a scar which was the result of an operation which Mrs. Crippen was known to have submitted to. The experts for the defense contended that the portion of the remains produced in court was not that of the part of the body which had been submitted to the operation and that the marks were not necessarily those of a surgical operation. If the case had rested solely upon this evidence it is doubtful if a conviction would have resulted. Unfortunately, however, for the accused, there was found with the remains a portion of a pair of pyjamas,

which, at the close of the trial, were proved to have been purchased by Dr. Crippen himself at a certain shop in London.

It will naturally be seen that evidence of this character, as well as other facts of the case which it was necessary for the prosecution to prove, might have been the occasion for heated discussions upon the relevancy and admissibility of evidence. It certainly would have been so in an American court and the proceedings would in all probability have been continued for some weeks. The trial in London was begun on Tuesday, October 19, and finished on Saturday, October 23. It is worthy of note that throughout the trial there were no technical objections on either side to questions propounded by counsel, or to the evidence generally. There was no argument upon evidence and no request to the judge to take a note of objections. Whatever questions were raised were discussed and disposed of without wrangling and without practically anything in the way of a dispute.

The most notable feature of the case, however, was the promptness with which the appeal from the verdict and sentence was disposed of. It has been stated that the trial was concluded on Saturday, October 23. The appeal was argued and disposed of on Saturday, October 30, that is to say exactly one week after the conviction. It was heard by a court consisting of Mr. Justice Darling, Mr. Justice Channell and Mr. Justice Pickford, all judges of eminent ability and long experience. There were four grounds for appeal. The court decided to hear each of these grounds argued separately and to give its decision at the close of the arguments on each of them. The grounds were as follows:—

1. That a juryman who became ill

during the time of the trial was separated for a time from the rest of the jury.

As this was a matter of fact, the court decided to hear evidence as to the circumstances under which the jurymen were, in fact, temporarily separated from the jury, and what, if any, intercourse he had had with others than the officers of the court during the time of his temporary illness. (The juror had fainted and had been taken into the lobby behind the court.) The court found that there was no opportunity for anyone from the outside to influence the jurymen, that his illness was simply a fainting spell, that he was removed into a place where the ventilation was better, that during the time he was attended by a physician and the officers of the court and that no words were spoken to him with reference to the trial.

2. That the Crown was allowed to call evidence as to the date of Crippen's purchase of the pyjama suit (part of which was found with the remains) after Crippen had given evidence in his own behalf.

The court decided that there was no trap set for Crippen and that the Lord Chief Justice had rightly used his discretion in allowing the new evidence.

3. That the evidence as to the identity of the remains and the use of poison was not conclusive.

The court held that the evidence was ample to support the jury's verdict.

4. That certain phrases in the Lord Chief Justice's summing up were improper, or were not justified by the evidence.

The court held that the Lord Chief Justice had adequately, fairly and fully put the case for the prisoner.

The appellate judges were unanimous in their decision on these several points. An interesting question was raised as to whether or not the prisoner should

be permitted to be present during the hearing of the appeal. Upon the ground that the appeal was solely upon questions of law Mr. Justice Ridley prior to the trial, upon an application in Chambers, refused permission for Crippen to be present, but as evidence was given during the appeal upon questions of fact, Crippen was brought into the court and remained to the end of the proceedings.

But a still more interesting feature of the Crippen case, and one which should commend the English system to the people of the United States, is the action the court took upon certain interlocutory proceedings, based upon applications for rules *nisi*, to show why certain newspapers should not be punished for contempt of court by reason of their having commented upon Crippen's arrest, and upon the probability of Crippen's guilt. The first of these applications was made on October 13 against the *Sheffield Weekly Telegraph*, on the ground that the published paragraph "was calculated to interfere with the course of justice." The application was made to the Lord Chief Justice, who, having considered the paragraph, which was not read in open court, said that the applicant was entitled to the rule *nisi* but that he would not permit it to be argued at present. He added that there was nothing worse, so far as the press was concerned, than the occasional attempts it made, he supposed in order to gain popularity, by writing such paragraphs, and the court would not hesitate to punish the publishers if such paragraphs amounted to contempt of court, but having regard to the character of the case and that it stood for trial in the next few days, he did not think it desirable that the application should be discussed at present.

After the trial was over the motion was renewed. It then appeared that the matter complained of consisted of an article headed "Murderer's Little Mistakes." "Flying from justice, Dr. Crippen forgot all about wireless telegraphy; it brought about his capture. In the murder itself (despite the diabolical skill and cunning with which the remains were mutilated), who knows what little missing particle of evidence he may have omitted to obliterate, and it may prove the very thing to fix his fate?" The court decided that this paragraph was, in the language of the applicant for the rule, "calculated to interfere with the cause of justice," and ordered the editor of the paper to pay a fine of £100, and to stand committed until the fine was paid. It was disclosed during the argument of the case that the particular editor who had passed the paragraph and caused it to be inserted in the paper had been discharged by the proprietors of the paper for having inserted the paragraph.

A similar application was made for a rule against the *Daily Chronicle* for having published two items of news with respect to the Crippen case. One was to the effect that a sensational discovery had just been made that a deadly poison had been purchased by Crippen some time before Mrs. Crippen's death. The other was the following paragraph from the Canadian correspondent of the paper: "I have confidence in the authority on which I cabled you the information sent last night, and I am assured today from the same source, that Crippen admitted in the presence of witnesses that he had killed his wife, but denied that the act was murder." Upon hearing this paragraph read Mr. Justice Pickford said: "Can you imagine more pernicious gossip than that?"

Mr. Justice Darling said: "Even if a confession had really been made, it might still have been contempt to publish it. It might have been of such a kind as would have been inadmissible in evidence." He further said that so long as the judges sat there, they were determined that trial by newspaper should not be substituted for trial by jury. It was argued on this motion that at the time the cable was published (it was immediately after Crippen was arrested) no legal proceedings were pending. The court unanimously held that an issue of a warrant was commencement of proceedings, so far as the question of contempt for discussing the matter *sub judice* was concerned. The court imposed a fine of £200 upon the editor who had permitted the cable to be published.

There was a third application of a similar nature against the editor and proprietors of the *Evening News*, because they had published, during the course of the trial, a statement to the effect that the quartermaster, who, Crippen asserted in his evidence, had agreed to secrete him in the cargo of the ship and to pass him on shore while the cargo was being discharged, had been found in London and had been in consultation with the prosecuting counsel for the Crown. In this case the editor was fined £200.

These incidents show how decided the English courts are, to use Mr. Justice Darling's language, in insisting that in all trials for capital offenses "trial by newspaper is not to be substituted for trial by jury" in England. It is noteworthy that during the proceedings the London and provincial newspapers devoted many columns each day to a report of the proceedings, but the report in every instance, while it was introduced by certain descriptive

writing to give their readers an idea of the scene in the court, was otherwise confined to a *verbatim* transcript of the language of counsel, the jury and the evidence of the witnesses, and there was nothing which could be construed in any way as an indication of what impression the evidence and arguments of counsel were making upon the judge or jury.

It may be pointed out that in England, according to fixed rules, execution takes place about a fortnight or three weeks after the sentence. The time allotted after conviction, or after an affirmance thereof on appeal, before the execution takes place allows for a minimum of two clear Sundays, but the more recent practice is that there shall be three

intervening Sundays, and thus executions are generally fixed for the Tuesday after the third Sunday from conviction. As an illustration of the working of this rule, and as also indicating the celerity with which justice is administered in England, it may be stated that in the recent case of Dickman, arrested for the Newcastle train murder, the conviction was on July 6, notice of appeal was entered on July 7, the appeal was heard on July 22 and the murderer was executed on August 9. In the case of Macdonald, who was indicted for the murder of Schlitte, a foreign banker, the conviction was on December 15, the appeal was heard on December 22 and the execution was on January 6.

The Code of Legal Ethics of the Bar Association of San Francisco

[The Bar Association of San Francisco unanimously adopted the following code of ethics at a meeting held Oct. 13, 1910. The code is framed upon an entirely different plan from that of the American Bar Association Code, laying particular stress on the duty of the lawyer to devote every effort to remedying present defects in the administration of justice. The committee which reported the code consisted of Charles S. Wheeler (chairman), Warren Olney, Grover O'Connor, Charles A. Shurtleff and A. C. Freeman.—*Ed.*]

I. *Distinctive Character of American Legal Ethics*

The Bar Association of San Francisco calls upon all licensed practitioners at the San Francisco Bar to bear in mind that the profession of the law, for more than two thousand years, has been recognized as essential to the social concept which is the basis of American civilization; that the ideals of the profession call not only for ability, learning, humanity and probity, but for a high-minded and unselfish obedience to the

ethical truth that the lawyer, as an officer of the court, is obligated to aid in, and not to hamper or thwart, the administration of justice.

They are also called upon to remember that their profession is incorporated into, and dignified by, the organic acts of the state and the nation; that the bar is charged with the high duty of supplying from its limited ranks the Judicial Department of government, the supreme importance of which department is emphasized in the circumstance that the people have delegated to it

the power to adjudge null and void the acts of the two remaining departments.

The bar is admonished that an incompetent, cowardly or dishonest judiciary would, if persisted in, lead to the overthrow of American institutions; and that a competent, courageous and honest judiciary cannot be looked for if the bar itself is incompetent, cowardly, dishonest or careless of the obligations resting upon it as a collective body.

The profession should also bear in mind that the lawyer, in addition to his distinct functions in reference to the judicial branch of the government, has always been given much prominence in the legislative and executive departments; that in the legislative department members of his profession have usually, if not invariably, outnumbered the legislators elected from any other single walk in life, while the chief executives of the state and the nation have, in most instances, been members of the bar.

The foregoing considerations, to which many of a kindred nature might be added, emphasize the vital nature of the relation of the bar to American institutions, and point to the supreme truth that American patriotism is the keystone of American Legal Ethics.

II. *Lawyers' Obligations to the Professional Body*

To the end that the duties which rest upon the bar as a professional body may be performed, each lawyer is in honor obligated to devote to the common cause a fair proportion of his time and labor.

III. *Organized Effort Essential*

Since it is obvious that the work of the bar cannot be effectually accom-

plished without organized effort, it follows that a local Bar Association should embrace in its membership each and every reputable member of the bar. The refusal of a member of the bar so to identify himself with the body of his profession at his earliest opportunity is a flagrant disregard of professional duty.

Each member of the bar is morally bound to perform fairly and thoroughly the work assigned to him by the organized bar.

Duties of an inquisitorial or disciplinary character demand not only fairness and impartiality, but the highest degree of moral courage, unselfishness and backbone. Boards and committees called upon to discharge such duties are, in an important sense, the custodians of the reputation and dignity of the bar. Shirking of duty on such committees is reprehensible and unprofessional in a high degree.

IV. *Duty to Maintain High Standard in Personnel of Bench and Bar*

It is the duty of the united bar to exert its influence and efforts to the end that those only who are honest, intelligent and adequately prepared shall be admitted to the bar; that those only who maintain their integrity of character shall be permitted to remain there; that those only who are in every way fitted shall be elevated to the bench and that those only whose honesty, industry, affiliations, associations and habits continue to maintain the people's faith in and respect for the law shall be permitted to remain on the bench.

V. *Non-Partisanship in Regard to the Bench*

It is the duty of the bar to endeavor to prevent political considerations from

outweighing judicial fitness in the selection of judges. It should protest earnestly and actively against the appointment or election of those who are unsuitable for the bench. The united bar should likewise strive for retention in office of competent judges, irrespective of their party affiliations, and should exert its influence for the removal of the judiciary from the domain of partisan politics.

VI. *Attitude of the Bar Toward the Bench*

The lawyer must bear in mind that his duty to maintain toward the courts a respectful attitude does not spring from his personal regard for the incumbent of the judicial office, but from the fact that it is of supreme importance that the dignity of the office shall be maintained. Bad opinion of the incumbent, however well-founded, cannot excuse a failure to exhibit the respect due to the judicial office.

Judges are entitled to receive the support of the bar as a professional body against unjust criticism and clamor.

Where there is a proper ground for serious complaint against a judicial officer, it is the right and duty of the lawyer to submit his grievance to the proper authorities. In such cases, but not otherwise, such charges should be encouraged, and the person making them should be upheld and protected by his professional brethren.

Lawyers are admonished to bear in mind that one side or the other must prevail in each of the several stages of a court proceeding, and that it is highly unprofessional to display temper either in court or out because of an adverse ruling or decision.

It is reprehensible and highly unprofessional for a lawyer to communicate or argue privately with a judge as to

the merits of a pending cause, and he deserves rebuke and denunciation for any device or attempt to gain from a judge special consideration or personal privilege or favor.

VII. *Relations of Bench and Bar*

Mutual respect, induced by high-minded independence in the discharge of judicial and professional duty, is a proper foundation for cordial personal and official relations between bench and bar.

A judge's personal and political friends who practise before him, owe it to him, to the bar and to the public to be scrupulously careful to avoid any appearance, act or conduct susceptible of misconstruction.

VIII. *Profession Responsible for the Progress and Adequacy of the Law*

Law is a progressive science, and it is the duty of the bar to do its utmost to keep it abreast of the needs of the times. To that end the bar should exert itself to bring about the abolition of any rules of law or practice, however firmly grounded in precedent, that may appear to have become unsuited to present conditions. Particularly should the bar strive for the abolition of any statutory or judicial doctrine not consonant with justice and equity.

IX. *Profession Responsible for the Law's Delays*

The bar admits its full responsibility for such of the law's delays as are not inherently necessary under our system of government. This bar recognizes that it is an immediate and continuing duty on the part of the profession, on the bench and at the bar, to remedy the present tardy methods of conducting legal controversies. To that end the

members of the bar are admonished that code provisions and rules of court regulating pleadings, practice and procedure are intended to facilitate and speed the administration of justice. Those in existence are recognized by the bar as adaptable to that purpose if their spirit is insisted upon and obeyed by both bench and bar.

To the same end, the Association declares it to be not professional for a lawyer to take advantage of any imperfections in the machinery of the law, with the intent thereby to retard, delay or restrict the speedy trial and conclusion of civil and criminal actions and proceedings, or the hearing of any demurrer, motion or matter therein requiring a hearing.

It is not professional to interpose demurrers for the purpose of securing delay, nor to carp at trivial defects in a pleading not going to the merits; nor to move to strike out parts of a pleading where no useful purpose will be subserved thereby; nor to obtain by stipulation or by order more time to plead than is reasonably and fairly necessary; nor to neglect to demand a jury trial until on or near the day of trial; nor ever to demand a jury trial where the purpose of the demand is to delay the cause; nor to move or request a court to grant a continuance of a cause on statutory grounds without making a strictly legal showing, or upon any other grounds without making or causing to be made to the court and opposing counsel a full, truthful and unexaggerated statement of the reason therefor; nor to refrain from notifying the court and opposing counsel, as far in advance of the time set for trial as the circumstances of the case will admit, of an intent to move for a continuance; nor to move for a change of venue or to make any other motion in an

action or proceeding, merely to vex, harass or annoy the opposite party, or to put him to needless expense; nor to make use of the delays necessary or possible in the law for the purpose of wearing out an antagonist or forcing him to a compromise.

It is the duty of the bench and bar to be punctual in attendance upon court.

It is the lawyer's duty, in the trial of causes, to expedite the work of the court by admitting the truth of all matters which he knows to be true, and not to consume its time by requiring proof, in the hope of discovering and obtaining advantage from technical defects in an opponent's preparation or procedure.

The lawyer is ethically obligated, not only to his clients, but also to the bar, to take upon himself no more business than he can properly and speedily dispatch. While reasonable courtesies in the matter of continuances are essential in the experience of every lawyer, it is unethical to expect, or to seek to obtain, postponements or delays in the trial of causes which are either unreasonable in number or duration, or which are not absolutely necessary.

X. Responsibility of the Bar Relative to the Jury System

The bar must hold its own apathy largely responsible for the disrespect into which the jury system has fallen. In all cases a lawyer is responsible to his professional brethren for his own conduct and the conduct of his employees in relation to the jury. Existing conditions demand that he also be held *prima facie* responsible for any misconduct in the same regard by his client or his client's employees. To that end it is declared that henceforth the lawyer representing the side employing

improper means with a jury is presumed to be the responsible source of such scandal, and where such improper conduct is shown to have been employed, it is essential to the professional standing of the lawyer representing the side involved that he exonerate himself before the organized bar from complicity in it or connivance at it.

All attempts to curry favor with juries by fawning, flattery, or pretended solicitude for their personal comfort are unprofessional. Suggestions of counsel looking to the comfort or convenience of jurors, and propositions to dispense with argument, should be made to the court out of the jury's hearing.

A lawyer must never converse privately with jurors or prospective jurors, and both before and during the trial he should avoid communicating with them even as to matters foreign to the cause.

It is not professional for a lawyer to offer evidence which he knows the court should reject in order, under the guise of arguing its admissibility, to get the same before the jury, nor should a lawyer address to the judge arguments or statements known to be foreign to the issue.

It is particularly reprehensible to introduce into an argument addressed to the court remarks or statements intended to influence the jury or prospective jurors in the cause.

It is disreputable and unprofessional to make, in an opening statement to the jury, or in an offer to prove, assertions which a lawyer knows he cannot or will not be permitted to prove.

A too narrow application of existing rules operates to relieve a large part of the most intelligent portion of the community from jury duty. The obligation rests upon the bar to strive for greater liberality in these rules to the

end that juries may possess the intelligence essential to true fairmindedness.

The members of the bar who make up the judiciary are respectfully admonished that it is the consensus of opinion of this Association that the latitude often permitted counsel conducting jury trials, particularly in criminal cases, tends to confuse the issue, to improperly bias the jury and to defeat the ends of justice; and it is the intent of this code respectfully to remind the bench that it is the duty of the courts, in their ethical relations to the bar, to hold all counsel strictly and impartially to the issues involved, in criminal and civil jury trials, and to enforce their orders and admonitions given to that end with all of the powers at their command.

XI. *The Conduct of Criminal Cases*

This Association takes notice of the opinion expressed by the Chief Executive of the nation—himself a distinguished lawyer and judge—that the administration of the criminal law is a disgrace to our institutions. It further recognizes that the remedy lies to a large extent in the domain of legal ethics. It therefore lays down the following canons which should be obvious but which it believes have been generally disregarded in the trial of criminal causes:—

The lawyer's right and obligation to defend persons charged with crime carries with it no duty and no right to prostitute either the letter or the spirit of the law.

The lawyer's primary obligation, as an officer of the court, to assist in the administration of justice, is neither abrogated nor diminished by his appointment or retainer to defend a person charged with crime.

A lawyer who invents or manufactures defenses for prisoners, or who procures their acquittal by the practice of any manner of deceit, cajolery, willful distortion or misrepresentation of facts, or any other means not within the spirit as well as the letter of the law, is to be reckoned as an enemy to society more dangerous than the criminal himself; while successes at the bar won by such methods can never be the basis of desirable professional reputations, but, on the contrary, are badges of infamy.

Whenever an attorney's professional obligation compels him to bring about the acquittal of a person charged with crime through the advancement of a legal proposition foreign to the guilt or innocence of the accused, his success is to be regarded both by him and by his professional brethren rather as the culmination of a regrettable duty than as a professional triumph.

Lawyers representing the people in public prosecutions should use every proper means to lay before the jury the cause of the people, and should strive to prevent miscarriages of justice through the exercise by persons accused

of crime, or those acting in their behalf, of any improper or corrupt means.

In the criminal law it must be remembered that the people rightfully demand, and are entitled to, not only the conviction of the guilty but the acquittal of the innocent as well.

To the extent of a full recognition of the foregoing principles, the feelings of the attorney charged with the prosecution or with the defense may properly enter into his client's cause, but beyond this he should avoid bringing his personality or his personal feelings or beliefs into a criminal cause.

XII. *Paramount Ethical Obligation*

As a final and emphatic canon in this, its Code of Ethics, the Bar Association of San Francisco admonishes the profession that its members are officers of the court charged with the high duty of aiding in the administration of justice, and that this duty enters into and must be recognized as the dominant factor in the interpretation of any obligation resting upon the lawyer to further the interests of his clients or to maintain successfully their causes.

A San Francisco Program of Procedural Reform

THE Bar Association of San Francisco has shown itself one of the most progressive and alert organizations of the kind in the country by the interest it has shown in the subjects of procedural reform, improvements in judicial administration and professional ethics. Within a short time the Association has adopted, substantially without change, recommendations offered by a committee calling for considerable amendments to the California Code of Civil

Procedure, it has also adopted the suggestions of another committee contemplating improvements in the methods of the Superior Court, and it has unanimously adopted the report of still another committee submitting a code of professional ethics.

The committee which offered the recommendations regarding the reform of civil and criminal procedure was made up of some of the most distinguished California lawyers, O. K. Cushing,

Boutwell Dunlap, I. Harris, Beverly L. Hodghead, Grant H. Smith and Curtis H. Lindley (*ex officio*). The committee had met weekly for the past year, and its report is an able document, fortified by a careful discussion of all the legal questions involved. The report drew forth wide and favorable comment from the California press. As these recommendations will be of interest not only in the code states but throughout the country, we present the following greatly condensed summary of the report:—

CIVIL PROCEDURE

I. *The Pleadings*

“One of the steps in an action where much delay occurs is in bringing the cause to issue. The time demurrer is a frequent cause of delay. We believe that if the defendant were required to answer and demur at the same time no injustice would result and, on the other hand, we think the practice of raising immaterial points by demurrer, which is now prevalent, would be greatly discouraged.”

To that end amendments to the California Code of Civil Procedure are offered, allowing the defendant to demur and answer at the same time within the time required in the summons for answering, providing that the defendant shall be deemed to have waived the right to answer if he demurs without answering, and striking out ambiguity, unintelligibility and uncertainty as grounds of demurrer. Another amendment is also favored, which makes specific denials unnecessary, so that a general denial may be made in every case.

II. *Exceptions*

“Under the present practice it is sometimes necessary to serve bills of exceptions, notices, etc., upon a party

in default. This, we think, should never be required. A party who has been duly brought into court and has defaulted should never be heard to complain of any relief that is given to his opponent so long as the pleadings have not been amended.”

It is therefore proposed that section 650 of the Code, relating to bills of exceptions, be amended by the addition of the words, “but the bill need not be served upon any party whose default has been duly entered.”

III. *New Trials*

“We believe that the present procedure on motion for new trial is a cause of much delay in litigation.” Several amendments designed to simplify the practice are therefore recommended.

One would strike out the provision for moving upon a bill of exceptions or statement of the case. Under the present code the motion for a new trial is seldom made on the minutes of the court, but under the proposed section it can only be made upon affidavits or the minutes of the court.

Others would provide that no notice of intention to move for a new trial need be served upon any party whose default has been duly entered, that the ten days shall run for original and reply affidavits alike and that the requirement that the notice of intention shall set forth the particular errors upon which the party will rely be dispensed with.

Another amendment would allow the court a hearing on a motion for a new trial, to consider all depositions, documentary evidence and oral testimony material to the case, whether produced with the notice or not.

Still other amendments would dispense with the requirement that on appeal from the order granting or refusing a new trial, the losing party shall

prepare a bill of exceptions if the motion for a new trial was made on affidavits, thus obviating delay, would make the practice with regard to bills of exceptions constituting the record on appeal from such order uniform with that with regard to other bills of exceptions, and would make it possible so to prepare the bill of exceptions that it may be used equally well on appeal from a final judgment and on appeal from an order granting or refusing a new trial.

IV. Appeals

Amendments to the Code are advocated which would provide that no notice of appeal need be served on any party whose default has been duly entered, and dispensing with the \$300 undertaking on appeal, which the committee think is generally considered by the bench and bar to be "practically useless."

CRIMINAL PROCEDURE

I. The Grand Jury

The committee expresses itself as unqualifiedly opposed to long investigations at the instance of indicted persons regarding the qualifications of grand jurors. They therefore favor the adoption of the Oregon statute (sections 1268, 1269, Ballinger & Cotton's Code), which provides that every grand juror found by the court duly qualified to act must be accepted unless the court excuses him before being sworn at his own request, and that no challenge can be made, except by the court for want of qualification.

II. Amendments

A change in the law is favored, demanded by "the spirit of our law" as in keeping with the disregard of technicalities, the effect of which would be to adopt the provisions of progressive

states allowing amendments of indictments and informations. It is not proposed, however, that an indictment may be so amended as to change the offense charged.

III. Arraignment

On this subject the committee accompany their recommendation that copies of testimony taken before the grand jury should not be required to be served upon the defendant with the following observations:—

"We believe that the requirement that all the testimony taken before grand juries shall be taken down by a stenographer and transcribed and filed with the clerk and that a copy thereof be served upon the defendant, adds unnecessarily to the expense of grand juries, encumbers their deliberations, robs their proceedings of secrecy and gives accused persons (and other persons who are likely to be accused) the opportunity of thwarting justice. This latter consideration we deem to be an important one, for while in theory it is only fair to an accused person to know what the witnesses against him have testified to, we know that under our system there is only the remotest possibility that an innocent person will be convicted, and we believe that such information is commonly used by the guilty to build up defenses and get rid of witnesses."

IV. Evidence

The enactment of a section following the form of New York and federal statutes is favored, which would do away with disqualifying or excusing any person from testifying on the ground that he may incriminate himself.

V. Constitutional Amendments

An amendment is advocated allowing

for verdicts rendered by three-fourths of a jury in criminal as well as civil cases, unless the death penalty is involved, or the offense was committed before the adoption of the amendment.

Another constitutional amendment would modify the rule against self-incrimination by providing that the prosecuting officer "may make such

comment upon the failure of the party accused to testify, and the court may give such instructions to the jury regarding the same, as the Legislature by law may provide."

On the last point the law as treated in the case of *Twining v. New Jersey* and other leading cases is reviewed at length.

The Duties of a Chairman

By FRED R. BARLEE

DO you, my *Green Bag* readers, know
 The duties of "The Chair?"
 He that presides must ever be
 Discreet, unbiased, fair.
 The whole Assembly's *prompt support*
 He properly *may claim*,
 Provided he's to each and all
Impartially the same.
 "His *ordinary functions*" (he
 Must ever bear in mind),
 "Are *ministerial alone*"
 (By Palgrave, Kt.,¹ defined).
 He does not as a member speak
 Like any other there,
 His words are only to explain
 His *conduct*, or to air
 His views as *chairman*; he should not
 Attempt to sway at all
 The wish or the *decision* of
 Those *present* in the hall.
 If *motion or amendment's made*
 (In order *scilicet*),
 Duly *proposed and seconded*,
 All doubts at rest are set
 By this clear rule, *The question must*
 Be from the *Chair proposed*
 At once (*scil.* after it's discussed).
 No option is reposed
 In chairmen, *though the motion put*,

¹ See Sir F. Palgrave on "Duties of a Chairman."

One may distinctly see,
Shows, to the meeting's purposes,
Direct hostility;
E'en though, if carried, the debate
 It would abruptly end
By forcing him to leave the chair,
 And to an *impasse* tend.
 Let these few rules your conduct guide,
 And ever bear in mind
 (No doubt superfluous advice),
 Be courteous, firm but kind.

Perth, Western Australia.

Canadian Appeals to the Privy Council

IT is not often that dissatisfaction with the present system of appeals to the Judicial Committee of the Privy Council expresses itself in Canada. In fact, such dissatisfaction can hardly be said to exist, in any general sense. The Judicial Committee has always been careful not to interfere in matters where its meddling might give offense to Canadians, and not only in Canada but in other parts of the British Empire, its position as the final arbiter of the graver questions of a constitutional nature rests rather upon the voluntary demand for an imperial tribunal of last resort than upon any forcible assertion of its prerogatives. The consequence is that if it attempted to meddle in matters of purely local concern it would soon find itself divested of the jurisdiction which it now exercises.

One Canadian writer, however, now comes forward to object vigorously to the action of the Judicial Committee in disposing of an appeal from the Supreme Court of Canada. In a communication published in two Canadian law journals,¹ Mr. W. S. Deacon,

declaring that the Privy Council should not interfere "with judgments of courts of last resort in the colonies in cases of minor importance, such as *Gordon v. Horne*," charges that in this case, not yet reported, the Judicial Committee "reversed the decision of the trial judge upon a pure question of fact, which decision had been affirmed by a majority of the Supreme Court of Canada (42 S. C. R. 240)."

There is, in fact, something in the very cocksureness of this criticism which shakes one's credulity. What is charged is nothing less than a deviation from the policy which the Privy Council has steadily pursued, and it is difficult to believe that the decision in question was as plain a case of "reversal upon a pure issue of fact" as represented.

Indeed, Mr. Deacon has been answered in an intelligent, fair editorial in the *Canada Law Journal* which probably disposes finally of this controversy. This reply brings out one very important circumstance, namely, that the Privy Council held an opinion of the facts similar to that of the Supreme Court of British Columbia, though it reversed the Supreme Court

¹30 *Canadian Law Times* 875 (Nov.), 46 *Canada Law Journal* 690 (Nov. 15).

of Canada, and Mr. Justice Riddell's remarks on the reversal of findings of fact, delivered in *Beal v. Michigan Central R. R. Co.*, 19 O. L. R. 504, are quoted with approval. This learned Canadian judge emphasized the distinction between the reversal of a finding of fact which turned on the credibility of witnesses and the reversal of one depending on the inferences to be drawn from the evidence. In the former case, the trial judge is best able to tell what witness is to be believed, but in the latter (to quote):—

If it appear from the reasons given by the trial judge that he has misapprehended the effect of the evidence or failed to consider a material part of the evidence, and the evidence which has been believed by him, when fairly read and considered as a whole, leads the appellate court to a clear conclusion that the findings of the trial judge are erroneous, it becomes the plain duty of the court to reverse these findings.

Mr. Deacon seems, therefore, to get rather the worst of the argument. However, to make its position stronger, the *Canada Law Journal* offers some general observations on the Canadian bench:—

It is an obvious and well-known fact (1) that our judges in this country are selected almost entirely from the supporters of the Government then in power, and selected, moreover, for political reasons; (2) that the best men at our bar are not generally chosen partly for the reasons above referred to and partly because the honor of the position is outweighed by the inadequacy of their emolument. On the other hand the English bench is selected from the very best men at the English bar—men of the highest legal training that the world affords—the pick of a population of sixty millions, as compared with our six millions. We have had occasion to criticize from time to time the spirit of the "little Englander." Is there not something equally "insular" in the tone of those who, for so-called patriotic reasons, indulge in the parrot cry, "Canada for the Canadians"? What we need in Canada are the best thoughts the best methods and the best men we can copy or get from any other land, and use them for the development of a great country, the success of which would be retarded by such short-sighted, prejudiced policy. . . .

Whether it would be possible to frame a rule that would exclude such questions as the veracity of a witness or other simple issues of fact, from the purview of a Court of Appeal, for in this respect the Privy Council is in exactly the same position as our Supreme Court, we very much doubt. Judges at Ottawa are just as likely to be mistaken in a case such as this as judges at Westminster.

The Law on the Stage

"IT is difficult to consider the trial scene in the Merchant of Venice seriously from a legal point of view," writes Alexander Otis of the Rochester, N. Y., bar, in *Case and Comment*. "Imagine it! Such a contract actually brought into court with a demand for specific performance! And yet the fair jurist calmly decides that Shylock is legally entitled to his pound of flesh if he can manage to take it without spilling one drop of Christian blood!

"The dramatic effect of all this is wonderful, but from the legal point of view the absurdity has only just begun. Having decided this peculiar equity suit, Portia proceeds to formulate a criminal accusation against Shylock, and, without the formality of arrest or indictment, places him on trial on the charge of conspiracy against the life of Antonio, finds him guilty, on the evidence adduced in the civil action, and then and there sentences him to the

forfeiture of his entire estate, both real and personal, and reduces him to beggary. A most effective *dénouement*, but it isn't justice and it isn't law. The excellent young woman whom we all admire for her well phrased ideas on 'mercy' wouldn't be a safe person to preside over a night police court. She isn't 'fossilized,' however, though she is almost four hundred years old!"

Writing of the way modern playwrights treat the law, this writer asks what we are to expect from them if Shakspeare thus felt at liberty to twist law and procedure to produce the desired dramatic effect. Taking up the case of Mr. George Bernard Shaw, he remarks:—

"One cannot help wondering whether Mr. Bernard Shaw had not just been served with legal process of some sort at the instance of an unfeeling and unpoetic solicitor when he penned that amusing farce, 'You Never Can Tell,' which has been acted in this country recently. For the sake of the legal profession let us devoutly hope that the dramatist never gets into trouble with his tailor or other grasping tradesman.

"As a fair illustration of the way the 'stage lawyer' is maligned and made ridiculous, I will quote briefly from a scene in 'You Never Can Tell.'

"A young lady is dining with an attorney at a summer hotel, and the following conversation with their waiter ensues:—

"*Young Lady*. Is your son a waiter too, William?

"*Waiter (serving fowl)*. Oh, no, Miss, he's too impetuous; he's at the bar.

"*Lawyer (patronizingly)*. A potman, eh?

"*Waiter*. No, sir, the other bar; your profession, sir,—a Q.C., sir.

"*Lawyer (embarrassed)*. I am sure I beg your pardon.

"*Waiter*. Not at all, sir, a very natural mistake I am sure, sir. I've often wished he was a potman, sir. Had to support him until he was thirty-seven; but doing well now, sir.

"*Lawyer*. Modern democracy!

"*Waiter*. No, sir, not democracy; only education, sir; scholarships, sir; Cambridge local, sir; Sidney Sussex College, sir; very good thing for him, sir; he never had any turn for real work, sir!"

A far better representation of the law on the stage, in this author's opinion, is found in Alexandre Bisson's "Madame X," which is "a very well-constructed melodrama, in which the *dénouement* is a trial scene that does not shock one's legal sense of the eternal fitness of things, partly, perhaps, because the setting is French. . . .

"In the English adaptation of 'Madame X,' Mr. Raphael, the translator, has been careful to preserve the French flavor of the court scene. The three judges and the public prosecutor wear bright red uniforms, and the young attorney, who is about to defend his own mother, a black robe and cassock. There is something ridiculous about the wigs of the English barristers and judges. They seldom fit well and are made of horse hair. In American tribunals attorneys have been known to address the court with their overcoats on. When it comes to law on dress parade the French have the best of us."

But the truth of the matter, we are told, is that "the sober business of the legal profession does not lend itself readily or naturally to dramatic situation. . . .

"At first blush it is difficult to understand why this should be so. Every law suit would seem to lend itself to the requirements of dramatic construction, passing by well-defined gradations from

the incidents arising *ante litem motam* to the *dénouement* of final judgment. As De Maupassant—and probably many others—has said, 'life resolves itself naturally into drama,' and the shelves of every law library are replete with heart throbs, containing the plots and the characters for more dramas and better dramas than have been written by the human pen since the days of Aristophanes. For law is life epitomized, and courts of law have been cynically described as 'great maternity hospitals for the miscarriage of justice.'

"While all this is true, while it is indisputable that every writer and dramatist might glean vast stores of humor and pathos from out the hidden world that lies between rotting sheepskin covers, the fact remains that the grooves of legal procedure do not fit the wheels of a chariot drawn by Pegasus.

"Yet what a theme for the pen of the serio-comic muse is the fate of that poor chap arrested and convicted in South Carolina colonial days for disturbing a religious meeting, on the ground that when he tried to sing it moved the congregation to irresistible laughter—a mere nugget from the dramatic material on our office shelves, a mine workable only on the placer theory; though, by the way, Mr. Anthony Hope has recently woven a charming love story around a disputed right of way.

"Criminal trials and the quasi-criminal divorce and breach of promise litigations appeal most vividly to the makers of plays and to the popular imagination generally. How many young men would select the law for a profession if they did not dream of one day addressing a jury and melting it to tears by their eloquence, like Raymond Floriot in 'Madame X'?"

The Doctrine of Harmless Error

THE Oklahoma Criminal Court of Appeals has plainly stated the policy which it proposes to pursue in ruling upon appeals based upon technicalities not affecting the substantial merits of controversies that may come before it. In *Byers v. Territory*, 103 Pac. 532, the Court declares that it "will not reverse the conviction upon any technicality or exception which did not deprive the defendant of a substantial right." We quote:—

"Justice demands that in the administration of law its processes should never be allowed to become a game of skill between contending counsel. There has been entirely too much of this in the past. It has resulted in the miscarriage of justice in many cases, and has bred a

spirit of disgust for law and contempt for courts in the public mind. Reduced to its last analysis, the doctrine contended for by counsel, if recognized, would require this court to hold that, where evidence is admitted during a trial and upon appeal it is held that such evidence was improperly admitted, a reversal of the conviction must follow, regardless of the character of the evidence in the record, upon the ground that, the prosecution having offered this evidence as a part of its case, it is estopped from denying its injurious effect.

"It appears to us that this application of the doctrine of estoppel, to the state, in the enforcement of its criminal law, on account of the ignorance or mistaken judgment of one of its servants,

is technicality run mad and gone to seed. We decline to be bound by, or to follow, a line of authorities so repugnant to reason, so demoralizing to respect for law, and so destructive to justice. The habit of reversing cases upon technicalities is a very convenient one for appellate courts, for by so doing they can escape much hard labor and all responsibility for their decisions, for a violation of some technical rule can be found in almost every closely contested case.

"We believe that appellate courts should faithfully and fearlessly do their duty, and decide every question presented with reference to the substantial merits of the case in which it arises. In this way only can justice be administered. Ignoring justice and deciding cases upon technicalities has not only largely lost to the courts the confidence and respect of the people, but it has also greatly alarmed the profession of law itself.

"No one can say that the members of the American Bar Association are sensationalists, or are wanting in learning or ability. It is eminently a conservative body. Yet we find them crying out against and proposing a remedy for this evil. At its last meeting at Seattle, Wash., it recommended to Congress the following amendment to the Revised Statutes of the United States: 'No judgment shall be set aside, or new trial

granted, by any court of the United States, in any case, civil or criminal, on the ground of misdirection of the jury or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, unless in the opinion of the court to which application is made, after an examination of the entire case, it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice. 1 U. S. Comp. St. p. 715. No writ of error shall be issued in any criminal case unless a justice of the Supreme Court shall certify that there is probable cause to believe that the defendant was unjustly convicted. 1 U. S. Comp. St. p. 575.' See *Green Bag*, October, 1908, p. 525. The same recommendation was adopted by the New York State Bar Association at Buffalo, on January 28 and 29, 1909. See *Green Bag* for February, 1909.

"While the above resolutions are in stronger language than our statute upon the same subject, yet they are protests against the same evil, breathe the same spirit and tend in the same direction. While we do not recognize the action of the American Bar Association and of the New York Bar Association as authority, yet we are pleased to know that views which this court has repeatedly expressed in written opinions have found such impartial, able, and conservative indorsements."

Reviews of Books

MARTIN'S LAW OF LABOR UNIONS

A Treatise on the Law of Labor Unions; Containing a Consideration of the Law Relating to Trade Disputes in All its Phases, Internal Administration of Unions, Union Labels and a Collection of Approved Forms of Pleadings, Injunctions and Restraining Orders. By W. A.

Martin, Reviewing Editor of *Cyc*, and author of *Adverse Possession, Appearances, Costs*, etc. John Byrne & Co., Washington. Pp. xxv, 455 + forms 122 + table of cases and index 72. (\$6.)

IN this age of strikes, boycotts and lock-outs, a treatise on the law of labor unions is very timely. We do find statements on

this branch of law in the encyclopedias, and in treatises on more general topics. But the courts have given us a great mass of decisions upon labor unions and their affairs in the last few years and it is quite time that they were carefully collected and digested. Mr. Martin's book has done just that. It is a complete and thorough collection and digest of the decisions done in the form of a treatise. Every statement has its authority in the footnote, and in some instances whole pages are given over to citations supporting the text.

There is no effort to make the work a philosophical treatise upon the law such as we used to have in Kent, Story and many other of the older writers. The fundamental whys and wherefores are not touched, except in so far as the author finds them passed upon in some cited decision. There are no deep-lying theories or broad doctrines laid down, and argued and supported by citations. It does not appear to be the work of a great legal theorist on the subject—but it is rather the work of the industrious library worker and collector of all known authorities. We are not surprised when we find the author described as "Reviewing Editor of Cyc, and author of Adverse Possession, Appearances, Costs, etc." The book is written with the most painstaking thoroughness, with a logical and complete classification of topics and with very full and helpful cross references.

The scope of the work is very broad. Of course it considers the right of workmen to combine and also strikes and boycotts and picketing, in each case taking the topic up historically but laying principal stress upon the present law. In addition we have chapters on combinations of employers, black-listing and lockouts, internal administration of general and local unions, union labels and many other subjects—perhaps we should also mention those on obstruction of interstate traffic, obstruction of the mails and contempt, which have proved themselves to be three troublesome propositions for the labor unions in their controversies with capital.

At the end of the text we are given more than a hundred pages of forms of pleadings, injunctions and restraining orders. These forms are interesting because in many instances they are taken from well-known controversies. In all there are thirty-four forms taken from fifteen different jurisdictions. It is well known, however, that forms throughout the country are very largely governed by

codes of procedure, practice acts and local court rules, to such an extent that a form may be good in one state and yet bad in an adjoining state. For this reason we are inclined to doubt the practical value of these forms for the lawyer who uses the book. Still, they make for the completeness of the book and may be of use to one who is drawing such papers in a jurisdiction where no precedents in point can be found.

The book of course has a very complete index and a table of cases.

It is impossible to make any criticism, either favorable or adverse, of the author's theories or doctrines, because he is not laying down anything that has not been embodied in court decisions. In true encyclopedic style he does not commit himself except in the case of a conflict among the decisions, and then he merely says "the weight of authority" or perhaps "the better view" would seem to be so and so. We think that such a work is undoubtedly of more immediate and obvious value to the practising lawyer today than would be a philosophical discussion of basic principles. The great and ever-increasing mass of reported cases, and the habits of our judiciary, make it more and more necessary for the lawyer to rely upon decisions of the courts rather than theories or principles, however lofty. The present work is built upon that foundation. The casual reader will not care for it any more than he would for a dictionary or a digest, but as a reference book for one who wants to find a decision in the shortest possible time upon some topic relating to labor unions or their affairs, it will be of very great value and will save a tedious search through many digests.

OSBORN ON QUESTIONED DOCUMENTS

Questioned Documents; a study of questioned documents, with an outline of methods by which the facts may be discovered and shown. By Albert S. Osborn, Examiner of Questioned Documents, with an introduction by Prof. John H. Wigmore, author of "Wigmore on Evidence." Illustrated. Lawyers' Co-operative Publishing Co., Rochester. Pp. xxiv + 475 + 10 (appendix and bibliography) + 13 (index). (\$5.25 net.)

"QUESTIONED Documents" is not a mere treatise on handwriting and forgery, for the expert on questioned documents goes much farther than a mere examination of writing and ink. And in the present work the author, in a clear, frank and convincing way, tells us of his art and its powers, limita-

tions and methods. There is nothing occult or mysterious about it. It is pleasing to realize that the work of the questioned document expert has so far advanced that it can be stated without technical terms or details and can be made absolutely plain to the unskilled reader or to the ordinary jury. The book is very readable and interesting, and will be of considerable value to any one who finds it important to prove either the validity or invalidity of any important documents.

The author first explains to us his various instruments and their use. He tells us how the camera and microscope are used to detect, illustrate and prove the facts as to the suspected parts of the documents, and he shows us how, with proper instruments, he can measure the minutest differences in width of lines or thickness of paper, and he explains many mechanical devices to aid in comparing suspected writing with samples that are known to be genuine.

Next comes a discussion of the little noticed peculiarities of handwriting, such as line quality, alignment, pen position, pen pressure, arrangement, proportion and spacing of writing. They often pass by absolutely unnoticed until they are enlarged, measured and recorded by the expert, and yet they are as characteristic as the features of a man's face. The author also carefully discusses the different kinds of forgeries and the methods of detecting them and showing them to court and jury. Less attention is paid to the question of ink than to the other features of questioned writing, for as to the ink the opportunities of the expert seem to be more limited than anywhere else.

In this age of typewriting, when important documents are seldom done in handwriting, probably the chapter on typewriting will be considered the most interesting. There it is pointed out that every single typewriting machine has individual characteristics of alignment, slant, spacing, letters and so forth, that can be accurately measured and that positively distinguish that machine from every other one. And the illustrations show these differences so obviously that we only wonder that we had not noticed them ourselves.

Mr. Osborn also gives us a valuable discussion of the attitude of courts of law as to the admissibility of the expert's testimony and proofs, and also appends at the end of the book a bibliography of the whole subject, both of which features should be very useful

to any one who has to deal with a questioned document in a legal proceeding.

Wherever Mr. Osborn's book is read the somewhat prevalent prejudice against experts' testimony as to questioned documents must disappear or at least be greatly diminished. The powers and limitations of the expert are so clearly stated and illustrated as to carry conviction to the reader. We are told constantly that the expert's opinion is worth little or nothing unless it can be backed up and illustrated in such a way that the judge and jury can fully understand it and verify it. For instance, at page 468 we find: "The primary purpose and function of questioned document expert testimony is not to foist a ready-made opinion on court and jury, but to assist the jury in reaching a correct interpretation of the facts before them. The importance of the bare opinion given by the witness should be constantly minimized and the reasons for the opinions should be elaborated and emphasized." And again, at page 147, we find it said: "Not much time should be spent in preparing testimony regarding a questioned writing that a judge or jurymen cannot see, understand and verify. A conflict of testimony in such a case nullifies it, which is not true when proper illustrations are prepared and cogent reasons are given." And this theory of expert testimony is repeated and emphasized throughout the book.

The book is a scholarly and conservative effort and is a distinct addition to the literature of the subject.

JOYCE ON INTOXICATING LIQUORS

The Law Relating to Intoxicating Liquors; a treatise covering the construction and application of all constitutional and statutory provisions relating to the traffic in intoxicating liquors and prosecutions for violations of the liquor laws. By Howard C. Joyce, of New York City, author of *Law of Injunctions, Law of Indictments*, etc. Matthew Bender & Co., Albany. Pp. cx (table of contents and table of cases) + 734 + 106 (index). (\$7.50.)

WE welcome the appearance of a treatise so excellent in form and substance as this. The author has arranged his material in a lucid manner, and he presents it in compact form, confining himself for the most part to a succinct statement of rules of law without indulging in any unnecessary discussion. The principal text of the book is in legible, open type, and the footnotes are chiefly designed to embody citations for the rules stated. Upwards of 3,000 cases are cited, and while drunkenness in its numerous

legal bearings is not treated, and no effort has been made to cite other than American cases, the work is a complete manual of the law of the liquor traffic in the United States, intelligently designed and skillfully executed. The arrangement is logical and convenient. Opening with two chapters devoted to definitions, the treatise proceeds to consider the provisions of the federal Constitution and the effect of statutes and municipal ordinances, and to consider fully such subjects as taxes, licenses, local option, civil damage acts, search and seizure, sales by social clubs, injunction and abatement, indictments and informations, and evidence. While such topics as returns by druggists, Sunday sales, sales to minors, liability of servant or agent and adulteration do not appear in the chapter headings, they are adequately treated, as the excellent index shows. The typography of the book is satisfactory.

VIRGINIA COLONIAL DECISIONS

Virginia Colonial Decisions. The Reports by Sir John Randolph and by Edward Barradall of Decisions of the General Court of Virginia, 1728-1741. Edited, with Historical Introduction, by R. T. Barton. 2 v. Boston Book Company, Boston. V. 1, pp. xxviii + Introduction 250 + Randolph's Reports 118; v. 2, Barradall's Reports, pp. 394. (\$7.)

OF the entire Colonial period of one hundred and sixty-nine years, the only Virginia cases of which reports have come down to posterity are those now included in these two volumes, with the exception of a few of a later time reported by Jefferson and a very few by William Hopkins. The reports of Sir John Randolph, at one time Attorney-General of Virginia, occupy only one hundred pages, those of Edward Barradall filling the entire second volume. The bulk of the first volume consists of an interesting historical introduction by the editor. The reports will scarcely be considered to have more than an antiquarian interest, but Mr. Barton's vivid sketch of conditions in Colonial Virginia gives the work a human flavor, and permanent value is insured by the accuracy with which the transcription of old manuscripts has been made.

Students of the earlier history of the common law in this country will find much to interest them in these reports. There is no very wide range of subjects, most of the cases turning on questions of titles to slaves and to real property, and involving the construction of wills or devises. Criminal actions

are practically absent, and those in contract and debt are not numerous. Of actions in ejectment or in detinue there are an abundance. The explanation of this one-sidedness of the collection seems to be found not in the limited jurisdiction of the General Court of the colony, as it possessed broad powers, but in the special equipment of the two reporters, whose learning in the law of real and personal property was remarkable and who seem to have selected cases in which they could include their own arguments as counsel, the judgment of the court being in all cases brief and reduced to writing only in the form of notes.

Primogeniture with entails, "very constantly docked on application by the General Assembly," and the English laws of descent generally were followed in the colony. Citations from the old English reports are therefore frequent, and the two reporters show a learning and an industry which evidence the extraordinary vitality of the old English common law on American soil in the Colonial period.

SULLIVAN'S BUSINESS LAW

American Business Law, with Legal Forms. By John J. Sullivan, A.M., LL.B., of the Philadelphia Bar, Instructor in Business Law at University of Pennsylvania. D. Appleton & Co., New York. Pp. xi, 424 + index 9. (\$1.50 net.)

A POPULAR manual of business law, useful to students of that subject and to business men generally, prepared by a lawyer particularly well fitted to write such a book and so well executed as to deserve the approval of the bar, is what has been accomplished by Mr. Sullivan in the short work here considered. The subject is divided up into five general divisions: (1) contracts, (2) agency, partnership, and corporations, (3) personal and real property, (4) suretyship and guaranty and insurance, (5) estates of decedents. The topics are treated in a logical order which helps the lay reader to form the notion of an orderly legal system, and no fault will be found with the general perspective of the author or with his statement of special rules. The book is written in language for the most part untechnical, but brief citations are included for purposes of illustration. The work should prove an excellent one for the class of readers whose needs it is designed to meet, and especially for young men who are debating whether to take up serious study of the law.

KENNAN'S INCOME TAXATION

Income Taxation; Methods and Results in Various Countries. By Kossuth Kent Kennan. Burdick & Allen, Milwaukee. Pp. 325+appendix and index 22 (\$3.50 net).

THIS rather extensive work is compiled, as the sub-title suggests, with the modest aim of presenting data on the subject of income taxation rather than a discussion of matters involved in that question. The body of the treatise is a compilation of facts relating to the history and present phases of income tax legislation, all the important countries of the world being separately dealt with. Income tax legislation in this country, both federal and state, is treated in detail, the subject being brought up to date. The writer regards the federal corporation tax as plainly an income tax. He finds it expedient to condense much of his information regarding the workings of the numerous systems of the world into a statistical form. The several chapters appear to have been prepared with intelligent and painstaking thoroughness.

The book has been written from the standpoint of the lawyer rather than of the economist, and the author modestly defers to the opinions of economic experts on controversial points. He declares it his purpose to refrain from scientific discussion, but what little is introduced is practical and suggestive if not profound.

The author shows himself to be neither visionary nor reactionary in his attitude toward the income tax. His estimate of the results attained in the administration of this tax, and his conclusions as to the reason for only indifferent success, are judiciously stated. It is interesting to note that while he does not consider that the income tax has yet been a success in the United States, largely owing to imperfections in the method of self-assessment, still it is doubtless destined to come into general use. He is disposed to favor a federal income tax. His view of the objects of the income tax is conservative. It is not a panacea for social ills. Its proper function, he says, is not "to correct social inequalities nor to take money from the rich for the benefit of those less fortunate. It is primarily and preeminently a fiscal measure, which finds its justification in the extent to which it will adjust itself with reasonable fairness to the abilities of those who are called upon to pay it."

Emphasis is rightly laid on the importance of our legislators undertaking to frame income

tax laws only in the light of that special study of the workings of the income tax which they have hitherto disregarded, and which is necessary to obviate serious defects in this form of legislation.

BANKRUPTCY FORMS ANNOTATED

Forms, Rules, and General Orders in Bankruptcy; collated, revised, and annotated by Marshall S. Hagar, of the New York bar, and Thomas Alexander, clerk of the United States District Court for the southern district of New York, and United States Commissioner. Matthew Bender & Co., Albany. pp. li (including table of cases), 534+22 (general orders of the United States Supreme Court)+50 bankruptcy act as amended to date)+111 (rules of court)+27 (index). (\$6.50.)

BEING the most complete collection of bankruptcy forms which has yet appeared, this book will prove immeasurably useful in bankruptcy practice. The principal merits of the work are the logical arrangement of subjects, illustrating all successive stages of a bankruptcy proceeding, and the care employed in selecting forms which long professional experience has shown best to meet the test of judicial approval.

The logical sequence of subjects is a feature perhaps new to bankruptcy treatises. Some indication of the character of the work is given by the following chapter headings: Petition and Adjudication, Temporary Receiver, Proceedings before Referee after Adjudication, Proofs of Debt and Proceedings for Allowance of Claims, Trustee in Bankruptcy, Examination of Witnesses and Depositions *de bene esse*, Sales, Restraining Orders, Discharge of Bankrupt, Composition with Creditors, Reclamation Proceedings, Miscellaneous Proceedings and Orders, Complaints in Suits by Trustee in Bankruptcy, Appeals and Petitions to Review, Particular Writs, Indictments.

The official forms prescribed by the United States Supreme Court having been found inadequate, and having in some cases been held by the courts insufficient and demurrable, only those which are found suited to such conditions as those of the southern district of New York have been retained, and an effort has been made to collect forms approved by the courts or by the experience of other members of the bar. The collection, therefore, instead of having been perfunctorily made, is intelligently designed to secure the greatest possible practical utility.

The full citation of cases in the annotations is a valuable feature, and ready access to rules of court in different jurisdictions is afforded by a work which does credit to the highly specialized skill of its authors.

ENGLISH CRIMINAL LAW

A Guide to Criminal Law and Procedure; intended chiefly for the use of bar students and articulated clerks. By Charles Thwaites, Solicitor. 8th ed. George Barber, London. Pp. xx, 234+ index 12. (10s. *net*.)

A CLEAR, precise statement of the English criminal law, by a solicitor who enjoys an excellent reputation as a teacher of law, will be found in this well-printed handbook. Each topic of the criminal law is treated in a short, comprehensive exposition of legal doctrine supported by citations of leading British decisions. Statutory offenses unknown to the common law are included in the purview of the treatise. A substantial portion of the volume, nearly one half, is concerned with procedure. Questions and answers for bar examination review are appended.

American readers would be unlikely to find this handbook of much use except for purposes of comparative study, in which connection it may be found handier than the bulkier Russell on Crimes. It will also give the practitioner ready access to English authorities for those doctrines which may be upheld in American courts.

NOTES

A splendid address on professional ethics is that which was delivered by Hon. Pliny T. Sexton of the Board of Regents of the State of New York, at the Commencement Exercises of the Albany Law School last June. This stimulating address has now been issued in pamphlet form, under the title, "Laws as Contracts, and Legal Ethics."

The theory of state sovereignty and of the rights of states to secede from the Union is vigorously defended in a striking paper by Associate Justice Eugene B. Gary of South Carolina, which in its logical vigor and cogency recalls Calhoun. This paper, now issued as a pamphlet, was delivered by Judge Gary in October before the law class of South Carolina University.

"Some Practical Suggestions for the Preparation of Written Records with a View to their Permanence" is the title of a brochure written by Webster A. Melcher of the Pennsylvania bar, examiner of questioned writings and documents. It treats of the means which should be employed to ensure the preservation of important documents, with reference to ink, paper, binding, etc.

BOOKS RECEIVED

RECEIPT of the following new books is acknowledged:—

Ethical Obligations of the Lawyer. By Gleason L. Archer, LL.B., Dean of the Suffolk School of Law, Boston. Little, Brown & Co., Boston. (\$3 *net*.)

History of the Sherman Law of the United States of America. By Albert H. Walker, of the New York bar. Albert H Walker, New York, Pp. 312. (\$2.)

Land Law and Registration of Title: A Comparison of the Old and New Methods of Transferring Land. By Eustace J. Harvey. Longmans, Green & Co., New York and London. Pp. 278. (\$2.60 *net*.)

Frederick William Maitland, Downing Professor of the Laws of England: A Biographical Sketch. By H. A. L. Fisher. G. P. Putnam's Sons, New York; Cambridge University Press. Pp. 179. (\$1.65 *net*; 5s. *net*.)

Popular Law-Making: A Study of the History and the Tendencies of English and American Legislation. By Frederic J. Stimson, University Professor of Comparative Legislation at the Harvard Law School. Charles Scribner's Sons, New York. (\$2.50 *net*.)

The Constitutional Law of the United States. By Westel Woodbury Willoughby, Ph.D., Professor of Political Science, Johns Hopkins University, Managing-Editor of the *American Political Science Review*, etc. Baker, Voorhis & Co., New York. 2 v. V. 1, pp. lxxxv, 628; v. 2, pp. xxx, 714 + 56 (index). (\$12 *net*.)

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 in Historical and Political Science, series 28, no. 3. Johns Hopkins Press, Baltimore. Pp. viii, 117. (\$1 cloth, 50 cts. paper).

The Visigothic Code (*Forum Judicium*). Translated from the original Latin, and edited by S. P. Scott, author of "Through Spain" and "History of the Moorish Empire in Europe," member of the Comparative Law Bureau of the American Bar Association. Boston Book Co., Boston. Pp. lxxiv, 409 + 9 (index). (\$5.)

The Federal Penal Code, in force January 1, 1910; together with other Statutes having Penal Provisions in force December 1, 1908. Annotated by George F. Tucker, joint author of "Gould and Tucker's Notes on the United States Statutes," and Charles W. Blood, of the Boston bar. Little, Brown & Co., Boston. Pp. lii, 301 + 168 (appendix) + 35 (index). (\$5 *net*.)

Compendium of the Laws of Mexico; officially authorized by the Mexican government, containing the federal Constitution, with all amendments, and a thorough abridgment of all the codes and special laws of importance to foreigners concerned with business in the republic; all accurately translated into English. By Joseph Wheless of the St. Louis bar. F. H. Thomas Law Book Co., St. Louis. 2 v. V. 1, pp. lxxxv, 521; v. 2, pp. 462 + 64 (index). (\$10.)

Index to Periodicals

Articles on Topics of Legal Science and Related Subjects

Aliens. "The Relation of the Alien to the Administration of the Civil and Criminal Law." By Gino C. Speranza. 1 *Journal of Criminal Law and Criminology* 563 (Nov.).

Exposing the unfair discrimination against aliens of our laws, more particularly in New York, with concrete examples of such injustice.

Aviation Law. "Liability for Accidents in Aerial Navigation." By Simeon E. Baldwin. 9 *Michigan Law Review* 20 (Nov.).

Governor Baldwin opposes the granting of any franchise for aviation which would carry exemption from liability to those injured by its exercise, and he regards the bill for an act regulating commerce by air ships referred last September to the Committee on Jurisprudence and Law Reform of the American Bar Association as open to objection.

"Trespass by Aeroplane." By H. G. Meyer. 36 *Law Magazine and Review* 17 (Nov.).

Aerial navigation will certainly bring about the destruction of the doctrine *Cujus est solum ejus est usque ad caelum*. The rule that a flight by an aviator over the land of another constitutes an act of trespass will surely not survive. But the present author holds to the theory which is doomed to pass away.

Banking and Currency. "Banking Problems." Special number of *Annals of American Academy of Political and Social Science*, v. 36, no. 3 (Nov.).

Containing a collection of most valuable papers on the monetary and banking problems of the hour, written by bankers, economists and other experts.

Comparative Jurisprudence. "Some Notes on East African Native Laws and Customs." Reprinted from East Africa Protectorate Reports, v. 1. 9 *Journal of Comparative Legislation*, pt. 1, no. 23, p. 181 (Nov.).

See International Law, Marriage and Divorce, Workmen's Compensation.

Conflict of Laws. "I, Le Conflit des Lois Personnelles; II, Le Mariage et le Divorce; III, La Filiation." By J. Champcommunal. 6 *Revue de Droit International Privé*, no. 1, p. 57 (Jan.-Mar.).

Continued from the same review, 1909, p. 536.

Conservation of Natural Resources. See Federal and State Powers.

Contracts. "Essential Error." By Hector Burn Murdock. 22 *Juridical Review* 222 (Oct.).

A thorough examination of this subject, treated with reference to Scots law. Five "orthodox" varieties of essential error, sufficient to destroy the validity of contracts, are stated, but the author proceeds to formulate a classification of his own which is more minute and more logical.

Criminal Procedure. "Draft Report of Committee E of the American Institute of Criminal Law and Criminology." By Professors Roscoe Pound, Howard L. Smith and W. E. Higgins. 1 *Journal of Criminal Law and Criminology* 584 (Nov.).

With respect to criminal pleading, the committee offer the following general propositions, with their reasons therefor:—

"I. It should be made permissible in all jurisdictions to prosecute any and every species of offense by information, after examination and commitment by a magistrate, permitting also prosecution by indictment with or without such examination and commitment.

"II. Amendment of indictments and informations should be allowed (1) as to all formal matters in any court at any time, (2) in order to prevent variance by the trial court, before or during trial upon such terms as will afford to the accused reasonable notice and opportunity to make his defense, (3) after trial, to conform to the proofs, either in the trial court or in a court of review, where the variance was not expressly brought to the attention of the trial court when the evidence was offered and the trial proceeded without claim by the accused that he was not properly notified of the case actually made against him.

"III. The office of an indictment or information should be (1) to give the accused notice of the crime with which he is charged and of the case on the facts which will be made against him, (2) to set out the facts constituting the alleged offense with sufficient exactness to support a plea of former conviction or former acquittal, as the case may be. The further office of providing a formal basis for the judgment of conviction, so that the indictment or information must set forth everything which is necessary to a complete case on paper, no longer serves any useful end, produces miscarriages of justice, and should be done away with."

With regard to the other subject referred to the committee, the elimination of unnecessary technicalities in appellate procedure.

the following propositions are suggested, elucidatory matter being here omitted:—

"I. Rules of procedure intended solely to provide for the orderly dispatch of business, saving of public time, and maintenance of the dignity of tribunals should be distinguished carefully from rules intended to secure to the accused a fair opportunity to meet the case against him and a full opportunity to present his own case; rulings upon the former class should be reviewable only for abuse of discretion and nothing should depend on, or be obtainable through, the latter class except the securing of such opportunity.

"II. No prosecution should be thrown out solely because brought in or taken to the wrong court or wrong venue, but if there is one where it may be brought or prosecuted, it should be transferred thereto and go on there, all prior proceedings being saved.

"III. Questions of law conclusive of the controversy, or of some part thereof, should be reserved and a verdict should be taken subject thereto, if the questions are at all doubtful, with power in the court, and in any other court to which the cause may be taken for review, to enter judgment either upon the verdict or upon the point reserved, as its judgment upon such point reserved may require.

"IV. Any court to which a cause is taken for review should have power to take additional evidence by affidavit, deposition, or reference, as rule of court may prescribe, for the purpose of sustaining a verdict wherever the error complained of is lack of proof of some matter capable of proof by record or other incontrovertible evidence, defective certification, or failure to lay the proper foundation for evidence which can, in fact, without involving some question for a jury, be shown to have been competent.

"V. No conviction should be set aside or new trial granted for error as to any matter of procedure unless it shall appear to the reviewing court that the error complained of has (a) resulted in a conviction not authorized by substantive law or (b) deprived the accused of some right given by adjective law to insure a fair opportunity to meet the case against him or a full opportunity to present his own."

"Criminal Procedure in England." By Prof. John D. Lawson and Prof. Edwin R. Keedy. 1 *Journal of Criminal Law and Criminology* 595 (Nov.).

The authors, as members of a committee of the American Institute of Criminal Law and Criminology, were commissioned last spring to visit England and study criminal procedure in that country. This information was gathered from personal observation, interview and conversation. A concise account of the judicial organization of England, together with the practice as regards bail, commencement of prosecutions, disregard of formal technicalities in the indictment and selection of juries, is presented. The authors offer no comparisons with American pro-

cedure and make no suggestions. As a brief comprehensive statement the article should be valued for the information which it contains.

Messrs. Lawson and Keedy are members of a committee appointed to investigate the question whether such methods as those employed in Great Britain are applicable to conditions in the United States. Their paper constitutes the first part of the committee report. The second part of the report will be published in the January number of the *Journal*.

See Procedure.

Criminology. "Social Responsibility and Heredity." By Mrs. Ellen F. Pinsent. *National Review*, v. 56, p. 506 (Nov.).

In the case of a stock tainted by hereditary insanity, we are here told, the segregation of the second generation would have stemmed the tide of disease, suffering and crime; this alone was necessary and the altruistic environmental legislation of the last century has accomplished nothing for the relief of such cases. Charts are given of several family histories. What is needed is prevention of the birth of degenerates, not futile legislation to improve their environment. "It is not too much to say that we encourage the degenerate to perpetuate themselves at the expense of the desirable citizens who are rated and taxed to supply degenerates with facilities for breeding."

"The Classification of Criminals." By Prof. Charles A. Ellwood. 1 *Journal of Criminal Law and Criminology* 536 (Nov.).

Drähms concludes that all criminals should be classified under three main heads: Instinctive criminals, habitual criminals and single offenders. The writer's purpose is "to show that this classification is at once thoroughly scientific and easily applied," and "a necessity for scientific criminal jurisprudence."

"International Congress of Criminology: A Review." By Edward Lindsey. 1 *Journal of Criminal Law and Criminology* 578 (Nov.).

Six meetings have been held, which are reviewed, and the seventh will take place in Cologne next October.

See Drunkenness, Penology.

Crippen Case. "A Study in Circumstantial Evidence." Editorial. *Solicitors' Journal and Weekly Reporter*, Nov. 12, p. 42.

A convincing summary of the circumstantial evidence serving as the foundation for the conviction of the prisoner.

Declaration of London. See Maritime Law.

Defamation. "When a Libel is not a Libel." By Rocellus S. Guernsey. 20 *Yale Law Journal* 36 (Nov.).

A short article on the defenses allowed in

actions for libel, including truth, privilege and fair comment.

Descent. "Sir William Blackstone's Influence on the Rule in *Shelley's Case*." By Henry C. Spurr. 17 *Case and Comment* 284 (Nov.).

"This reason for the rule advanced by Blackstone has been repeated over and over again, and has been the main fortress behind which its advocates have stood to meet the assaults of their adversaries. It is not too much to say, therefore, that the longevity of the rule in *Shelley's Case* has been due in a very large measure to the genius of Sir William Blackstone."

Diplomacy. "Diplomacy and the Diplomatist." By A. Pearce Higgins, LL.D. 22 *Juridical Review* 198 (Oct.).

Compressing a vast amount of information about the fundamental principles of the art of diplomacy, the training of diplomats and the requirements of this profession.

Drunkenness. "Fair Play for the Inebriate." By Judge McKenzie Cleland. 1 *Journal of Criminal Law and Criminology* 573 (Nov.).

The writer opposes the practice of arresting for drunkenness, which "is merely a logical development of our national craze for arresting people." He favors an ordinance providing that such persons shall be taken to their homes wherever possible, as is successfully being done in Cleveland.

Employer's Liability. See Workmen's Compensation.

Equity. "Law and Equity—The Test of their Fusion." By James Edward Hogg. 22 *Juridical Review* 244 (Oct.).

An attempt to apply to the circumstances of *Chapman v. Smethurst* (1909) 1 K. B. 73, 927, an action by the payee of a promissory note against the maker, the observation of Maitland: "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."

Equity Jurisdiction. "Equity Jurisdiction in Illinois over Irregularities in Execution Sales." By Prof. Henry Schofield. 5 *Illinois Law Review* 203 (Nov.).

"The jurisdiction invoked by a bill in equity filed on the equity side of an Illinois court to set aside an execution sale of land on an Illinois judgment, is not the limited jurisdiction of the English High Court of Chancery to interrupt and turn aside the course of the jurisdiction of a common law court, on the foundation of actual fraud, accident, mistake or surprise, occurring in the proceedings in the common law court, but is rather the wider inherent jurisdiction of the court that renders a judgment or decree to supervise and con-

trol its execution, partly to prevent the scandal that inevitably and properly arises whenever the property of a party is sacrificed under the process of a court in contravention of the clearly expressed policy and spirit of the law, and partly to establish justice between party and party, by keeping the execution act from being perverted from its true purpose, the compulsory payment of debts, into a means or instrument of stripping debtors of their property for the unjust enrichment of creditors."

Evidence. "Medical Evidence in Accident Cases." By Raymond D. Thurber. 23 *Bench and Bar* 62 (Nov.).

An attempt to clear up the confusion in the rules which govern the introduction of medical testimony.

Execution. "To what Extent are Money, Jewels, Bonds, or other Property, Carried on or Attached to the Person of the Holder, Subject to Replevin, Attachment, or Other Means of Recovery or Execution at Law or Equity." Prize thesis, Baltimore Law School, 1910. By Robert Clyde M'Kee. 43 *Chicago Legal News* 118, 128 (Nov. 19, 26).

A very full review of the authorities.

Executors and Administrators. See Survival of Actions.

Federal and State Powers. "Conservation and the Constitution." By William B. Bosley. 20 *Yale Law Journal* 18 (Nov.).

"The proposed conservation legislation, so far as it relates to the leasing of coal, phosphate, oil and other mineral lands, although it is in form an exercise of the power of the United States to provide for the disposition of the public lands in which such minerals exist, is really repugnant to the spirit of the Constitution for two reasons: First, because it contemplates the perpetual ownership by the United States of lands which are not required for the exercise of any of its governmental powers or duties, and which, as we have seen, it is the duty of Congress (although a political duty of imperfect obligation) to dispose of so that they may become private property, and subject in all respects to the jurisdiction and sovereignty of the states in which they are situate; and, second, because the real object sought to be attained by this legislation is the indirect control by Congress, by means of covenants and conditions to be inserted in the leases, of certain productive industries, the right to regulate which is vested, not in Congress, but in the legislatures of the several states. If this legislation shall be adopted, it will inevitably give rise to conflicts between laws enacted by the several states in the exercise of their acknowledged constitutional powers for the purpose of preventing monopoly and regulating the conduct of these industries, on the one hand, and, on the other hand, the conditions and

covenants of the leases by means of which the executive officers of the United States acting under the authority of this legislation, will attempt to regulate and control the same industries. The ends sought to be accomplished are neither fairly nor legitimately within the scope of the Constitution, and consequently the enactment of the proposed measures would be a plain perversion of the power of Congress to dispose of the public lands of the United States."

"Violation by a State of the Conditions of its Enabling Act." By Julien C. Monnet. 10 *Columbia Law Review* 591 (Nov.).

This article is concerned with the question of the validity of one of those conditions which Congress has seen fit to impose, in the enabling acts of the last quarter century, upon territories seeking statehood, preliminary to their admission into the Union.

The state of Oklahoma was granted statehood on certain such conditions, one of which was that the state capital should be located at Guthrie until 1913. The constitutional convention of Oklahoma was required to accept this condition "by ordinance irrevocable," and did so accept it, without inserting it into its written constitution. On June 11, 1910, however, the people of Oklahoma voted to locate the capital at Oklahoma City.

The writer, who is of the State University of Oklahoma, contends that this condition was not binding upon the people of Oklahoma, as it impaired the sovereignty of a free and independent state, and he makes a most vigorous and able argument strongly enforced by citations of authorities, in support of this heterodox and doubtful position.

Government. "The Constitution in Writing." By J. H. Morgan, Professor of Constitutional Law, University of London. *Nineteenth Century*, v. 68, p. 765 (Nov.).

"The truth is that the importance of written constitutions has been enormously exaggerated. By the time a country has reached the stage at which a written constitution is possible, it no longer needs one. Most of the written constitutions of the world are either delegations of power by the sovereign to new communities, as in the case of our Colonies, or else the offspring of revolutions, as in France; or else federal treaties between old political societies, as in the case of the United States, Switzerland, and Germany. In all these cases there is the creation of a new state rather than a distribution of power in a pre existing one, as is the position with us today—and therefore analogies fail us. Had it been a case of an old state like our own in possession of institutions, a written constitution would not have been needed. Even as it is, the constitutions of these societies do not embrace the whole field of constitutional law, and they all presume a pre-existent body of law. . . .

"A people living under written constitutions may be more exposed to arbitrary government

than a people which is not, and, indeed, in Continental countries it seems to be assumed that whatever power is not expressly denied to the executive is reserved by it—the power of legislation included. There are few continental governments which do not possess, independently of the constitution, an almost unrestricted power of issuing 'Notverordnungen,' or emergency decrees. In Prussia the courts cannot question them, nor is it necessary for the legislature to sanction them."

"Constitutional Law in 1909–1910." By Prof. Eugene Wambaugh, Harvard Law School. 4 *American Political Science Review* 483 (Nov.).

Professor Wambaugh finds that the Supreme Court decided at its last term no less than sixty-five constitutional cases, the rules in which he concisely states and classifies. The most important decision of the year he finds to be *International Textbook v. Pigg*, 217 U. S. 91, in which it was held not only that the business of a correspondence school is interstate commerce, but that a state cannot require a foreign corporation wishing to engage in interstate commerce to obtain a license as a condition precedent. This decision is briefly discussed. The practical result of the doctrine, it seems, must be one of the following:—

"(1) National legislation placing foreign interstate commerce corporations under the control, to some extent, of the several states—in short, legislation resembling the Wilson Act as to original packages, or—

"(2) National licensing of corporations organized in this country or abroad for the purpose of engaging in interstate or foreign commerce, or—

"(3) National incorporation."

"Popular Election of United States Senators." By John William Perrin. *North American Review*, v. 192, p. 799 (Dec).

The agitation of the question of direct election of United States Senators is not new, but "is almost as old as the Constitution itself." The attempts to bring about a departure from the regular method of election, in 1826, in 1835, in the fifties and subsequently, are reviewed. The treatment is historical rather than argumentative.

"Judicial Control over the Amendment of State Constitutions." By W. F. Dodd. 10 *Columbia Law Review* 618 (Nov.).

This article is concerned with the way in which courts exercise judicial control over the process of amendment, having of course no jurisdiction over the substance or subject-matter of the amendments adopted. The treatment is extended and minute, the article forming a part of the author's forthcoming work to be issued by the Johns Hopkins Press, on "The Revision and Amendment of State Constitutions."

"The Railroad Bill and the Court of Commerce." By James Wallace Bryan. 4 *American Political Science Review* 537 (Nov.).

The writer thinks it a grave question whether it was expedient to establish a new court at considerable expense, merely to accelerate litigation and to secure uniformity of decision, advantages attainable by other means. He does not approve of the policy underlying the creation of the new court, the work of which could be effectually performed, he thinks, by the existing courts. The treatment is extended, but is marred by what seems an occasional lapse of judgment, and by overemphasis on some of the technical arguments which have been adduced against the constitution of the new court.

Australia. "The Commonwealth Constitution and its Development." By Sir Courtenay Ilbert. K. C. B. 9 *Journal of Comparative Legislation*, pt. 1, no. 23, p. 28 (Nov.).

A review of the second edition of Moore's "Commonwealth of Australia," with an account of constitutional developments that have taken place since the appearance of the first edition in 1902.

Canada. Appeals to Privy Council. See p. 25, *supra*.

Cuba. "Cuba." By Sydney Brooks. *Fortnightly Review*, v. 88, p. 796 (Nov.).

Treating of the recent political history of that country.

Great Britain. "The Prerogative of the Crown and the House of Lords." By Hugh H. L. Bellot, D.C.L. 36 *Law Magazine and Review* 65 (Nov.).

The prerogative of the Crown with regard to the creation of peers is treated historically, and the Conservative party is found fault with for denying the power of the Crown to create peers in order to meet a political crisis. This author would like to see "the old alliance between the Crown and the people" renewed, and considers that the peerage is seeking to limit the prerogatives of the Crown.

"The Evolution of the Cabinet System in England." By W. F. Wyndham Brown. 36 *Law Magazine and Review* 49 (Nov.).

The author is evidently animated by a desire to find something in the history of the Cabinet supporting the separation of the powers of the executive and of Parliament, and he thinks there might be advantages in a non-Parliamentary executive, removed from the vicissitudes of popular elections. He does not suggest, however, how such a radical innovation could be accomplished.

"The Osborne Judgment and Trade Unions." By J. Ramsay MacDonald. *Contemporary Review*, v. 98, p. 535 (Nov.).

A somewhat bitter partisan denunciation of "the stilted" constitutionalism of the political judges who sat in the *Osborne* case" (22 *Green Bag* 135). The author is in favor of payment of members of Parliament by the government.

Latin America. "Causes of Lack of Political Cohesion in South America." By Hiram Bingham. 4 *American Political Science Review*, 508 (Nov.).

The explanation is found in the inherited characteristics of a people accustomed to live under decentralized institutions, used to the continuous hazards and hostilities of the conquest of an unexplored land.

Philippines. "The Extraordinary Session of the Philippine Legislature and the Work of the Philippine Assembly." By James Alexander Robertson. 4 *American Political Science Review* 516 (Nov.).

The writer considers this session, convened to meet legitimate budget needs, to afford an encouraging example of the growing political capacity of the Filipinos.

South Africa. "The Union of South Africa." By Stephen Leacock. 4 *American Political Science Review* 498 (Nov.).

A brief but illuminating paper, reviewing leading features of the new constitutional entity in their broader aspects.

See Federal and State Powers, Local Government, Status, etc.

History. "A Diary of the Reconstruction Period; XI, The Results of Impeachment." By Gideon T. Welles. *Atlantic*, v. 106, p. 818 (Dec.).

"The managers of the impeachment, on the part of the House, have summoned witnesses. . . . This wholly illegal and unauthorized inquisition by this presuming and usurping House shows the spirit which prevails, and how personal rights are disregarded. . . . For a conscientious discharge of their official duty, and a regard for their oaths, the ablest Senators of long experience are assailed with bitterness, as apostates and renegades. . . ."

See Government (Great Britain).

Immigration. "Some European Condition. Affecting Immigration." By Arthur Clinton Boggess. *Popular Science Monthly*, v. 77, p. 570 (Dec.).

"Since 1889 no Jew in Russia can be admitted to the bar except by a special permit of the minister of justice in each case. . . . Private practice of law or medicine is almost the only professional work open to Jews, and as a result these occupations are so crowded that a living income can scarcely be made."

International Arbitration. "International Courts." By Justice Henry Billings Brown, retired. 20 *Yale Law Journal* 1 (Nov.).

Delivered at the Yale Commencement last June (see 22 *Green Bag* 490).

International Law. "The Fourth International Conference of American Republics." By Prof. Paul S. Reinsch. 4 *American Journal of International Law* 777 (Oct.).

Despite the fact that differences of opinion were insisted upon with energy and with argumentative skill, it is gratifying to record that "it was possible to arrive at a practically unanimous agreement upon every subject of the program."

"Principles of International Law Applied by the Spanish Treaty Claims Commission." By Samuel B. Crandall. 4 *American Journal of International Law* 806 (Oct.).

The Commission was constituted by Act of Congress in 1901 and finished its judicial duties in May, 1910. The principles by which it announced that it would be governed are stated, and some of the most important cases decided by it are reviewed.

"The International Law Association Conference: A Survey." By Lord Chief Justice Alverstone. 9 *Journal of Comparative Legislation*, pt. 1, no. 23, p. 13 (Nov.).

A short, luminous survey of the recent conference (see 22 *Green Bag* 609). This issue of the *Journal of Comparative Legislation* contains some of the important papers read on that occasion.

"The International Law Association: London Conference." 36 *Law Magazine and Review* 77 (Nov.).

A short summary of this meeting, which was reported in 22 *Green Bag* 609.

See also under special subjects, e.g. Conflict of Laws, Maritime Law, Nationality, Negotiable Instruments, Newfoundland Fisheries Arbitration.

Interstate Commerce. See Federal and State Powers, Monopolies, Railway Rates.

Judicial Administration. "A German View of English Law." By James Edward Hogg. 9 *Journal of Comparative Legislation*, pt. 1, no. 23, p. 177 (Nov.).

A review of Dr. Gerland's "*Die Englische Gerichtsverfassung*" (1910). This German critic complains of the intricacy and obscurity of English case law, and of the inconvenience and wastefulness of court centralization and the circuit system. Dr. Gerland also says that English law will remain in a backward state of development as long as the doctrine of judicial precedent is followed. But judge-made law in England means something very different, Mr. Hogg points out, from judge-made law in Germany. In the latter country persons who in England would be termed masters, registrars, or even arbitrators, are all styled "judges." (Cf. Judge

Lewinski, p. 43, *infra*.) Moreover, in England the decisions of inferior courts do not make law.

Needless to add, Dr. Gerland's view of English law implies a very similar view of American law, conditions in this country being largely the same.

Jury Trial. "Trial by Jury in Civil Actions." By Col. John W. Hinsdale. 16 *Virginia Law Register* 561 (Dec.).

This paper was read before the North Carolina Bar Association at its last annual meeting. An able paper, which prefaces its recommendations with a historical review of the system of trial by jury. Mr. W. S. Scott's remark (in "Should Trial by Jury in Civil Cases be Abolished?" 20 *American Law Review*) is quoted, regarding the successful outcome of the practice which has obtained in England ever since the institution of the Court of Chancery, and in this country during its entire history, of leaving the determination of questions of fact in equity cases to the bench. "There is absolutely nothing in the principles of a democracy," says Mr. Hinsdale, "which makes jury trial in civil actions necessary or useful in the perpetuation of a republican form of government or in the protection of civil liberties." The defects of the system are summarized. The proposal advanced is "that all civil actions be tried by three *nisi prius* judges, who shall rotate, and thus avoid all possible local influence, prejudice, or favor." This cannot be brought about without an amendment to the state constitution rendering possible the trial of common law actions without a jury. The change proposed is recognized to be one not likely to be adopted in our generation, so the writer turns his attention to possible ways of reforming and improving upon the present system, and advocates the repeal of every exemption from jury service, restriction of causes of challenge, empowering judges to aid the jury by an expression of opinion upon the facts, the abolition of the unanimity rule so as to provide for three-fourths verdicts, legislation requiring the trial judge to set aside a verdict which is against the weight of the evidence, and provision for appeals from every refusal to set aside a verdict manifestly against the weight of the evidence.

Labor Law. "The Changing Attitude of the Courts Toward Social Legislation." By Prof. Louis M. Greeley. 5 *Illinois Law Review* 222 (Nov.).

Read last May at St. Louis before the National Conference of Charities and Correction. Discussing the constitutional aspects of the question of the eight-hour day, emphasizing the extent to which the courts are receding from what the writer considers their former extreme position.

Lawyer and Olient. "The Lawyer, Our Old Man of the Sea." By Ignotus. *Westminster Review*, v. 174, p. 544 (Nov.).

A truculent attack on the legal profession in England, buttressed by a good deal of historical discussion. The author thinks that the close and intimate association of bench and bar is inimical to the public welfare and should be discontinued. He writes, however, with utter absence of moderation.

Legal Education. "The Extension of Law Teaching at Oxford." By A. V. Dicey, Emeritus Professor, Oxford University. 24 *Harvard Law Review* 1 (Nov.).

Mainly a description of legal education at Oxford, including some remarks on the lectureship on Private International Law at All Souls, to which Dr. Dicey was elected last May. The following reference to the case method of instruction possesses a broader interest:—

"For this system I have always entertained and expressed the greatest admiration. Your distinguished professors wisely fix the attention of their pupils on reported cases and the inferences to be drawn therefrom. This brings young men into touch with reality. But to an English teacher it would seem, if I may venture to play the part of the friendly critic, that to this invaluable foundation there ought to be added a wider knowledge of the law of Rome than, unless I am mistaken, is given in the celebrated law schools of America, and also an acquaintance, which can hardly be obtained from cases alone, with the principles to be gathered from the works of the best among the legal writers of England and of America. The now ever growing mass of good legal literature must be studied as no small part of the English world of letters. Whilst I earnestly wish that the catechetical teaching of law may be more and more cultivated at Oxford, I still hold that the consecutive lectures there delivered are admirably suited for the literary and logical exposition of legal principles."

Legal History. "The Formal Contract of Early English Law." By Harold D. Hazeltine, University of Cambridge. 10 *Columbia Law Review* 608 (Nov.).

"Contrary to the view that has sometimes been expressed, we believe that contract formed a very prominent feature of the English legal system prior to the Norman Conquest." The writer seems to have the advantage of Maitland and other English writers in having intimate acquaintance with the recent German researches of Gierke and others, and in having deeply studied old Teutonic law on the Continent. This article is based on Mr. Hazeltine's book, "*Geschichte des Englischen Pfandrechts*."

"The Evolution of the Judicial System of New Jersey, I." By Oliver Bunce Ferris. 33 *New Jersey Law Journal* 331 (Nov.).

This installment treats of the history of the courts up to the close of the seventeenth century.

"A Recent History of English Law." By Arthur Lyon Cross. 3 *Michigan Law Review* 1 (Nov.).

An extended review of Holdsworth, for the most part appreciative.

"Strikes." By R. A. Reid, D.C.L. 30 *Canadian Law Times* 866 (Nov.).

Continued from article mentioned in 22 *Green Bag* 703, 715.

See Descent, Trade-marks.

Legal Institutions. "From Status to Contract." By Wilbur Larremore. 44 *American Law Review* 877 (Nov.-Dec.).

Mr. Larremore takes issue with Ferrero's comparison between present American civilization and conditions at the close of the Roman Republic and the opening of the Empire.

"Public gifts at the time of Augustus were in line with the traditional eleemosynary policy towards the proletariat and cemented the authority of caste. In the United States public gifts have been coincident with a relentless and successful crusade to curb the power of the givers and to establish equality of right.

"The agitation for conservation of natural resources and to forestall their exploitation by private greed, and the movement for graduated inheritance taxes to affect 'swollen fortunes,' are obviously in line with the general trend toward equality of opportunity. The latter policy is one that will probably figure largely in the future. Men so different in many respects as Theodore Roosevelt and Andrew Carnegie have advocated the arbitrary limitation of the size of estates that may be privately transmitted by will or intestacy. And the way is legally open; the adage 'shrouds have no pockets' is good as a proposition of constitutional law."

Literature. "The Stage Lawyer." By Alexander Otis. 17 *Case and Comment* 277 (Nov.).

See p. 26, *supra*.

Local Government. "Düsseldorf: A City of Tomorrow." By Frederick C. Howe. *Hampton's*, v. 25, p. 697 (Dec.).

The author thinks this the first of German cities. It has carried municipal ownership farther than most cities, and he writes enthusiastically of its liberal provisions for the social and aesthetic needs of its citizens, particularly those of the humbler class, yet it is a city ruled by business men who do not believe in socialism.

Maritime Law. "Early Cases on the Doctrine of Continuous Voyages." By Lester H. Woolsey. 4 *American Journal of International Law* 823 (Oct.).

The writer apologizes for offering an article on the subject on continuous voyage, by

explaining that he purposes to adopt a novel treatment. The bearing of the early cases on the modern doctrines of blockade and continuous voyage is considered.

"The Declaration of London." By Leverton Harris, M.P. *National Review*, v. 56, p. 393 (Nov.).

So much has appeared about the Declaration that one rather expects not to find much new light thrown upon it. This writer, however, attacks the subject in a more controversial spirit than we have thus far seen exhibited. He believes that the ratification of the Declaration by Great Britain would imperil that country in time of war, section 35, relating to the destination of contraband cargo, giving Germany and other countries an unfair advantage. He therefore urges that it not be ratified.

"The Declaration of London." By Sir John Macdonell, LL.D. 9 *Journal of Comparative Legislation*, pt. 1, no. 23, p. 68 (Nov.).

Read before the International Law Association last summer. See 22 *Green Bag* 598, 609.

See International Law.

Marriage and Divorce. "Breach of Promise of Marriage." By Edward Manson. 9 *Journal of Comparative Legislation*, pt. 1, no. 23, p. 156 (Nov.).

The ruling of Lord Raymond, that an exchange of mutual promises to marry creates an actionable contract, is as true now in England as it was a hundred and eighty years ago. Examination of the law in the most important countries shows that specific performance of such a contract has become an anachronism. The pendulum has swung so far in the opposite direction, in most Continental countries, that no actionable right is created, the remedy being confined to special damage in the nature of tort flowing from the breach. But England, Scotland, the United States, and modern Roman-Dutch law take a middle course. "A promise of marriage without being specifically enforceable is still a valid contract, and the breach of it gives a cause of action."

"The Problem of Marriage and Divorce." By C. A. Hereshoff Bartlett. 36 *Law Magazine and Review* 1 (Nov.).

The author's argument amounts to a plea for the extension of the principle of voidability of marriages on account of misrepresentation, for the problem of marriage itself must be faced before we take up that of divorce. The author thus shows himself more inclined to regard marriage as a contract than as a status.

"Marriage and Legal Customs of the Edo-Speaking Peoples of Nigeria." By Northcote Thomas. 9 *Journal of Comparative Legislation*, pt. 1, no. 23, p. 94 (Nov.).

A succinct account of the customs of these peoples as regards marriage, legitimacy and succession.

Medical Jurisprudence. See Evidence.

Mining. "The Mining Law of Ontario." By S. Price, K.C. 30 *Canadian Law Times* 853 (Nov.).

A brief résumé of the legislation of the Province, by its Mining Commissioner.

Monopolies. "The Supreme Court and the Sherman Anti-Trust Act." By Harold Evans. 59 *Univ. of Pa. Law Review* 61 (Nov.).

This writer complains that the phrase "restraint of trade," originally applied to a particular species of contracts, has come to be used synonymously with "restraint of competition," with reference to contracts in general. This has led to confusion, he thinks, for the former class of contracts is properly subject to the reasonableness test, while the proper test for the latter is not the reasonableness or unreasonableness of the restraint, but its extent. The judicial construction of the Sherman act, he goes on to say, has changed the common law existing before the passage of the act, inasmuch as it has led to the treatment of all restraints of competition as illegal, regardless of the reasonableness rule. Mr. Evans, however, apparently approves of this change in the law, for he believes in the maintenance of free competition and does not wish to see the Sherman act amended.

"Has the Sugar-Trust Case been Overruled?" By Stuart Chevalier. 44 *American Law Review* 858 (Nov.-Dec.).

"The course pursued by the Supreme Court through these successive anti-trust cases from the *Knight* case down to the present time is comparable to that of a ship sailing forth into unknown waters and picking at first a precarious and winding path among the breakers and around the hidden shoals, its general direction changing and wavering and its final destination appearing to the observer uncertain, until at last it steers out safely into the open sea and points its prow toward the straight course which it thereafter pursues." And that course, we are told, leads in an opposite direction from that of the ruling in the *Knight* case.

"The Sherman Anti-Trust Law." By M. S. Hottenstein. 44 *American Law Review* 827 (Nov.-Dec.).

The author outlines the history of the chief cases arising under the Sherman act, and most of the facts he adduces are already familiar to well-informed lawyers. He has no independent observations to offer of a particularly novel or interesting kind.

"The Surrender of New England." By Charles Edward Russell. *Hampton's*, v. 25, p. 759 (Dec.).

A foolish article by a writer who appears

to be opposed to every form of monopoly, whether regulated or unregulated.

Nationality. "Nationality and Naturalization in Latin America, from the Point of View of International Law." By Harmodio Arias. 9 *Journal of Comparative Legislation*, pt. 1, no. 23, p. 126 (Nov.).

In some Latin-American countries children follow the nationality of their parents (*jus sanguinis*), in others nationality is determined by the place of their birth (*jus soli*). The general tendency that prevails, with regard to nationality and naturalization, is to assimilate foreigners, as far as possible, with the native element of the community. "This is the reason why the *jus loci* is generally adopted, and the requirements for obtaining naturalization are made comparatively easy."

Negotiable Instruments. "Dr. Meyer's Bills of Exchange Draft Code, from an English Point of View." By Ernest J. Schuster, LL.D. 9 *Journal of Comparative Legislation*, pt. 1, no. 23, p. 143 (Nov.).

"Read before the International Law Association (22 *Green Bag* 609).

Newfoundland Fisheries Arbitration. "*United States v. Great Britain, in the Matter of the North Atlantic Coast Fisheries.*" 4 *American Journal of International Law* 948 (Oct.).

This is the first full report of the decision of the Permanent Court at The Hague to be published in the United States.

"The North Atlantic Coast Fisheries Arbitration." By Sir Erle Richards, K.C.S.I. 9 *Journal of Comparative Legislation*, pt. 1, no. 23, p. 18 (Nov.).

A *résumé*, without much discussion, of the proceedings, and of the findings of the tribunal on the principal points.

See International Law.

Pardoning Power. "Nature and Limits of the Pardoning Power." By William W. Smithers. 1 *Journal of Criminal Law and Criminology* 549 (Nov.).

The independence of the executive branch of the government, in which is vested complete discretion in the exercise of the pardoning power, is recognized, and the restraints and obligations imposed on the depository of such power, which would seem to be moral rather than legal, are considered.

Patents. "Damages and Profits in Patent Causes." By William Macomber. 10 *Columbia Law Review* 639 (Nov.).

"The time is at hand when our courts must recognize the fact that the rule of segregation as stated in the *Mop* case [*Garretson v. Clark*, 111 U. S. 120] is not a rule of damages or

profits in any proper sense of the term, but a rule of *evidence* in arriving at damages and profits; and that as such it must be construed to conform to the larger and broader and more equitable rules of *onus probandi*. With no other change than this, we shall be able to say with much better grace that the main principles of the patent law are developed and fixed."

Penology. See Criminology, Drunkenness, Pardoning Power.

Practice. "Liability for Costs of a Person not a Party to an Action." By Clarence M. Lewis. 23 *Bench and Bar* 57 (Nov.).

Treating of section 3247 of the New York Code of Civil Procedure.

Procedure. "Courts and Procedure in Germany." By Judge Karl von Lewinski. 5 *Illinois Law Review* 193 (Nov.).

Bringing out with great clearness the salient features of German court organization and practice. The shifting of the work done in this country by the bar to the bench results in a very large number of judges, which are not usually chosen from the ranks of the bar as here. The result is that the German judge is apt to be of mediocre ability. But the procedure in Germany may have its advantages over ours, says Judge Lewinski, on account of its great simplicity. In the lower courts the parties do not have to be represented by counsel, and there is no technical system of pleading. "Every procedural irregularity is cured, if the point is not raised immediately."

"The Practice in Reversing Judgments *non obstante veredicto*, and in Amending the Pleadings in Pennsylvania." By Henry B. Patton. 59 *Univ. of Pa. Law Review* 77 (Nov.).

Discussing questions connected with the reversal of judgments and amendments of pleadings in Pennsylvania practice.

"Simplification of Legal Procedure—Expediency Must Not Sacrifice Principle." By Thomas W. Shelton. 71 *Central Law Journal* 330 (Nov. 11).

"There is a great deal more in pleading than mere form. It stands, as has been endeavored to be shown, as the bulwark of protection between the bench and the litigant; it fixes inviolate limitations within which the judge may rule, making all else *obiter dictum*, and, of equal importance, it confines the testimony which may be introduced. How, indeed, could the counsel protect if he may not object and how may he object if there be no limits either to the *allegata* or to the *probata*? It follows as the night follows the day, that these must be governed by fixed rules and precedents, sacredly observed."

See Criminal Procedure, Jury Trial.

Property Rights. "Have the States been

Law-Abiding?" By Alfred P. Thom. 44 *American Law Review* 801 (Nov.-Dec.).

"It cannot be denied that the attitude of the states, in disobeying and disregarding the supreme law in matters relating to the security of property, furnishes a thoughtful student of our institutions a serious cause for apprehension. Stripped of all disguise, it means that in many of our states the will of the people, their momentary caprice, will not brook the restraint of law. It is necessary to admit that such action of the states correctly reflects the temper at the time of their people and is supported by the popular approval for the time being within the states."

Railway Rates. "Railway Rate Theories of the Interstate Commerce Commission." By M. B. Hammond. *Quarterly Journal of Economics*, v. 25, p. 1 (Nov.).

From a study of the abstracts of the Commission's decisions given in the annual reports, Mr. Hammond selected those cases which seemed most likely to offer a discussion of the principles involved in rate making. One hundred and thirty-five cases were selected and the full reports of these cases studied in detail. The cases were then classified according to leading principles.

At the outset, in their first annual report, the Commissioners declared value of service the fundamental factor in the determination of rates. But "no single principle has been used by the Commission for solving all the problems of rate making; or, at any rate, if the Commissioners insist on their statement that value of service is the underlying principle in all cases, this expression is used in such a broad sense that it is made to include a variety of considerations, any one of which may at times be made the leading factor in the Commission's decisions. Opinions may differ somewhat as to the best way of stating the factors involved. By the present writer they have been classified as follows: (1) the relative values of the commodities transported; (2) the relative costs of transporting the commodities; (3) the relative distances the articles are carried; (4) the relative natural advantages of location possessed by various places; (5) the special and peculiar interests of a given section or of a given class of producers; (6) the importance of maintaining competition; (7) the extent to which a given rate tends to yield a fair return on the actual capital investment."

The application by the Commission of these several tests, whether singly or in combination, is then studied. Its mode of dealing with the value of commodities as a rate basis is shown, whether the commodities be competitive or non-competitive, and the test of cost of service is also discussed at length. The analysis is split up into an examination of various important sub-topics.

"Our review of the cases in which differences in the costs of service have been cited by members of the Commission as reasons for

differences in rates shows that the Commissioners, as well as the traffic officials of the various railroads, have made much greater use of the cost of service principle than their preliminary utterances would lead us to expect."

"The Unit of Offense in Federal Statutes." By F. Granville Munson. 20 *Yale Law Journal* 28 (Nov.).

"If the law should disregard the state of mind, there would be no question but that every act was a separate offense—thus, if I drive my automobile at an illegal rate of speed on thirty consecutive days, I certainly would commit at least thirty distinct offenses. But this would be a case of that class where the law regards presence or absence of intent as immaterial—offenses which an eminent teacher is accustomed to term to his classes 'public torts,' i.e., acts where the gist of the liability is the damage done to the public and not the wrongful state of mind of the doer."

Socialism. "The Economics of Henry George's 'Progress and Poverty.'" By Edgar H. Johnson. *Journal of Political Economy*, v. 18, p. 714 (Nov.).

A lucid criticism of the fallacies of Henry George.

Stare Decisis. "The English Common Law in the United States." By Herbert Pope. 24 *Harvard Law Review* 6 (Nov.).

An acute analysis which shows the extent to which American courts have been misled by the Blackstonian theory that decisions of courts are not the law, but only evidence of it. But the adoption of the common law rule of the authority of precedent, one can see from this discussion, has tended to nullify Blackstone's theory and to bring order out of chaos, though the confusion would have been less had our courts uniformly felt themselves bound by the English decisions making up the mass of the common law adopted in this country.

Status. "The Abolition of Slavery in the Chinese Empire." By E. T. Williams. 4 *American Journal of International Law* 794 (Oct.).

An account of social conditions in the Chinese Empire, which promise much in the way of consummation of this reform. The Imperial Rescript is printed in full in the Supplement to this issue.

Survival of Actions. "Actions against Executors." By T. F. Martin. 36 *Law Magazine and Review* 23 (Nov.).

Discussing the basis of the distinction between claims that do and those that do not survive against legal personal representatives of deceased persons.

Tariff. "The Tariff and the Tariff Com-

mission." By Prof. F. W. Taussig, Harvard University. *Atlantic*, v. 106, p. 721 (Dec.).

"The tariff question, as it affects the people, is really, how far shall domestic producers be encouraged to enter on industries in which they are unable to meet foreign competition? The very fact of their being unable to meet it shows that for some reason or other conditions are unfavorable. Domestic costs then are high; domestic producers are under a disadvantage. The free-trader says that this is *prima facie* an indication that the industry had better not be carried on within the country at all. . . . His opponent, the protectionist, in setting forth the equalizing notion as the 'true' principle, does not answer him. This principle assumes at the very outset that any and every sort of domestic production is advantageous, and that there is no problem as to the limits within which we should keep in bolstering up industries that cannot stand without legislative aid."

"The Mysteries and Cruelties of the Tariff: Mr. Aldrich and the Tariff." By Ida M. Tarbell. *American Magazine*, v. 71, p. 212 (Dec.).

A previous article dealt with the wool schedule; here the methods of making the cotton schedule are treated. It rather suggests a determination to find something sensational in an unsensational subject.

Taxation (Federal Corporation Tax). "Constitutional Aspects of the Federal Tax on the Income of Corporations." By Francis W. Bird. 24 *Harvard Law Review* 31 (Nov.).

"While, as we have shown above, this tax is, so far as the quality of directness is concerned, essentially like the income tax of 1894, it has numerous incidental differences,—notably the description of the tax as an excise upon the doing of business,—which the court may seize upon as the ground of a distinction from the *Pollock* case. The *Spreckels* case furnishes an excellent basis for such a distinction; and the language of the *Pollock* case concerning certain earlier cases reinforces this. . . .

"Whether the court will seize upon such a distinction to sustain this tax will depend very largely upon its opinion of the ultimate wisdom of the holding of the *Pollock* case. The difficulty of harmonizing a decision upholding this statute and the *Pollock* case can hardly be unnoticed by the court. If the court were of opinion that the fundamental reasoning of the *Pollock* case is sound, it would doubtless annul the new tax; but if the court views with disfavor the decision of the *Pollock* case, it can virtually overrule that case without seeming to do so, by relying upon the authorities last cited."

Trade-marks. "Trade Names." By Bernard C. Steiner. 20 *Yale Law Journal* 44 (Nov.).

Dealing with the legal question of the descriptiveness of trade names and trade-marks, with great copiousness of citation and illustration.

"Some Historical Matter Concerning Trade-Marks." By Edward S. Rogers. 9 *Michigan Law Review* 29 (Nov.).

Full of curious and out-of-the-way historical information.

Trespass. See Aviation Law.

Usury. "Money-Lenders in India." By I. B. Sen. 9 *Journal of Comparative Legislation*, pt. 1, no. 23, p. 168 (Nov.).

Workmen's Compensation. "The Modern Conception of Civil Responsibility." By P. B. Mignault, K.C. of Montreal. 9 *Journal of Comparative Legislation*, pt. 1, no. 23, p. 102 (Nov.).

Read before the International Law Association last summer. See 22 *Green Bag* 595, 702.

"Employers, Employees, and Accidents." By Sir John Gray Hill. 9 *Journal of Comparative Legislation*, pt. 1, no. 23, p. 55 (Nov.).

Read before the International Law Association. See 22 *Green Bag* 595, 609.

Miscellaneous Articles of Interest to the Legal Profession

Biography. *Bentham.* "Striking Figures in the Legal History of England: Jeremy Bentham." By E. M. 130 *Law Times* 58 (Nov. 19).

A very entertaining sketch of the great *doctinaire*.

Blackstone. "Sir William Blackstone, who Idealized English Law and Made it Rational." By the Editor. 17 *Case and Comment* 271 (Nov.).

Brougham. "Brougham as an Advocate." By J. A. Lovat-Fraser. 36 *Law Magazine and Review* 36 (Nov.).

A good characterization of the strength and weakness of that versatile but shallow man.

Innes. "Sir James Rose Innes, K.C.M.G." By Dr. W. R. Bisschop. 9 *Journal of Comparative Legislation*, pt. 1, no. 23, p. 9 (Nov.).

A short sketch of the Chief Justice of the Transvaal, who is a native of Cape Colony.

Lincoln. "The Career of a Country Lawyer. Abraham Lincoln—I." By Charles W. Moores. 44 *American Law Review* 886 (Nov.-Dec.).

M'Laren. "Lord M'Laren." By N. J. D. Kennedy, LL.D., K.C. 22 *Juridical Review* 181 (Oct.).

An account of the eminent Scottish jurist and his legal treatises, and of his career at the bar and on the bench.

Morgan. "The Life Story of J. Pierpont Morgan: The First Morgan Syndicate and the Rescue of Vanderbilt." By Carl Hovey. *Metropolitan Magazine*, v. 33, p. 363 (Dec.).

A most interesting narrative of the achievements of Mr. Morgan. This installment treats particularly of his early success in the underwriting syndicate, and is true to life in showing the foundation upon which public confidence in the Morgan firm has been built up. The story of the apparent ease with which Mr. Morgan disposed of a vast quantity of government securities and of Mr. Vanderbilt's New York Central holdings in the English market reads like a romance, but in the former case it meant hard work and occasional doubts of the merits of the syndicate idea.

Savigny. "The Great Jurists of the World; XII, Friedrich Carl von Savigny." By J. E. G. de Montmorency. *Journal of Comparative Legislation*, pt. 1, no. 23, p. 32 (Nov.).

A fascinating portrayal of the great jurist, who as a lecturer is compared to Maitland, and who was the first lawyer to demolish the *a priori* method and establish the vital principles of the Renaissance on an impregnable basis. "For my own part," writes the author, "I should be tempted to call him the Newton or the Darwin of the Science of Law. His achievements resemble the achievements of both of these mighty men."

Sidgwick. "The Leaves of the Tree." By Arthur C. Benson. *North American Review*, v. 192, p. 816 (Dec.).

A beautiful delineation of a noble character, that of the late Professor Henry Sidgwick of the University of Cambridge.

Stowell. "The Great Jurists of the World; XIII, Lord Stowell." By Norman Bentwich. *Journal of Comparative Legislation*, pt. 1, no. 23, p. 114 (Nov.).

This well-known historical writer here gives an excellent summary of the qualities which distinguished Lord Stowell, and a sound estimate of his place in the history of international law, and of the historical significance of his chief decisions involving prize law and private international law.

China. "China and the Powers Since the Boxer Movement." By William R. Manning. *American Journal of International Law* 848 (Oct.).

An extended article, purporting to treat only in the barest outlines the "wonderful progress" of China in political and social reconstruction during the past few years.

Ferrer Case. "The Trial and Death of Ferrer, II." By William Archer. *McClure's*, v. 36, p. 229 (Dec.).

This concluding chapter treats of the trial. The Scotch literary critic discusses it from the point of view of a layman, and is perhaps too severe on the Spanish authorities in comparing it to the trial of Dreyfus. While scarcely a lawyer's estimate, it does give a minute account of the proceedings and of the character of the evidence relied on.

Party Politics. "The Insurgence of Insurgency." By William Allen White. *American Magazine*, v. 71, p. 170 (Dec.).

Stating what the radicals of the Republican party have accomplished, with regard to the initiative and referendum and other popular measures.

Pensions. "The Pension Carnival; III, Capitalizing the Nation's Gratitude." By William Bayard Hale. *World's Work*, v. 21, p. 13 730 (Dec.).

The cost of pensions fell from 1874 to 1878, but then was formed, we are told, an alliance between pension promoters and high tariff advocates which was successful, resulting in the accumulation of a treasury surplus which was looted by the passage of the Arrears Pension Act.

Political Corruption. "What are You Going to Do About It? V, Colorado—New Tricks in an Old Game." By Charles Edward Russell. *Cosmopolitan*, v. 50, p. 45 (Dec.).

Simon Guggenheim is here severely denounced for his alleged improper use of money in securing his election to the United States Senate.

Portugal. "Some Causes of the Portuguese Revolution." By Francis McCullagh. *Nineteenth Century*, v. 68, p. 931 (Nov.).

Shedding much light on the conditions which made the success of the Revolutionists so extraordinarily easy.

Railways. "The Masters of Capital in America: The Multimillionaires of the Great Northern System." By John Moody and George Kibbe Turner. *McClure's*, v. 36, p. 123 (Dec.).

This is a valuable human document and an important chapter of economic history, treating of that great step in the consolidation of American railways culminating in the Hill-Morgan alliance.

Wall Street. "It; IV, The Politics of Business." By Lincoln Steffens. *Everybody's*, v. 23, p. 813 (Dec.).

The subject of this paper is political pull in business, and business pull in politics, the object being to show how every citizen is caught in the tentacles of this control, alike in his business and his politics, for there is a "deadly parallel" between the present organization of business and that of public affairs.



The Editor's Bag

APPEALS TO THE SUPREME COURT

THE measures suggested by President Taft for the relief of the overburdened docket of the United States Supreme Court are not altogether new, for the need of some such remedies was perceived two years ago by the American Bar Association's special committee investigating the delays and unnecessary cost of litigation. The committee said in its first report:—¹

The railroad legislation which has been adopted by Congress will throw upon the Supreme Court a great amount of additional work. Even now its docket is overcrowded. We have to rely upon that Court for the uniformity of our commercial law, but the pressure of business is such that it grants a *certiorari* to review the decisions of the Circuit Courts of Appeals very reluctantly, and dismisses many cases which do come before it on the ground that only questions of fact are involved, where formerly the cause would have been heard upon the merits.

There is possibly a popular tendency to exaggerate somewhat the hardship imposed by the present arrears of the work of the Supreme Court, but wholly apart from the consideration of inconvenience, the work of the Court should be arranged as far as possible in accordance with its legitimate function in relation to the judicial machinery of the country, which is the function of a supreme tribunal interpreting the Constitution and handling only business

involving fundamental legal rights, and not simply that of a court of final resort for the consideration of appeals from federal and state courts. Any step tending to increase the dignity of the Court in the popular estimation should be welcomed, and its business should be expedited not solely for the benefit of litigants but to afford a salutary example to all the other courts of the land.

The American Bar Association has endorsed measures now pending in Congress which are framed upon the principle that no man should in all cases have an appeal to the Supreme Court as a matter of right, and its most distinguished member has emphasized the same principle in his latest Message. His recommendations contemplate giving to the Circuit Courts of Appeals the responsible authority which they should exercise and which ought not to be shifted anywhere else. They are also in harmony with the approved tendency of recent legislation to deny to litigants more than a single appeal. It would not of course be advisable to restrict the number of appeals to one under all circumstances, and the President does not go so far as that, but generally a single appeal is amply sufficient to protect all rights of the parties, and it is wise to curtail the powers of the Supreme Court to review the decisions of the Circuit Courts of Appeals when it can thereby be relieved of the consideration of eighty cases annually.

¹Reports of Am. Bar Ass'n, vol. xxxiii, p. 547.

DEADLY REPARTEE

SIR EDWARD CARSON, K.C., an Irishman, is one of the wits of the English bar, and a skillful and deadly cross-examiner. He recently began his cross-examination of an offensive witness thus:—

Carson.—"I believe you are a heavy drinker?"

Witness.—"That's *my* business!"

Carson (without a moment's hesitation).—"Have you any other?"

It is needless to say that the promptness of the question, and the laughter which followed, put the witness completely at counsel's mercy.

A DESERVED REBUKE

AN ex-Governor of the state of Connecticut was a man of sterling merit but of very humble origin, and the field of his first venture in the struggle for place and existence is said to have been made in the neighborhood of the Fulton Market, in New York City; his occupation is said to have been that of renovating the floors and paraphernalia of divers liquor saloons in that locality before their morning opening for business.

Such employment necessarily made him an early riser, and as it is proverbial that the early bird is the lucky one, the opportunity to better his condition quickly fell to his lot.

Certain admirers of his pluck and energy in taking hold of anything that offered, however menial in character, earned a friendship for him that resulted in his transferring the scene of his labors from New York to eastern Connecticut, with the securing of temporal and educational advantages by which he was enabled to acquire an education, and to become a member

of the bar of that state, and ultimately he became its Governor.

The ex-Governor never forgot his humble beginning, and at the zenith of his power and fame he never arrogated to himself any of the false pride or pompous manner which other great men have sometimes mistakenly affected, but was genial and companionable in whatever company he found himself.

His rise to place and preferment naturally brought him enemies, just as preference and advancement may bring enemies to others whom the world hails as great or distinguished, and one of those enemies was a brother lawyer who, worsted in an argument by the ex-Governor before one of the courts of Connecticut, taunted him with his humble origin, and to emphasize his enmity and contempt, while decrying the probability of the ex-Governor being intellectually or mentally equipped with sufficient knowledge or learning to enunciate and define a sound logical proposition of law, angrily remarked to the presiding judge, "Why, sir, that man used to clean spittoons in Fulton Market barrooms, and at a not very remote period either."

The ex-Governor calmly arose from his seat, cast a pitying glance at his opponent, whose red nose and watery eyes proclaimed unmistakably that he, too, knew something about barrooms, and turning to the astonished and indignant judge, said, "I pray Almighty God, sir, that my friend's career does not end where mine began."

LEMAN B. TREADWELL.

New York City.

THE LONGEST LEASE

IT not infrequently happens in Europe that there is some bar to the actual sale of a piece of property—though

the title of the owner is perfectly good, the title itself may contain a sale-restraining clause. In such instances, it is the custom to grant a lease for a long period, say for nine hundred and ninety-nine years. Most persons are just as well satisfied to be in possession for nine hundred and ninety-nine years as for ever.

One of the longest leases known to exist was granted for a small section of meadow land, comprising some sixteen acres, situated in Surrey, England. This lease was granted on St. Michael's Day, 1651, and is for the term of twenty-nine hundred years. The rental was fixed at a "red rose when demanded." Why this odd stipulation is not known, as there is nothing about the land in question to suggest it, no roses growing or having ever grown, so far as is known, on the sixteen acres.

The present holder of the lease may remain in undisturbed possession for some time yet, as his tenure does not expire until the somewhat distant year 4551.

A SPLENDID ORATION

IN the Pine Tree State of Maine the celebration of the Fourth of July still partakes of features that have been obscured in other localities by boat-races and baseball games.

There was a large public meeting on the town square of one of the cities this year, and farmers from miles around drove in to listen to the speeches and see the fireworks. In the course of the exercises the Declaration of Independence was read by a young attorney whose smooth-shaven face makes him appear even younger than he really is.

Afterward a farmer from some distance confided to a bystander that he was making his first visit to the city

since he got married some thirty years before, and in commenting on the celebration said: "Now I never was much stuck on book larnin', but thet young chap did make a splendid speech, an' ef thet's the way they teach 'em ter talk in ther schools now-a-days why I'm fer eddication!"

NO DISPUTE IN THIS CASE

SENATOR X—, who now spends most of his time in Washington, was formerly a resident of a small town in North Carolina, and at that time was local Justice of the Peace and was continually opposed by a local politician who was inclined to be quarrelsome.

This man was constantly involved in broils which led to shooting affrays and was before the Justice about as regularly as the court sat.

The Senator passed through the town recently on his way to Florida for a vacation, and when the train stopped he alighted and greeted several old acquaintances on the station platform. After the usual hand-shaking one of the lot said: "Say Senator, your old opponent G— is dead."

"Another dispute, I suppose," said the Senator, "and somebody shot him at last."

"Oh, no," said his informant, "there warn't no dispute, he died unanimous."

AN INDISCRETION

ONE Starr in an early day was one of the great lawyers at the bar, but he had one failing—he did drink. One morning he appeared before the Supreme Court while motions and oral arguments were being heard, and got up and said to the court then in session:—

"I have only one case in your court. My client is poor, and I need fees which are not forthcoming. I wish this case

could be decided at once, and I will give the court five dollars if I can get a decision now."

The Chief Justice rapped for order and replied that they could not entertain such a proposition. The attorney got up again and thought he would fix it up.

"Your honors, I did not mean five dollars for all of you, I meant five dollars apiece." Then the attorney was led out by a brother lawyer while

court and audience broke out in roars of laughter.

GETTING STARTED

YOUNG Doctor.—"Well, old chap, at last I have a case; and he has lots of money, too."

Young Lawyer.—"All right, Doc; when you get him to the point where he wants a will drawn up, why just 'phone over. He may be the means of getting us both started."

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, factia, and anecdotes.

USELESS BUT ENTERTAINING

"How far is it between these two towns?" asked the lawyer.

"About four miles as the flow cries," replied the witness.

"You mean as the cry flows."

"No," put in the Judge, "he means as the fly crows."

And they all looked at each other, feeling that something was wrong.

—*Everybody's Magazine.*

A pompous member of the bar of the Quaker City was seeking to convey the impression that his income from practice was exceedingly large. "Gentlemen, I *have* to earn a good deal. My personal expenses are over fifteen thousand dollars a year. It costs me that to live!"

"That's too much," interjected a fellow lawyer. "I wouldn't pay it,—it isn't worth it!"

—*Woman's Home Companion.*

A certain jurist was an enthusiastic golfer. Once he had occasion to interrogate, in a criminal suit, a boy witness from Bala.

"Now, my lad," he said, "are you acquainted with the nature and significance of an oath?"

The boy, raising his brows in surprise, answered:—

"Of course I am, sir. Don't I caddy for you at the Country Club?" —*Success.*

Heard in the Superior Court of Cook county —The jury, after having been out for some time, appeared before the Court and asked for further instruction.

Court.—"On what subject do you need enlightenment?"

Juryman.—"We desire to know who the plaintiff is."

—*National Corporation Reporter.*

Correspondence

WORDS WHICH MR. GALSWORTHY DID NOT WRITE

To the Editor of the Green Bag:—

Sir: In a very charming review of my play "Justice" which has been sent to me, your critic uses this expression: "In naming this 'a story of guiltless crime' Mr. Galsworthy may be ill-advised." If he had even done so he would indeed not only have been ill-

advised but incorrect. The expression "a story of guiltless crime" was added as a headline by the *American Magazine* without my knowledge, and gave me a shock when I read it.

Possibly you might like to draw your readers' attention to this correction.

JOHN GALSWORTHY.

Wingstone, Manaton, Devon,
November 24, 1910.

The Legal World

The Governors' Conference

The House of Governors held its third conference at Frankfort, Ky., for five days beginning November 29. Twenty-four Governors and four Governors-elect answered to the roll call. The first morning was given up to the formal speeches of welcome by the Governor of Kentucky and the mayor of the city and a reply to these greetings by the Governor of Rhode Island. The afternoon session was taken up with matters of routine and organization and the speech of Governor-elect Woodrow Wilson of New Jersey on the scope of the Governors' conference. It was natural, said Dr. Wilson, that Americans should turn to the national government for protection and relief from industrial abuses, but it is not altogether desirable that it should exercise full powers, because "to put federal law back of the great corporations would have been to give them the right to dominate and override local conditions, to equip them with the majesty and supremacy of the law which created and regulated them and to level the variety of the communities before them." It is therefore, Dr. Wilson thinks, incumbent upon the states to co-operate in meeting the situation created by a highly organized business; and for the purpose of this co-operation it is the duty of the Governors to "throw their energies into a common task."

On the afternoon of Dec. 1, the conservation of natural resources from a state standpoint was discussed. An able paper was read by Governor Norris of Montana. The discussion was participated in by several of the Governors—the Governor of Colorado, the Governor of Arizona and the Governor of Montana advocating strongly state supervision of natural resources which are the property of the government, while the Governor of Mississippi strongly advocated their control by the national government.

Another important question taken up was the question of workmen's compensation acts. This discussion was opened by Governor Hadley of Missouri in a very able statement of the conditions at present existing. There were material differences of opinion among the Governors as to what ought to be accomplished, but there was a general consensus of opinion that it was a great subject, which must be dealt with wisely and carefully in the near future. The debate on this question occupied several hours.

On Dec. 2, the two principal matters which were formally up for discussion were the subjects of direct nominations and of reciprocity in automobile laws among the different states. Governor Fort of New Jersey presented a very able paper favoring direct nominations. The Governors in the states where direct nominations are in force favored

them, on the whole, although they felt that in each instance the laws needed to be amended and improved. Governor Draper of Massachusetts offered some criticisms on the system of direct nominations, but did not desire to be considered definitely opposed to their adoption if some manifest objections to them can be corrected.

The discussion on automobile legislation was concerned with automobile regulations and laws and the methods of licensing, and aroused a great deal of discussion. The laws of Massachusetts and Connecticut were especially commended.

Next year's conference will be held at Spring Lake, New Jersey, in September.

Personal

Grover C. Hosford has been appointed Professor of Law in the University of Missouri Law School to succeed Prof. Thomas A. Street, who has been appointed a member of the committee to revise the Philippine laws. Prof. Hosford had been a member of the editorial staff of the Edward Thompson Company.

Hon. Samuel J. Elder was honored by a company of judges and attorneys at a dinner at the Boston City Club Nov. 28, when he delighted them by recounting his experiences at The Hague. The affair was complimentary to Mr. Elder's success in defending the interests of the American fishermen. He was praised by the speakers at the postprandial exercises, which were attended by about one hundred and fifty, and later applauded and cheered by six hundred men when he delivered his address in the large hall.

"No less than three of the judges now entitled to sit in the House of Lords won distinction in athletics in their university days," says *Law Notes* of London. "The Lord Chancellor played three times on the Oxford cricket eleven and thrice represented his university at racquets. Lord Macnaghten rowed for Cambridge in the university boat-race sixty years ago, and in 1851 won the Colquhoun sculls—the sculling championship of the university. And the Lord Chief Justice was famous in his day both as a runner and a cricketer. Among the High Court judges may be mentioned Mr. Justice Channell, who won the Colquhoun sculls ten years after Lord Macnaghten, and Mr. Justice Scrutton, long a noted golfer."

Announcement was made December 3 of the appointment of Frederick W. Lehmann of St. Louis to be Solicitor-General of the United States, to fill the vacancy caused by the death of Lloyd W. Bowers. Mr. Lehmann

is one of the ablest members of the St. Louis bar, and was president of the American Bar Association two years ago. He was born in Prussia, fifty-seven years ago, but came to America as a boy and lived successively in Ohio, Indiana and Iowa. He practised law in Nebraska until 1876 and in Des Moines until 1890, in which year he went to St. Louis as attorney for the Wabash Railroad. Until 1905 he was a member of the firm of Boyle, Priest & Lehmann, and is now of the firm of Lehmann & Lehmann.

Wisconsin Criminologists Meet

The annual meeting of the Wisconsin Branch of the American Institute of Criminal Law and Criminology was held in Milwaukee November 25-26. Hon. Emil Seidel, mayor of the city, welcomed the conference. The president of the Branch, Judge E. Ray Stevens of the ninth judicial circuit, delivered the opening address in which he reviewed some recent decisions in Wisconsin indicating a tendency of the Supreme Court to disregard unsubstantial technicalities. He also called attention to an opinion in a recent Wisconsin case in which the Wisconsin Branch was referred to as "a flame in whose light we are now administering the criminal law." Following the president's address Hon. Harry Olson, Chief Justice of the Municipal Court of Chicago, spoke on "The Organization and Unification of Courts."

The meeting was notable for the large number in attendance. The personnel included judges of the state Supreme Court, of the circuit courts, of the municipal courts, district attorneys, prominent attorneys, physicians, ministers and laymen.

The principal work of the conference was the consideration of the reports of the committees appointed at the conference of 1909. The reports, which had been printed and distributed in advance of the meeting, related to the following subjects: Trial procedure; Organization of Courts; Trial of the Issue of Mental Responsibility; Sterilization; Jury; Juvenile Offenders; Classification and Segregation. Definite action on the following subjects, embodied in the reports of the above committees was taken: That the existing unrestricted constitutional guaranty against incriminating testimony by one accused of crime should be abolished and in its place should be substituted, either in the form of a statute or an amendment to the constitution, a modified or limited immunity (as four years at least must elapse before any constitutional change is possible, the preparation of the substituted scheme will in the meantime be in charge of a committee of the Branch); that the existing statutory provision declaring that the refusal or failure of an accused person to testify should create no presumption against him should be changed at once so as to permit such refusal to be considered by the jury with the other evidence in the case; that the statutes should be so amended as to require the defendant to raise,

before jeopardy has attached, all questions of law which can be so raised, or be deemed to have waived his jeopardy so as to permit an appeal by the state; that a review on behalf of the state should be permitted on questions of law decided adversely to it, even though jeopardy has attached, such review, however, not to affect the result in the particular case; that where the defence of insanity is interposed, the expert opinion in the case should be given only by experts chosen from a board or commission appointed by the state; that the existing statute requiring a judge to grant a change of venue on the filing of an affidavit of his prejudice should be repealed entirely or be so modified as to prescribe time limits for filing such affidavits, and notice thereby to opposite counsel; that the age limit of girls coming under the jurisdiction of the juvenile court be raised from sixteen to eighteen years, and of boys from sixteen to seventeen years; that a legislative committee of the Branch be appointed to put into proper shape the foregoing action, to bring the same to the attention of the legislature and to urge the legislation necessary to make such action effective.

The following questions were referred to committees for further consideration and report at the next annual meeting; the question of modifying the constitutional right of the accused to meet the witnesses face to face so as to permit the state in criminal cases to secure and offer in evidence depositions; that of the organization of courts; of the method and of the advisability of a trial on the special issue of insanity; of sterilization; and of the advisability of making obligatory upon all courts of record in the state the application of the principles of the juvenile court; the advisability of providing for the support of the wives and the support and education of the minor children of convicted and sentenced persons out of the earnings of such persons; the adoption of the indeterminate sentence.

The Milwaukee Committee on Arrangements added to the hospitality extended by the city of Milwaukee by tendering to the out-of-town members of the Branch a complimentary dinner at the Hotel Pfister. At the dinner Chief Justice Winslow of the Supreme Court acted as toastmaster and the following toasts were responded to: Mere Technicalities, Howard L. Smith, Professor of Law, University of Wisconsin; The Press a Mirror of Crime, John G. Gregory of the *Evening Wisconsin*, Milwaukee, Wis.; Reversed and Remanded, Joseph G. Donnelly, Chief Justice of the Civil Court of Milwaukee; Administration of Criminal Law in England, Professor E. R. Keedy, Northwestern University Law School. Chief Justice Winslow indicated that the number of those accused of crime in the state of Wisconsin who escaped punishment in the last year, in the Supreme Court at least, on what might in any sense of the term be called a technicality must have been few, as out of the nineteen appeals to that

court in criminal cases in the last year eighteen were affirmed.

The following officers were elected for the ensuing year: President, A. H. Reid, Judge of the sixteenth judicial circuit; vice-presidents, John B. Winslow, Chief Justice of the Supreme Court, B. R. Goggins, attorney; secretary, William U. Moore, Professor of Law, University of Wisconsin; treasurer, Louis E. Reber, director, Extension Division, University of Wisconsin; councilors, E. Ray Stevens, Judge of the Circuit Court; E. A. Ross, Professor of Sociology, University of Wisconsin; C. B. Bird, attorney; H. H. Jacobs, head of University Settlement, Milwaukee; E. A. Gilmore, Professor of Law, University of Wisconsin.

Bar Associations

New York.—The annual meeting of the New York State Bar Association is to be held January 19 and 20 in Syracuse. The principal address will be delivered by Hon. George W. Wickersham, Attorney-General of the United States. Senator Elihu Root will preside.

Philadelphia.—The membership of the Law Association of Philadelphia shows a gain of forty-nine for the past year, the total enrollment now being nine hundred and ninety-seven. At the annual meeting, held Dec. 6, the Association considered, without reaching any decision, the report of the Committee on Registration relating to reorganization of the courts, and this matter will be taken up again Jan. 10, when Judge Theodore F. Jenkins will offer a resolution opposing the proposed constitutional amendments on the ground that they would place the judiciary under the immediate control of the legislature and providing for the appointment of a committee to investigate and report on less objectionable remedies for the present delays in the courts of common pleas. The following officers were elected: Chancellor, Alex. Simpson, Jr.; vice-chancellor, Hampton L. Carson; secretary, Louis Barcroft Runk; treasurer, William W. Smithers; committee of censors, Stevens Heckscher, William B. Linn, Owen J. Roberts; board of governors, Charles Biddle, Joseph C. Fraley, Charles E. Morgan, John M. Strong.

Rhode Island.—Hon. Martin W. Littleton of Brooklyn, recently elected to Congress, and Hon. Hampton L. Carson of Philadelphia, former Attorney-General of Pennsylvania, were the principal speakers at the annual mid-winter banquet of the Rhode Island Bar Association in Providence, Dec. 5. The dinner was preceded by the annual meeting of the Association, and a resolution was adopted approving the proposed action by Congress contemplated in the moon bill, increasing the salaries of judges of the Supreme Court of the United States and of the Federal Circuit and District courts.

The subject of Mr. Carson's address was "The Interest and Value of the Study of Legal Biography."

Mr. Carson treated the great decisions of great jurists as records of the personalities of the men who wrote them and reflections of the times and conditions under which they were written. Mr. Littleton touched upon the present condition of the country as affected by the enforcement of the Sherman Anti-Trust law. The Constitution and original scheme of government, he declared, never intended that the business interests of the United States should wait upon the Supreme Court. He believed that Congress should amend the Sherman law, so that it would become so simple that everybody could understand and would respect it.

The officers elected for the ensuing year are: President, Albert A. Baker; first vice-president, Cyrus M. Van Slyck; second vice-president, William P. Sheffield, Jr.; secretary, Howard B. Gorman; treasurer, James A. Pirce; executive committee, Dexter B. Potter, William A. Morgan, Amasa M. Eaton, Charles C. Mumford and Chester W. Barrows.

Oregon.—The Oregon State Bar Association held its annual meeting at Portland, Nov. 15-16. Reports were received from the committees on grievances, on legal education, on judicial remedial law and on legislation. The report of the grievance committee precipitated extended debate, ending in the adoption of resolutions instructing this committee to report the names of members deemed guilty of professional misconduct, and providing for the appointment of a special committee of five to confer with the grievance committee and report a code of ethics and amendments to existing statute law improving the procedure for disbarment.

President Holman in his annual address discussed "The Uncertainty of Results Under the Initiative Amendments to the Oregon Constitution" relating to city charters. He averred that the crudity of many amendments was such that it had been necessary for the courts to amend them in making them into workable statutes. Mr. Holman particularly referred to the law relating to the application of the initiative to the right of a city to eminent domain, the power to grant franchises, the control of the streets and to build bridges over the navigable rivers wholly within a state.

A. L. Veazie discussed the single tax and the effect of the amendments to the taxation laws which were defeated at the recent election. The speaker declared that Oregon was to be the battle ground upon which new ideas of taxation are to be fought out.

William A. Huneke, Judge of the Superior Court of Spokane, delivered an address on "Criticism of the Courts."

Judge T. J. Geisler spoke on "The Method of Selecting a Non-political Judiciary." He said he did not favor the plan adopted by the lawyers, that the lawyers should nominate the judges.

Officers elected for the ensuing year include: President, W. T. Slater, Salem; secretary, W. L. Brewster; treasurer, Charles J. Schnabel; assistant treasurer, L. C. Mackey.

Obituary

Henry M. Hoyt.—Henry Martyn Hoyt, counselor for the Department of State, died at his home in Washington, D. C., Nov. 20, of peritonitis. Mr. Hoyt was the strong right arm of Philander C. Knox when the latter was Attorney-General, and when Mr. Knox became Secretary of State the latter lost no time in obtaining his transfer to the State Department.

Mr. Hoyt was born in Wilkesbarre, Dec. 2, 1856, the son of Gen. H. M. Hoyt, once Governor of the commonwealth. He was educated in the public schools, was graduated from Yale in 1878, took a post-graduate law course in the University of Pennsylvania in 1881 and afterwards was admitted to the bar and practised law in Pittsburg. In 1883 he married Anna, daughter of Col. Morton McMichael of Philadelphia.

He came to Washington in 1897 to accept an appointment as assistant Attorney-General. He served in that position until March 21, 1903, when he was appointed Solicitor-General by President Roosevelt to succeed John K. Richards. While he was Solicitor-General, Mr. Hoyt prepared and argued several noted cases with success. Many of them were of a constitutional character and the trace of his work is left in the law of the land.

William Wirt Dixon.—Hon. William Wirt Dixon died at Los Angeles, California, on November 13, 1910, in the seventy-third year of his age. He was born in Brooklyn, New York, June 3, 1838, but moved while a boy to Iowa, and was admitted to practice there in 1858. He practised his profession in Iowa, Tennessee and Arkansas, and in 1862 crossed the Plains to California, but soon returned as far east as Nevada, where he remained four years and then went to Helena, Montana, and later to Deer Lodge, Montana. In 1879 he went to the Black Hills, but returned to Montana and located in Butte in 1881, where he remained until 1907, when failing health compelled him to seek a warmer climate.

Judge Dixon was a member of both Constitutional Conventions of the state of Montana, was president of the Montana State Bar Association from 1887 to 1891, and was a representative in the Fifty-second Congress from Montana. He was prominent in political life in Montana, and was one of the leaders of the Democratic Party. In his law practice he was prominently connected with the most notable litigation in the state;

he represented the proponents of the will in the famous Davis will case. For many years he was Chief Counsel for the interests represented by the late Marcus Daly. He was a member of the American Bar Association, and at the time of his retirement from the active practice of law was considered the best lawyer in the state.

James B. Dill.—Judge James Brooks Dill, until recently a member of the New Jersey Court of Errors and Appeals, and one of the leading American authorities on corporation law, died at his home at East Orange, N. J., Dec. 2, of pneumonia. He was fifty-six years old.

Judge Dill was a graduate of Yale and was admitted to the bar in New York City in 1878 and from the beginning of his career devoted practically his entire attention to corporation law. He was the author of "Dill on Corporations," the standard work on the subject. His activities in connection with the management of various corporations and as director and counsel of large corporate interests have made his name known throughout the United States. He formed fully thirty important trusts having an aggregate capital of almost \$600,000,000. He was said to have received a fee of \$1,000,000 for his work in connection with the organization of the United States Steel Corporation.

Judge Dill was born at Spencerport, N. Y., on July 25, 1854. In 1858 his parents moved to Chicago, where they remained till the death of his father in 1862. Mrs. Dill then moved to New Haven, Conn. Four years later her son, then fourteen years old, went to Oberlin, Ohio, where he spent three years in a preparatory course, entering the freshman class of Oberlin College in 1871. The following year he left Oberlin to enter the freshman class of Yale University and was graduated in 1876. For a year he taught in a private school in Philadelphia, at the same time studying law with E. Cope Mitchell, a noted equity lawyer. He went to New York in 1877, was an instructor in Latin and mathematics in the Stevens Institute, and at the same time entered the Senior class in the University Law School, from which he was graduated as salutatorian of his class in 1878.

In New Jersey as well as in New York Judge Dill had been prominent in corporation matters. He had been director and one of the counsel of the National Steel Company, of the American Tin Plate Company and the Carnegie Company. He was a member of the Roosevelt committee for revising the laws of New York and was counsel to the committee for revising the laws of Canada, the only time on record that a foreign Government called in American counsel. He married in Philadelphia, in 1880, Mary W. Hansell of that city.



THE SUPREME COURT OF THE UNITED STATES

From left to right: Standing, Justices Van Devanter, Lurton, Hughes, Lamar, Seated, Justices Holmes, Harlan, Chief Justice White, Justices McKenna and Day.

The Green Bag

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The Re-organized Supreme Court

THE promotion of Mr. Justice Edward Douglass White of New Orleans to the Chief Justiceship of the United States Supreme Court has given general satisfaction as a thoroughly non-partisan appointment, fitly recognizing the attainments of one of the Justices of largest experience and most commanding ability. It would be invidious to speak of the Chief Justice as the ablest man on the Supreme Court bench, for that would unjustly belittle the talents of at least two or three others whose work has been of the highest juristic order, but it is assuredly safe to say that the new head of the Court is excelled by none of his associates in the qualities that go to make up a great lawyer and judge, and that the honor descends upon one readily conceived as *primus inter pares*. Moreover it is interesting to note that Senator Borah, himself a great lawyer, when asked his opinion of the Chief Justice, declared with deliberation: "If you were called upon to name the first ten of the men who have sat upon the Supreme Court bench since its creation, you would have to include White's name in the list. Otherwise the list would be incorrect."

The cast of the new Chief Justice's mind, and his general attitude toward constitutional questions, are indicated by his record with regard to several im-

portant cases. He wrote the opinion which practically killed the commodities clause of the Hepburn railroad act, all the Court concurring except Mr. Justice Harlan. Together with Mr. Justice Holmes, he dissented in the case of *Continental Wall Paper Co. v. Voight*, which held that a corporation rendered illegal by the Sherman act has no standing in court for the collection of debts. He voted with the minority of the Court in the *Northern Securities* case, and with the majority in the *Knight* case. He was one of the judges declaring the Employers' Liability act unconstitutional, Justices Harlan, McKenna and Holmes dissenting. He wrote the extremely able dissenting judgment in the *Income Tax* cases. Though he had been a strong anti-Imperialist, his independence was shown when he was one of five of the nine judges who decided in the insular cases that the Constitution does not follow the flag. He wrote the opinion in the famous *Haddock* divorce case.

The President in this appointment departed from precedent, no Associate Justice having ever before in the history of the Court been promoted to be Chief Justice. The *Legal Intelligencer* of Philadelphia has expressed a doubt whether this departure from precedent was wise, no reflection on Mr.

Chief Justice White, however, being intended. "It may be remembered by some," it says, "that when the name of Chief Justice Fuller was under consideration by President Cleveland for the nomination, the Associate Justices strongly urged upon him the promotion of Justice Field to the place of Chief Justice; this the President declined to do upon the ground that if the Associate Justices could look to such advancement, the expectation might lead to mutual jealousies and possible intrigue. The course followed by President Taft in the case of Justice White is in conflict with settled custom and tradition, and, should it be regarded in future as a precedent, might lead to most unfortunate results."

Senator Heyburn was the only member who opposed the confirmation of Mr. Chief Justice White when the appointment was presented to the Senate, and he opposed it on the ground that selection of one of the Associate Justices was contrary both to precedent and to policy. Eventually he surrendered with good grace, voting with the others so as to make the confirmation unanimous.

On the question of the wisdom of this precedent, the sentiment of by far the greater part of the legal profession is probably voiced by the *National Corporation Reporter*, in its editorial observation:—

While it is true that the Chief Justice of the United States has no duties that are not shared by his associates, and has no greater share than they in shaping the judicial history of the country, the mere name gives him a conspicuousness which he would not have if he were a mere presiding officer at meetings of the court, elected as the presiding justice in many other appellate courts are, by his associates. For this reason, he should, if possible, be the ablest man on the bench, and the best assurance of such eminence would be capable services as an Associate Jus-

tice for a sufficient length of time to enable the Executive to determine his fitness for the office of Chief Justice.

Chief Justice White's exalted conception of the duties of his high office is illustrated by a story told by the *Richmond Times-Dispatch*. "A delegation of Atlanta citizens called on Chief Justice White at ten o'clock in the morning, without notifying him. Luckily for them, he was at home and received the delegation cordially in his study. The object of the delegation was to invite the new head of the nation's most august tribunal to speak in Atlanta within a few weeks. The Chief Justice expressed his appreciation of the invitation, but made it evident from the outset that he could not accept it. To show that he was sincere in his declination, he exhibited some of his work to the visitors, saying: 'I want all of you to realize and appreciate what none of you and very few lawyers appreciate.'

"He crossed the room and pointed to a pile of paper-back books, placed by the side of his desk chair. There were two huge piles of books three or four feet high—some thin, some thick—twenty or thirty of them in all. Pointing to this heap Chief Justice White said: 'That, gentlemen, is why it is impossible for me to leave Washington. Those books represent the records in the cases we have heard this week, and it is only Thursday now. There will be others. They must be read. They must be studied. I went to bed at one this morning, and I arose again at six. I have been working on these records. That is the sort of life I have led for seventeen years on the bench.'"

A man of great physical stature and strength, the new Chief Justice, at the age of sixty-five, keeps his working powers at their maximum efficiency not only by reducing his hours of rest but

by a well-planned regimen of bodily exercise. Every morning the proprietor of a gymnasium in his neighborhood comes over to his house and puts him through a lot of gymnastic exercises, winding up with a massage. This is to get the Chief Justice in trim for his hard day's work.

A favorite walk of his is around the White Lot, the name for the big open space back of the White House grounds. Here the big form of the Chief Justice is often to be seen walking around the lot at his rapid pace, sometimes circling the route several times during an afternoon. This he does to obtain needed exercise. Often on such walks his lips are moving. In such cases he is analyzing precedents.

"For," to quote Charles Willis Thompson, "finished and elegant as his opinions always sound when they are handed down, he does not read them from manuscript, as do the other Justices. 'He is like,' said one of the court clerks, 'Justice Gray, who would read the title of a case and then throw his glasses down and deliver the rest of the opinion as if it were something on which he was formulating his views as he went along. He was a wonder, and Justice White is like him.'"

A United States Senator has said that Mr. White's opinions are classics in diction, and models of what decisions should be. This Senator said that he took a keen joy in the mere reading of a White decision, because of the pleasure in following its masterly arrangement and its perfect style.

Mr. Justice Willis Van Devanter of Cheyenne, Wyo., who was promoted

from the eighth judicial circuit, is fifty-one years old, and is credited to the "progressive" school of Republicanism. He took part, however, in the decision of the Circuit Court of Appeals for his Circuit, sustaining the position of the Government in the litigation with the Standard Oil Company. A former Chief Justice of the Wyoming Supreme Court, he is regarded as a high authority in land cases.

Mr. Justice Joseph Rucker Lamar, formerly of the Supreme Court of Georgia, is fifty-three years old, and is generally regarded as a man of conservative tendencies. He has been one of the leaders of the Southern bar since he left the state bench, and is a man of recognized strength of mind and character.

Of the nine members of the present bench, Mr. Taft has already named four (Lurton, Hughes, Van Devanter, Lamar). Justices Holmes and Day were appointed by President Roosevelt. Justice McKenna was named by President McKinley. Justice White was appointed by President Cleveland. Justice Harlan, who will be seventy-eight years of age on June 1, was appointed by President Hayes thirty-three years ago. Justice Harlan keeps a mind of remarkable vigor for a man of his advanced years. The next in age on the bench is Justice Oliver Wendell Holmes, who will be seventy in a few weeks, but whose mind is as fresh and active as ever. This is the powerful tribunal with which no other court of the world ranks in majesty and in power, and which is now called upon to decide a group of momentous cases involving the powers granted the federal Government by the Constitution.

Torrens Land Title Registration, in Its Historical, Practical and Legal Aspects¹

BY GILBERT RAY HAWES, OF THE NEW YORK BAR

WHILE seated in a subway car on my journey from the Borough of Manhattan, in order to address you here this evening, I was considering what I should take as a text for my remarks, and casually my eyes were directed to the various advertisements displayed of patent medicines, hair tonics, pickles, cereal foods, suspenders, Gold Brick Twins, etc., when my attention was arrested by one legend in large type glaring at me under the electric light, and which read as follows:—

It took courage to guarantee the first title—the risks looked so big. Experience has taught us to avoid many dangers—and the money we have saved enables us to pay promptly the unavoidable losses. Shift the risk to us. Title Guarantee & Trust Co., capital and surplus \$14,000,000.

As Squeers would say—"Here's richness for you." This is what we lawyers would call "a plea of confession and avoidance." The Title Guarantee & Trust Company admits, practically, that there is a big risk in the old method of title insurance, and that "it took courage to guarantee the first title." It then asserts that "Experience has taught us to avoid many dangers," but it does not explain frankly that the way in which it "avoids" these dangers is by issuing policies of title insurance "subject to exceptions contained in Schedule B," and also subject to the long and complicated "conditions" printed in microscopic characters on the back of the policy, so that in case of any mistake or omission the Company

insures the policy-holder only that it will give him the benefit of a law suit, as will be demonstrated later.

Then this illumining advertisement of the Title Guarantee & Trust Company further declares ingenuously "*The money we have saved enables us to pay promptly the unavoidable risks.*" Presumably the money saved refers to the "capital and surplus of \$14,000,000" saved by avoiding payment for mistakes made, except where such payment was "*unavoidable.*" And then to cap the climax, after such a confession, it concludes with the amazing prayer or demand, whichever it may be regarded, "*Shift the risk to us.*"

But if there is such a risk, as is frankly conceded, in the old system of title insurance, the public undoubtedly will prefer to adopt a system where there is no risk and where the state vests an absolutely indefeasible title which cannot be attacked subsequently, and whereby an action *in rem*, instituted by the owner as plaintiff against all mortgagees and other lienors and incumbancers of record, The People of the State of New York and "all other persons, if any, having any right or interest in or lien upon the property affected by this action, or any part thereof," as defendants, and by publication of notice to all the world, and by a short statute of limitations barring every one who fails to appear and answer the complaint, all clouds are removed, all defects are cured, and upon the search and report of the Official Examiner of Title, a final judgment and decree is entered and certificate issued

¹An address delivered October 25, 1910, before the Lawyers' Club, of Brooklyn.

by the Registrar. Thus all risk to the owner is eliminated and a *perfect title is created, not insured*. Could anything be more simple, comprehensive and satisfactory? And this in substance is the "Torrens System of Land Title Registration."

Let us now trace the history of this Torrens Law, showing its operation elsewhere and how came it to be adopted in New York State, what progress has already been made and the prospects for its universal adoption in the near future.

The Torrens System of Land Title Registration was devised by Sir Robert Richard Torrens and originated in the British Colony of South Australia in the year 1858. As Collector of Customs he became familiar with the system of transferring and mortgaging interests in ships by registering the title thereto; so, when in the year 1852, he was made Register General of the Province, his previous experience in matters of general legislation in the Legislative Council prompted him to conceive the idea that the system of registering titles to interests in ships, if extended to interests to land, would render the latter more readily transferable and would simplify the practice and reduce the cost of conveyance. (Torrens' *Essay on Conveyances in South Australia*.)

This law was thoroughly tested in the courts of Australia and pronounced constitutional. It was first applied to the Crown Lands, and was then extended to private lands, until now, after the lapse of fifty years, it has proven to be feasible and practical, and has been generally adopted, and the certificates of registration are everywhere accepted as basis of mortgage loans.

From Australia the system spread to New Zealand, New South Wales, England, Ireland, Wales, Norway, Den-

mark, Sweden, France, Germany, Austria and other European countries, and also the Dominion of Canada, where according to Judge Riddell, it has been in successful operation since the year 1860. The Torrens System has also been adopted in a number of the dependencies of Great Britain, including British Honduras in Central America, British Guiana in South America, the Leeward Islands in the West Indies, the Island of Jamaica, and also Tobago, Trinidad and Turks Island and several others.

In the United States this system has been adopted by a number of states, notably Massachusetts, Illinois, Indiana, Colorado and California, in all of which states the constitutionality of the act has been upheld by the highest courts.

One of the earliest litigations was in Massachusetts, where the validity of the Torrens Law was attacked by the old title insurance companies on the ground that it deprived individuals of their property rights without due process of law and was, therefore, unconstitutional. This question was thoroughly threshed out some ten years ago, and went to the highest court in Massachusetts, where an exhaustive and well-considered opinion was rendered by Judge Holmes, now on the bench of the United States Supreme Court, and the act was held to be in all respects constitutional and a valid enactment. (See *Tyler v. Judges of Court of Registration*, 175 Mass. 71.)

An appeal was taken to the United States Supreme Court at Washington, where on motion it was dismissed. (*Tyler v. Judges of Court of Registration*, 179 U. S. 405.) Consequently this may be considered a final adjudication as no other attack has since been made upon the law, and titles are now being registered thereunder in Massachusetts.

As to the practical operation of the Torrens Law let me quote as authority Judge Davis of the Land Court of Massachusetts, who in 1908 spoke as follows before the New York State Bar Association:—

The growth of new business has thus far shown a moderate but absolutely steady increase, both in the number of applications filed and in the assessed valuation of the property registered. In 1899 it was \$626,000; in 1902, \$1,991,000; in 1907, \$3,643,000. People who once apply for registration of title come back again. No suit has ever been brought against the Commonwealth, nor have I ever heard of any claim being suggested that anybody has ever been cut off from any right or interest in land during the ten years in which the land title registration act has been in operation. We have registered the titles to over \$20,000,000 worth of property at assessed valuations and to a vastly larger amount of actual valuation as the same property stands today. We have some 8,000 instruments in existence in the metropolitan district alone. No claim, as I said, has been made, and no litigation of any kind has ever been brought that I have ever heard of by or against anybody because of his title having been registered. Nobody has been involved in any of those many theoretical difficulties which we have heard described because he has had a registered title. There has never been a suit, there has never been a petition, there has never been even a question as to the meaning of a single clause of the land registration act.

It is to be noted that this Torrens Law is practically the same in all states, and consequently an adjudication in Massachusetts would constitute a precedent for other states. But the law has also been tested in separate actions brought in Colorado, Illinois, Minnesota and California, where the highest court in each state has held this law to be constitutional and not open to attack. See *People v. Crissman*, *Register of Titles* (Colo. 1907), 92 Pac. 949; *People v. Simon*, 176 Ill. 175; *Glos v. Kingman*, 207 Ill. 26; *State v. Westfall*, 85 Minn. 437; *National Bond & Security Co. v.*

Hopkins, 96 Minn. 119; *Robinson v. Kerrigan*, 151 Cal. 40; *Title & Document Restoration Co. v. Kerrigan*, 88 Pac. Rep. 356.

Now, as to the history of the law in this state, it is a well-known fact that the monopoly of the business of title searching gradually acquired by the old title insurance companies, their rapacity, greed and exorbitant charges, and the serious mistakes made and losses entailed, had become a grave public scandal. For years the public sought relief and remedial legislation, but found the hostile forces arrayed against them here and in Albany were too wealthy and powerful. It was only when Charles E. Hughes became Governor that this great reform was made possible and carried into effect.

In the year 1907 an act was passed by the legislature of the State of New York, known as Chapter 628 of the Laws of 1907, authorizing the appointment of a commission "to examine the system of registering titles to real property, known as the Torrens System and to report on the expediency of the establishment of that or a similar system in the State of New York, and, if deemed expedient, to draft a proposed law for the registration of such titles and to investigate and report on the nature and condition of titles to real property in the State of New York." In accordance therewith, a commission of real estate experts and lawyers was appointed by Governor Hughes, numerous public hearings were held in New York City and other cities of the state, and a vast amount of valuable statistical information collected, showing the operation of the Torrens System in other countries and in other states of the United States. The commission reported in favor of the Torrens System as against the old method of searching titles and issuing

policies of insurance thereon, and said, in part, as follows:—

The method which is used in New York and most of the states in this country grows more cumbersome as it becomes older, and, in spite of efforts to make it less burdensome, is tending to break down of its own weight. The multiplication of records and complication of titles and the repeated expense of re-examination and the delays incidental thereto, should be avoided, if any feasible method of doing so can be devised. We are very clearly of the opinion that a system of registering titles may be put into operation in this state in such manner as to avoid these and other difficulties incidental to the present system and to become of much utility and advantage to conveyancers and owners of real property.

Accordingly, the commission recommended the Torrens System of Land Title Registration and drafted a proposed act, which was passed by the legislature in May, 1908, known as Chapter 444 of the Laws of 1908, otherwise known as the "Land Title Registration Law," which, however, did not go into effect until the first day of February, 1909. It was then found that the presence of certain "jokers" inserted in the bill at the instance of the old title insurance companies tended to make the act uncertain and inoperative. A new bill was prepared containing the desired amendments, and this amendatory act was fiercely opposed by the representatives of the old title insurance companies, but was finally passed by the legislature and signed by Governor Hughes and became Chapter 627 of the Laws of 1910. So that in Article XII of the Real Property Law, as amended, we now have a perfected method of registering titles under the sanction and protection of the state.

Particular attention should be called to the fact that *only one search of the title is necessary*. After the property has been once transferred under the

Torrens System the title is established forever, and subsequent transfers are made simply by execution and delivery of deed, and at the same time surrendering to the Registrar of the county in which the property is located the duplicate certificate of title originally issued to the owner by the State, and paying to the Registrar a nominal fee, upon which he issues a new certificate to the new owner, without further expense. Under the old system of title insurance the title must be searched over and over again every time the property is transferred or mortgaged, and the owner or mortgagor is obliged to pay at least one-half of the original premium for a new policy of title insurance. Under the Torrens System the statutory fees and disbursements are small and the title obtained is backed by the guaranty of the state and free from the slightest doubt, thus demonstrating the advantage of this system as compared with the complicated and costly system of searching and insuring titles formerly in vogue.

It has been wittily said that a title insurance company is like the little girl's definition of a falsehood, namely, "An abomination unto the Lord, but an ever present help in time of trouble." I think this is quite accurate, provided the latter portion of the definition is omitted. Let us see how this works out in practice.

The general public are under a wrong impression with regard to the so-called "policies of title insurance" issued by the old title companies. They regard them in the same light as policies of life or fire insurance which indemnify the insured against all loss suffered. A perusal of the ordinary title insurance policy will demonstrate that it contains many exceptions and special provisions which nullify its value. For example,

we find a clause to the effect that "no claim shall arise under the policy until after final judgment is rendered under which the assured is actually dispossessed or evicted from the property." Consequently, should a question as to title arise, or if suit is brought by some one claiming an interest in the property, the present title insurance companies cannot be compelled to pay at once to the policy holder any loss or damage which he has suffered, but are allowed to defend the action in court. The litigation may continue for years, and in the meantime the policy holder cannot sell his property or give a good and marketable title thereto, and frequently, not being able to wait until the termination of the suit he is compelled to sell the property at a sacrifice, or accept such smaller amount as the title company may be willing to pay him as a purchase price. Even after the termination of the suit, the title company may still avoid payment to the policy holder by this provision which is inserted in the policy of that company, which implores the public to "shift the risk to us," as follows:—

In every case this company may demand a valuation of the insured estate or interest, to be made by three arbitrators or any two of them, one to be chosen by the insured and one by this Company, and the two thus chosen selecting an umpire, and then no right of action shall accrue until thirty days after such valuation shall have been served upon this Company . . . provided, also, this Company shall always have the right to appeal from any adverse determination, etc.

If, in the meantime, mortgages on the property fall due, it is impossible to have the same extended, or procure new mortgage loans during the pendency of the suit, or while a *lis pendens* is on file. All this is obviated by the Torrens System, which vests the title "once for all."

The Torrens Law in New York, as amended, having gone into force and effect only recently, as a consequence there have been few applications. But several titles have been registered already under this law and not a single title has been rejected, and other registrations are now pending in the counties of New York, Kings, Queens, Nassau, Suffolk, Richmond, Westchester, Rockland, etc. The constitutionality of the law has been upheld by a number of Justices of the Supreme Court and on two occasions by the unanimous decision of the Appellate Division in the Second Department. (*Duffy v. Shirden et al.*, 120 N. Y. Supp. 1122.) In this case some twenty-five separate and specific objections to the proceedings to register title were raised by the attorneys for the Title Guarantee and Trust Co. in Brooklyn. All these objections were overruled by Mr. Justice Crane at Special Term, and his decision was unanimously affirmed by the Appellate Division.

It goes without saying that those who attack the law should assume the burden of proof to establish its unconstitutionality, and until this is done the law, as it stands on the statute books, must be regarded as constitutional. There have been so many decisions in its favor, as above set forth, that it would seem to be an almost hopeless task now on the part of the old title insurance companies, or any one else, to have the law set aside or declared null and void.

In order to cast discredit on the Torrens System, however, and to delay, hinder and impede the operation of the title registration law, in a last desperate effort, one of the old title insurance companies has adopted peculiar methods which can hardly be termed commendable, proper or professional. Abut-

ting property owners or even strangers are sought out and induced by various means to allow the attorneys for said company to interpose an answer on their behalf in the action to register title, although they are not named as parties defendant and have no right or interest in the premises sought to be registered. The act distinctly declares that "*an abutting owner merely is not a necessary party to the action,*" as the Appellate Division of the Supreme Court has held unanimously. (See *Duffy v. Rodriguez et al.*, 124 N. Y. 529.)

The same attorneys for the same title insurance company took a position diametrically opposite to that assumed by them in the *Duffy-Rodriguez* case, when they attempted to intervene for an ignorant Italian as an abutting property owner in the suit of *Smith v. Martin et al.*, and by some irony of fate set up in their proposed answer certain alleged defects of title caused by the mistakes made by said company on a previous examination and search when it rejected the title. Judge Garretson, who granted an *ex parte* order allowing answer to be served, promptly vacated his own order on learning the true state of facts, and Judge Crane thereupon signed final judgment and decree of registration. You, gentlemen, as honorable lawyers, know that such tactics can never prevail against right and justice but that they must suffer defeat in the end.²

With respect to the practical value of the Torrens System, the question is

frequently asked what inducement can be offered to the property owner to have his title registered now and thus incur additional expense when he already possesses a policy of title insurance and has no immediate intention of selling or mortgaging his property. There are several reasons why he should take out a Torrens title immediately, among which may be mentioned the following:

1. It will make his property more valuable and more saleable. There can be no dispute that an absolutely indefeasible title created by the state is superior to a policy of title insurance, loaded down with "exceptions" and "conditions."

2. As the statutory procedure including posting, publication, application to the court, etc., requires a period of about two months in order to obtain registration of title, it is the part of wisdom not to wait until the necessity arises for selling or mortgaging the property, but to so arrange in advance that the sale or mortgage may be effected immediately, without delay, when needed.

3. Only one search of title is required and after the judgment roll has been duly filed and the requisite facts have all been noted in the book kept by the Registrar, no mortgages, judgments or other liens can affect the property, unless they are duly recorded in the Registrar's book, and it is a matter of a few minutes only to surrender and cancel the first certificate and to secure the issuance by the Registrar of a new certificate to the grantee, upon payment of a fee of \$2.00. The grantee is thus relieved from paying a big fee for a new search and a new policy of insurance from some title insurance company (provided the title is not rejected on some frivolous ground) and he goes into immediate occupancy.

²Subsequent to the delivery of this address an appeal was taken in *Smith v. Martin* to the Appellate Division, Second Department, State of New York, which on the 30th day of December, 1910, handed down a unanimous decision affirming the order of Judge Garretson vacating his previous order, and in the opinion we find this significant language: "*He (Nicola) asks to come in and serve the answer which is obviously to make trouble and delay, in some interest other than his own.*"

No preliminary contract of purchase and sale is required and there is no wait of thirty or more days for the title to be searched over again. This is a distinct advantage to the grantee, and the grantor can get for his property a much larger price, the difference representing a sum more than sufficient to cover the cost of his title registration.

4. At any time after his title has been once registered, the owner can in a few hours either obtain a short time loan from bank or trust company by depositing his certificate as collateral, or he can obtain a regular mortgage loan at slight expense and thus avoid payment of the excessive fees charged under the old system.

5. It has been found by experience that the average cost of a Torrens title is one per cent of the appraised value of the property and disbursements, the minimum fee being \$150.00. This compares very favorably with the schedule of rates of the old title insurance companies which do not pretend to vest an indefeasible title. It must be borne in mind also that not only does the owner get more for his money under the Torrens System, but there is only one search and one fee which covers the entire life of the property, instead of successive searches and successive fees, which thus tend to diminish the net amount received either on sale or mortgage.

There are many other advantages which might be enumerated, but sufficient has been said to prove the superiority of the Torrens System of Land Title Registration, which is destined ultimately to supersede the "antiquated, cumbersome and expensive" system employed by the old title companies.

In spite of the twenty-five per cent "rebate," "rake-off" or "commission"

paid by the title insurance companies to the lawyers willing to surrender their clients to the mercies of this rapacious monopoly, and even if it were increased to fifty per cent, all sensible people, lawyers and laymen alike, must appreciate the fact that the property owner is a slave to present conditions, although the chains of his thralldom may be gilded. No percentage of fees, however large, can tempt the conscientious attorney to betray his client, when he knows that the Torrens System will encourage and facilitate transactions in real estate, and that there is no other way to obtain a perfect title. In the end this will provide more business for every one and the profession will get its full share of the reward of duty well performed.

Fifteen or twenty years ago there was some semblance of competition and consequent reduction of prices. The Lawyers' Title Insurance Company was organized as a protest against the methods of the "T. G. & T." as it is commonly called. But soon a combination was formed and a "Gentlemen's Agreement" entered into, whereby the three leading title companies play into each others' hands and together monopolize the business of title searching by the possession of original searches, maps and papers acquired in various ways, by the control of the money lending market, and by their millions of dollars capital and surplus, so that they can dictate terms to the customer and borrower.

The term "Examining Counsel" is no longer a distinction and honor but has become a shame and reproach, and the framed certificate upon the wall is all that is left to remind the lawyer that he is still a conveyancer in name if not in deed.

With regard to the question of

mortgage loans, it has been asserted by the opponents and critics of the Torrens System that neither corporations nor individuals could be induced to loan on certificates of registration and that consequently the new system would never prove popular. But these dire forebodings have been negated by the actual facts. Several of the largest financial institutions of this city have expressed a willingness to make loans on Torrens certificates without requiring a policy of title insurance, as formerly, and already several such loans have been negotiated. It needs no argument to show that a title vested by the State is infinitely stronger and better than a policy of title insurance insuring a so-called "good and marketable" title, with a number of strings attached thereto.

The progress already made is extremely satisfactory and every conscientious lawyer, who is striving to advance the interests of his client, and not (to quote a classic expression) "working for his own pocket all the time," should recommend and urge the registration of land titles under the Torrens System and by his support give aid and encouragement to those who have labored so long and so earnestly to bring about this most beneficent reform.³

³On the 3d day of January, 1911, the United States Supreme Court at Washington, D. C., handed down a unanimous decision (the opinion being written by Chief Justice White) in the case of *American Land Co. v. Louis Zeiss*, wherein they upheld the validity of the Torrens Land Title Registration Law as to its constitutionality, and in particular declared that the operation thereof did not tend to deprive any person of his property without due process of law.

Inscriptions on German Court Buildings

BY ROY TEMPLE HOUSE¹

IT WOULD seem as if proverbs would be nowhere more appropriate than where legal decisions are rendered. We remember that all law was once couched in the form of crisp sayings. In the old days when every citizen still took part directly in the making and applying of laws and there were no separate legislative and judicial functionaries, every legal principle was couched in some striking and easily-retained aphorism which was carried from mouth to mouth and thus from generation to generation. The legal principles of those days were so simple and so limited in their application that these naive sentences were perfectly adequate to their

expression. They frequently took a humorous turn, and some of them are quaintly charming.

In a sort of resurrection of this pleasant long-forgotten practice it is becoming more and more the custom in Germany of late to adorn the courts of justice with sententious inscriptions and so to brighten the gloomy realm of Themis with the light of poesy. Thus we read in wonderful flourishes, below the sun dial on the façade of Provincial Tribunal I in Berlin, the inscription:

*Streit soll verwehen,
Zeit wird vergehen,
Recht muss bestehen.*

Let quarrels pass away
As pass the night and day;
Let justice ever stay.

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And the court building in Halle bears the solemn inscription:—

*Ein Volk, ein Kaiser, ein Reich,
Ein deutsches Recht für alle gleich.*

One people and one ruling hand,
One law for all the German land.

But it is especially in Provincial Tribunal III in Berlin that the authorities have called poetry into the service of a public in quest of justice. From every wall we are greeted by neat sayings which help to make the time shorter for citizens in waiting. We find, for example, a couplet which seems to incline rather to the mild theory of the possibility of reforming the criminal than to the hard doctrine of warning example, and which runs:—

*Strafe soll sein wie Salat,
Der mehr Oel wie Essig hat.*

No prisoner and no good salad spoil;
Let each have less of vinegar than oil.

Much severer is the bureaucratic rhyme that we meet later:—

*Lieber was gutes nicht belohnen
Als was schlechtes wo verschonen.*

Rather not reward the good
Than not punish where you should.

A very cutting rhyme is the one:—

*Allen Recht zu thun, würde mir nicht bangen,
Wurden alle nur was Rechts verlangen.*

I'd work for right to all with main and might,
If each one wanted only what was right.

And the warning lines are addressed to witnesses:—

*Ja soll ja, nein soll nein,
Nein nicht ja, ja nein nicht sein,
Der, der and'res reden kan,
Ist kein Christ, kein Biedermann.*

Yes must be yes, nay must be nay,
Yes never no, nay never yea;
Who speaks not truly, never can
Be Christian, or be honest man.

We are warned against all nervousness

and haste—even on the part of the judge—by the words:—

*Man kann in Ruhe etwas tun,
Man kann im Tun etwas ruh'n.*

A quiet man can something do;
He can be calm and active too.

A somewhat dubious estimate of our administration of justice is given in the touchingly frank comment:—

*Der Lehrer in der Schule
Der Richter auf dem Stuhle,
Der Kaufmann bei der Ware,
Der Priester vorm Altare,
Der Maler vor der Leinwand
Vertragen keinen Einwand.*

The teacher in his school,
The judge upon his stool,
The merchant with his wares,
The priest at altar stairs,
The painter at his picture,
Will hear no blame, nor stricture.

Remarkably well equipped, also, with quaint judicial rhymes is the new court building in Rudolstadt. Every window-frame and closet door is adorned with curious couplets for which Attorney Klinghainmer of that city is responsible. Some of these quaint aphorisms are very much worth preserving. We find, for example:—

*Kreuch' bald ins Bett, fang zeitig an,
Du musst eyn klares Köpflein han.*

Go tumble early into bed
If you would keep a lawyer's head.

*Führ deyne Sache gut oder schlecht,
Der Menge machst du's niemals recht.*

Do your work well, or do it ill,
The mob will blame, do what you will.

*Geh' deyne Wege scharf und grad',
Du bist kein Winkeladvocat.*

Seek out an honest way and true;
No pettifog attorney you.

*Schwankst zwischen Neigung du und Pflicht,
Horch auff, was deyn Gewissen spricht!*

If two opinions split the way,
Hear what your conscience has to say.

*Schnaus niemals deynen Gegner an,
Er ist wie du ein braver Mann.*

Don't curse defendant black and blue,
He's just as good a man as you.

*Die arme Eh' bringt wahre Freud',
Erst wann's Gericht sie wieder scheidt.*

Unhappy marriage finds no joy to mend it,
Except when judge and courts step in and end it.

*Verlierst du, lass kein Thränlein rinnen,
Zwo können nit zugleich gewinnen.*

At losing show no tearful face,
Two cannot win the selfsame case.

*Schau deyne Acta gründlich an,
Sonst bist du eyn verlornen Mann.*

Be careful of your (legal) deeds,
'Tis thus a notary succeeds.

*Processstoff ist ein Haufen Mist,
Dareyn ein Körnlein Rechtsens ist.*

A court proceeding is a barnyard heap
Where pounds of filth a grain of justice keep.

*Die Strafrechtsrevisionsinstants
Ist wie ein Kätzlein ohne Schwants.*

Our Criminal Law Revision Court
Is like a cat whose tail's too short.

*Willst du beym Volk in Achtung stahn,
Deyn Maul muss wie ein Mühlwerk gahn.*

Wilt thou have honor from the mob?
Then let thy tongue and jaw bone bob.

*Sey immer höflich vor Gericht—
Das Zähneflatschen lohnt sicht nicht.*

My friend, speak judge and jury fair:
It never pays to curse and swear.

*Notarius möcht'st du gerne seyn?
Dazu ist unser Land zu klein.*

Law would you study?—Slow and steady:
We know too much of law already.

Some Instances of Large Fees

By C. V. TEVIS

THE day of the trust, the merger and the consolidation of the country's industries brought a new opportunity to the legal profession. Corporation law became a business, practically, and the lawyers "legal partners." Retainers of \$50,000 were given and \$250,000 bills paid without a quibble. For the lawyer having knowledge and the ability to apply it in any branch of corporation practice, the high road to munificent reward was paved and shortened.

It is in proportion to the growth of the huge economic combinations of the day, that the rewards have increased. The same applies to criminal law, for nowadays the character of the crime and of the one accused determine, to a great extent, the lawyer's fee.

The record of achievement of some

of the great legal lights of the day is a marvelous one. The reversal of Judge Landis' fine of \$29,000,000 ended a brilliant piece of work by the Standard Oil Company's attorneys. More than \$1,000 a day was the price the company had to pay for this service during all the long time the case was in preparation and in court. The reorganization of the sugar trust, under New Jersey laws, by John E. Parsons was an accomplishment for which a bill of a quarter of a million was felt not to be exorbitant. The late James B. Dill effected an agreement between Carnegie and Frick after only two weeks of work, and received \$125,000 reward.

The \$1,000,000 remuneration received by William Nelson Cromwell for the sale to the government of the French interests in the Panama Canal

is one of the famous fees of recent years. Edward Lauterbach, who reorganized the Third Avenue Railway in New York, was paid \$200,000. What Senator Elihu Root and Paul D. Cravath received for their legal work in connection with the transfer of the Equitable Insurance Company to Thomas F. Ryan cannot positively be stated, but the fee is acknowledged to have been a record breaker.

Twenty-five thousand dollars was paid Delphin M. Delmas, who was engaged as special counsel during the first Thaw trial. Mr. Delmas was brought from San Francisco especially for this purpose. The will of Henry B. Plant was broken by William D. Guthrie, who was paid \$800,000. Governor Hughes and William M. Ivins together received \$42,500 for conducting the insurance and public service investigation in New York. Even that distinguished representative of the "old school" Hon. Joseph H. Choate accepts \$50,000 fees now where he formerly got \$5,000.

But he earns the \$45,000 difference. He is as much a genius of hard work as a man of brilliant mind. So are the others mentioned in the short list. From every sort of walk in life they have come up to the plane of the modern opportunity, which they have grasped with a determined grip.

A man who settled in New York only five years ago holds today an enviable position by reason of his alertness to grasp opportunity and his inordinate capacity for hard work. He is Louis C. Krauthoff, who, although having among his regular clients some of the most powerful financiers and largest corporate interests in America, is practically unknown to the public at large.

The reorganization of the Metropolitan Street Railway Company and the re-

habilitation of the Chicago Subway Company are two of the famous cases in which he has been interested during the past year, in connection with his routine duties as counsel for the "Beef Trust," the "Leather Trust" and one or two other so-called monopolies. As the private legal adviser of J. Ogden Armour, one of his connections, Mr. Krauthoff would have enough business to keep him busy all the time if he were an ordinary man.

It requires strenuous application to hold the title New York has given him, "the greatest corporation lawyer in the city," and Mr. Krauthoff had to follow like methods to win the place. He was born near Jefferson City, Mo., and his parents, who had emigrated to this country from Germany, were people of small means. His father was a petty storekeeper and probably did not take in as much in a year as his son now makes in a day.

As a boy, Louis Krauthoff got only such education as the public schools of his native town afforded. His one ambition was to be a lawyer, and as soon as possible he entered the office of Ewing and Smith, local attorneys, and in 1876, when only eighteen, was admitted to the bar. A year later his qualifications were so widely recognized that he was appointed assistant attorney-general of the state, which office he held for four years.

Following a term in the Missouri legislature, Krauthoff moved to Kansas City, where for thirteen years he played a remarkable game of politics. But the town became too small for him, and he went to Chicago as general counsel for the Armour interests. In turn he outgrew the western metropolis. Then began the present period of his career. The law has indeed been for him a wonderful highway to success.

Martin W. Littleton is also a brilliant example. He was born in Roane county, Tenn., Jan. 12, 1872, and started in life as a track walker out of the town of Weatherford. He had no intention, however, of remaining in such an occupation for any length of time, for he had one great purpose in life. He was going to be a lawyer.

At all sorts of odd hours he gathered his education. He had no time to go to school. Then one day he told his boss on the railroad that he was going to New York to become a great lawyer, and threw up his job.

At the age of nineteen he began the practice of law. The opportunities in Texas attracted him, and he went to Dallas, where he soon became well enough acquainted to enter the lists and be elected assistant prosecuting attorney. The experience he obtained in this position proved invaluable to him. In the office of assistant district attorney of Kings county, N. Y., which he later held for four years, he made an enviable record. Then August Belmont found him, and he was made.

As attorney for the United States Express Company, and various other combined interests, his fees have increased to that point where the extravagances of life in New York do not disturb the serenity of his bank account, and he has just been elected to Congress, though scarcely more than forty.

Elbert H. Gary, Chairman of the Board of Directors and the Finance Committee of the United States Steel Corporation, did not follow the path of the least resistance when he started out to make his way in the world. He chose the law, and this choice meant hardships and hard work.

He received his early education in the Wheaton, Ill., public schools. His parents were pioneer residents of that

town, and most ardent supporters of the little Methodist Church there. Later, when he was able, he took a course in the Wheaton College, which was organized when he was fourteen years of age. He was admitted to the Illinois state bar in 1867, and settled down to the routine of a small town lawyer.

In turn he was president of the village (for three terms), and the first mayor (for two terms) when the place was incorporated. As a politician of the "old school" it is said that there were few better than Gary. At that time he was apparently a shining mark of the kind that prefers to be a big toad in a little puddle to a pollywog in a pond. Du Page county folk thought a good deal of him, too, so much so, in fact, that after his last term as mayor they elected him county judge and kept him in office for two terms.

Then, all at once, he shocked his constituents immeasurably by pulling up stakes and going to Chicago to hang out his shingle. He had seen the grand opportunity of his life in the way of "specialization," which about that time began to receive much attention, and he had lost no time in taking advantage of it.

For twenty-five years the "county judge" practised law in Chicago with single purpose and signal success. He became the counsel for several railroad and manufacturing corporations, his interests gradually widening and deepening. In 1898 he retired from the public practice of law, to become the president of the Federal Steel Company, which was the first of a number of similar positions he has held.

The general-in-command of the Standard Oil Company's legal army, Mortimer F. Elliott, owes his present position to his quickness in recognizing and seizing upon a single opportunity.

So far as birth and social position are concerned, Mr. Elliott was seriously handicapped. What education he received he had to fight for, working all day and studying the greater part of the night.

In the Bradford oil district in northwestern Pennsylvania in the early eighties there was a rush of legal business of the most chaotic sort. The laws governing the ownership of oil and gas were conflicting, and no one appeared to understand the law. Of all the lawyers who were then in this district young Mr. Elliott alone saw the great chance and took it.

Very elaborately and painstakingly he went over every law that could possibly, by the farthest stretch of imagination, be applicable to any oil or gas case. Besides this he carefully familiarized himself with all the methods used by the producer and the marketer of both these commodities.

The reward for all this labor, which covered a period of many months, was neither slow nor small. He won several cases from the Standard Oil Company. This was cause enough for him to attract the attention of the magnates, but he went farther. He demonstrated that he knew all that could be learned about the oil and gas business, and that he was really the only one who did and who could apply his knowledge.

As a result, he was soon invited to identify himself exclusively with the Standard and its general solicitor, and, since the death of Samuel C. T. Dodd, the former counsel-general, he has been at the head of the company's legal forces, a position that had made him one of the best paid lawyers in America.

Richard A. Ballinger, Secretary of the Interior, who, when not actively engaged in politics, is one of the lawyers of the highest fee, used to ride many

miles every Sunday in one direction to recite Latin to a soldier, and several miles in another direction to recite Greek to a minister. It was under conditions like that the young man fought for an education in the law.

By dint of much labor the small sum necessary for a course in the University of Kansas was raised, and there young Ballinger went for three years. After his graduation from an Eastern school, through which he was assisted by Senator John J. Ingalls, he studied in the office of S. Corning Judd, a prominent Chicago attorney. He went to Kankakee, Ill., and became city attorney; then to Decatur, Ala., to become city attorney; thence to the state of Washington, where, in Jefferson county, he was for four years on the superior bench. He later became mayor of Seattle, and in that city conducted a very high-class legal business before being called to join the Cabinet of President Taft.

R. S. Lovett, the late Mr. Harriman's "man behind the gun," was discovered away down in the Texan wilds. Just fifty years ago he was born at San Jacinto, and the San Jacinto of 1860 was "some Western place." In what schools there were there young Lovett received his education, topping off, some years later, with a course in the Houston high school. This was all of the academic that he received. But it was enough. He was the kind that, his mind once made up, would learn the law whether or not there were any schools.

He began at the bottom and worked up through all the complexities of railroad law, representing at times about every line in the state. One day Mr. Harriman invited him into his private car and without further ado carried him off to New York and made him chief counsel of his entire railway

system, and president of some of the individual lines.

A minister's son, James B. Dill, dropped into New York in the year of 1878 from his home in Spencerport, by way of the Yale Law School, and then crossed the ferry and set up shop in Jersey City. In 1905 he became Judge of the Court of Errors and Appeals of New Jersey, a position into which he dropped, as it were, for a rest, and which he had resigned before his death.

It was he who said, "The lawyer has become a legal partner of trade."

And he should have known, for he single-handed had drafted the charters of thirty-five of the largest corporations

ever created, besides having had a hand in several hundred others. When he gave up his practice to sit on the bench he actually resigned from the directorate of nearly a hundred corporations. He had amassed a fortune as a "legal partner."

Almost at random one may put down his finger on the list of the big lawyers of the country and the name which is touched will be that of a man who has won by worth and work. The world today may look enviously upon him and accuse him of having been born with a golden spoon in his mouth, but his real story is different. He merely grasped the unusual opportunity.

Victories of Great Lawyers—Andrew Hamilton

BY ARTHUR WAKELING

"ARE there not younger men in New York? I—I am an old man."

Andrew Hamilton smiled as he looked into the face of his visitor, Mrs. Alexander, the society leader of New York.

"But I have made this journey from New York to Philadelphia—and oh, it's a terribly long one!—just to ask you to defend Zenger. The integrity of the government, the freedom of speech and the liberty of the individual—all depend upon Zenger's acquittal—and upon you. Whether the year 1735 is to be a byword and a reproach forever in New York—"

"I had not thought it so serious. If there be aught I can do"—the old lawyer's voice thrilled with the enthusiasm of youth—"in the cause of peace or justice or liberty, depend upon me to do my best. I'll defend this man Zenger!"

There was a tense, thrilling pause in the gray, dusty twilight of the office.

Mrs. Alexander well knew what that decision meant to the people of New York.

In a low voice she began to outline the case to the lawyer.

Zenger was the publisher of *The New York Weekly Journal*, a paper in which the evil practices of Governor Cosby, one of the worst men who ever preyed upon the colonial government of New York, were energetically and skilfully denounced.

Cosby was the governor who said to Chief Justice Lewis Morris, upon the presentation of a gift of seven hundred and fifty pounds voted by the Assembly:

"Zounds, why did they not count the shillings and the pence!"

Lewis Morris, Alexander and Smith were the principal opponents of the Governor and also the writers of the articles printed by Zenger.

"These articles must stop—at any cost!" Cosby asserted.

And he proceeded to carry out his designs with an unscrupulous craftiness that fully equalled his cupidity.

He ordered certain copies of the *Weekly Journal* to be burned by the hangman on Wall street, in the open square before the City Hall. His command was obeyed finally, but the burning was anything but an unqualified success. The city authorities refused to sanction the act; the court forbade it; the hangman refused to officiate at the miniature conflagration; and not a person would witness it. So the burning took place in a lonely and ominous solitude, while Governor Cosby swore revenge.

Shortly after this, Zenger was arrested and charged with having published libelous articles in his paper. Alexander and Smith had promptly taken up the defense and were as promptly debarred by the Governor's justices. With these two men out of the way and with no other distinguished lawyers to defend Zenger, Cosby felt secure. His time of triumph was approaching.

Then it was that Mrs. Alexander, escaping the vigilant guard kept by Cosby on all his enemies, journeyed to Philadelphia—an ordeal of sufficient terror to deter the stoutest heart, since the coach was without springs and the road without grade—to ask Andrew Hamilton, famous throughout the colonies, to appear for Zenger.

As she had said, it was more than the mere saving of the German publisher; it was the establishing of the freedom of speech and press throughout the New World.

The historical trial of colonial New York took place August 4, 1735, in the City Hall on Wall Street, before which had occurred the farcical burning of certain copies of the *Weekly Journal*. Cosby had resolved, however, that he

would not lose in this contest with his people, and he had taken every means to insure his success.

There was a breathless silence when Andrew Hamilton entered the court room and took his place. The attorneys for the Governor looked askance at their opponent; Cosby scowled savagely at the justices; and they held a whispered consultation.

Brilliant, thrilling was the defense that Hamilton made. He knew that, according to recognized principles, the law was against him. But his plea for the freedom of speech and press was no less convincing and his assurance was no less inspiring.

He admitted that the alleged libel had been published; but he claimed that every word of it was true. Then the court took a hand in the proceedings and denied him the privilege of proving the facts true, in spite of his very just protestations that the truth of the facts lay with the jury to determine.

Then he launched into a discussion of libel as sarcastic as it was clever:—

"I sincerely believe, that were some persons to go through the streets of New York now-a-days, and read out of the Bible, if it was not known to be such, Mr. Attorney, with the help of his innuendos, would easily turn it into a libel. As for instance: Is. ix: 16: 'The leaders of the people cause them to err, and they that are led by them are destroyed.' But should Mr. Attorney go about to make this a libel, he would read it thus: 'The leaders of the people' (innuendo, the Governor and counsel of New York) 'cause them' (innuendo, the people of this province) 'to err and they' (the Governor and counsel meaning) 'are destroyed' (innuendo, are deceived into the loss of their liberty, which is the worst kind of destruction)."

Finally, he swept into the flowing

periods of his peroration, a fitting climax to the forensic eloquence of his speech.

"Power may justly be compared to a great river: while kept within its due bounds, it is both beautiful and useful; but when it overflows its bounds, it is then too impetuous to be stemmed; it bears down all before it, and brings destruction and desolation wherever it comes. If, then, this is the nature of power, let us at least do our duty, and like wise men (who value freedom) use our utmost care to support liberty, the only bulwark against limitless power, which, in all ages, has sacrificed to its wild lust and boundless ambition, the blood of the best men that ever lived."

There was a solemn and tense stillness in the little court room, with the sober, black-gowned justices sitting behind the great panelled oak desk; the lawyers, glancing furtively at each other and fingering their quill pens nervously; the eager, expectant, and yet serious, terribly serious crowd of spectators; and the jurymen, filing into their places, white

and anxious, yet with a gleam of satisfaction in their glances about the court room.

"Not guilty!"

The words of the foreman were followed by a shout of triumph that was repeated endlessly with redoubled enthusiasm in the streets outside.

Hamilton was carried away by his overjoyed friends to be banquetted and acclaimed the champion of liberty. He was presented with the freedom of the city and a lavishly decorated gold case in which to preserve it; for he had won for the people of New York the freedom of speech—the freedom of criticising what they believed wrong, of doing what they believed right. He had gained for them the first victory of independence.

And Benjamin Franklin, writing in the *Pennsylvania Gazette*, August 6, 1741, when the old lawyer had passed away, said: "He feared God, loved mercy and did justice. What more could be said of any man!"

Case-Law Verses¹

BY FRED R. BARLEE, BARRISTER-AT-LAW

WITHDRAWAL OF OFFER BEFORE TIME GIVEN FOR ACCEPTANCE

(*Cooke v. Oxley*, 3 T. R. 653)

A OFFERED goods for sale to B,
 B said, "You're very kind;
 Give me till four o'clock today,
 I can't make up my mind."
 Meanwhile a chance of selling came,
 Which A *quite rightly* took,

¹ These extracts have been made from a little book by the author, which bears the sub-title, "A *Memoria Technica* of Leading Cases for the Use of Students and Others."

The Green Bag

As you may ascertain at will,
 From *Oxley* sued by *Cooke*.
 Had A the offer open kept,
 He might have still been ruing it;
 He wasn't bound, no *quid pro quo*
 Was given him for doing it.

"TRESPASS" AND "CASE"

(*Scott v. Shepherd*, 2 W. Bl. 892)

IN *Scott v. Shepherd* read the law
 On "*trespass*" and on "*case*";
 A lighted squib by Shepherd thrown,
 Burst in the plaintiff's face;
 Although it passed from hand to hand,
 The Court was fain to say—
 "Who threw it first must be compelled
 The damages to pay."

MEASURE OF DAMAGES IN CONTRACT

(*Hadley v. Baxendale*, 9 Ex. 341, 1895 (12) Ch. 377)

THE case where *Hadley* sued one *Baxendale*
 The lawyer cites, the student should not fail
 To read, for this to damages applies
 In actions that *from breach of contract* rise.
 In *Ebbetts* versus *Conquest* we can trace
 The judges followed and approved this case.

MEASURE OF DAMAGES IN ACTIONS ON TORT

(*Vicars v. Wilcox*, 8 East 1; *Lumley v. Gye*, 22 L. J. Q. B. 463)

VICARS *v. Wilcox, Lumley* versus *Gye*,
 You'll quote, however, as authority,
 For estimating damages of different sort,
 Such as arise in actions laid *in tort*.

SUA CUIQUE DOMUS TUTISSIMUM REFUGIUM

(*Semayne v. Gresham*, 5 Coke 91)

"AN Englishman's house is his castle,"
 A maxim as terse as it's plain.
 In 5 *Coke* 91 is reported
 The case so well known of *Semayne*.

DAMNUM SINE INJURIA

(Chasemore v. Richards, 7 H. L. C. 349, 29 L. J. Ex. 81)

DAMNUM alone won't found a claim,
 To plaintiff's satisfaction,
 "Because without *injuria*
 It gives no right of action."
 The student learns, and learns as well,
 By reading up the case, more
 About riparian owners' rights
 In *Richards* sued by *Chasemore*.

TRESPASS AB INITIO

(The Six Carpenters' Case, 8 Coke 146)

YE carpenters six, ye were good at your trade,
 In the Court it was found that your *case* was well made.
 'Twas *plain* you intended the landlord to *chisel*
 Yet his action for trespass went out with a fizzle.
 You were thankful, no doubt, so to you is the Law,
 You gave it the *handle* for more than one *saw*.

NO CONTRIBUTION BETWEEN JOINT TORT-FEASORS

(Merryweather v. Nixan, 8 T. R. 186)

IN *contract* the Law has no wish to gainsay
 What between two defendants is called contribution,
 So if one has the whole of the damage to pay,
 The other for *his* share must make restitution.
Merryweather v. Nixan declares that *in tort*
 The Law will not sanction a rule of this sort.

Perth, Western Australia.

The Doctrine of the Separation of Powers

A RECENT article by Professor Henry J. Ford of Princeton University, on "The Cause of Political Corruption,"¹ is striking in that it attacks the separation of the judicial, legislative and executive powers, under our form of government, as inconsistent with the principles of political science. Emphasizing the notion that our knowledge of these principles is based on inductive study of history, the writer maintains that healthy governments have always owed their well-being to the connection rather than the separation of the powers. Governments in which public opinion is restrained from expressing itself by an elaborate system of "checks and balances" are in his opinion unhealthy. The reader obviously will have to take into consideration the fact that the article was written from the standpoint of one for whom democracy and the untrammelled rule of the majority are synonymous. Confident generalizations which indicate no profound mastery of so large a subject may excite some incredulity.

"Both Montesquieu's theory" of the separation of powers, writes Prof. Ford, "and Blackstone's adaptation of it are now discarded by political science. . . . The causes of the discredit in which the doctrine now stands are soon stated. It is found that forms of government which are constructed on that principle always experience derangement of constitutional function, and it is found that forms of government displaying constitutional vigor and efficiency are organized on the directly contrary principle of the connection of the powers."

¹"The Cause of Political Corruption," by Henry Jones Ford, Professor of Politics in Princeton University. *Scribner's*, v. 49, p. 54 (Jan.).

The authority of Montesquieu is, of course, exploded, and the separation of the powers must rest partly on a legal fiction. The three powers, even under our own Constitution, do actually overlap one another, though legally distinct. To this extent Prof. Ford's position will be sustained by modern scientific thought, but he goes much farther, and he is venturing on shaky ground when he claims that every legal separation of powers invites constitutional decay and political corruption.

From the following it will be seen how he develops the theory and how he connects it with the idea of a pure democracy:—

"A government of separated powers is plainly incapable of responding to demands for greater efficiency of administration. In fact, as soon as attention is turned to business efficiency, separation of powers seems out of place. Any one who should suggest that in the organization of a private business corporation the president should not take part in the meetings of the board of directors, would be stared at as being out of plumb mentally. There is really no difference between public business and private business as to the principles of successful management, nor is any such difference supposed to exist except where people's minds are clouded by eighteenth century superstitions. As soon as Montesquieu's doctrine is examined, it is found that by its terms it does not make for efficiency. . . . In the acute phase of constitutional disease from this principle the separate powers are forced to move by violence, making the true constitution a military oligarchy. In the chronic phase they are forced to move by corruption, making the true constitution a

plutocratic oligarchy. Means do not exist for action in the sole interest of the general welfare, for the essential characteristic of the scheme is that all action shall be subject to the consent of privileged interests distinctly represented in the government. The scheme was not made for democratic use and is not susceptible of conversion to democratic use. This is the secret of the disharmony between American society and American politics. The rule of the people cannot be made effective for lack of appropriate institutions. Their sovereignty cannot become concrete and practical without an organ in which it can reside."

The diametrically opposite view of this subject is taken by a Justice of the United States Supreme Court, who goes back to Montesquieu for his theory of the state and asserts the doctrine of the separation of powers in what might almost be called a re-actionary manner.²

Mr. Justice Lurton's views of the Constitution are those of a strict constructionist on whose mind the theories of Savigny and succeeding German jurists appear to have made scant impression. He seems to give too much weight to the doctrine that a rigid Constitution is superior to a flexible one, a doctrine in which Mr. Bryce appears to be a firm believer, but which Professor Morgan of the University of London shook to its foundations in an article noticed in these pages last month (see *23 Green Bag* 38). Prof. Morgan went too far, in our judgment, in maintaining the superiority of flexible constitutions, the advantages being nearly even, inasmuch as the rigidity or flexibility of a Constitution rests in the last analysis on the rigidity or flexibility of public

opinion. The argument that the rigidity of our American Constitution must be sedulously preserved, to shield our government from tyranny, a view earnestly defended by Mr. Justice Lurton, is not invulnerable. Any higher degree of rigidity than that which our Constitution automatically maintains for itself is both impracticable and undesirable.

On the whole, the separation of powers in the American Constitution cannot be said to have worked badly. If the powers do in fact overlap each other, it does not follow that they should be so merged as to lose their identity. The doctrine can no longer be stated in the extreme form in which Montesquieu stated it, but it has stood the test of experience so well that when it is stated in the form which study of our institutions shows to be necessary it must be pronounced sound, at least with reference to the American commonwealth. And that the three powers are co-operative, not conflicting, and should be exercised as far as possible in orderly harmony, is a position with which all should agree, applauding the following remarks of Mr. Justice Lurton:—

"The Courts possess neither the power of taxation nor that of the sword. They are dependent upon the legislative power for their existence and upon the executive for the force needful to enforce their judgments. Set in the place of an arbiter between the branches among which the functions of government have been parceled, they constitute the balance-wheel in our unique and splendid governmental system. They are the guardians of the fundamental law which conducts and controls the otherwise uncontrollable legislative power. Their dominating authority is moral. They will continue to retain the authority necessary to their free action so long only as they shall respect their own limitations,

²"A Government of Law or a Government of Men?" by Associate Justice Horace H. Lurton. *North American Review*, v. 193, p. 9 (Jan.).

scrupulously avoiding the exercise of powers which they have not and fearlessly exercising those which they have. But this duty of keeping within the limits of the organic law is one which does not rest upon the judicial branch with any greater force than it rests upon the co-ordinate departments of government. The lawmaker no less than the judge exercises his office under the same solemn obligation to support and uphold

the limitations of the organic law. Why shall that oath rest more lightly upon one than the other? In the forum of conscience may the legislator say, as he too often does, 'I will not consider that side of the matter—that I will turn over to the Courts.' Yet, as we all know, this is not an unusual attitude for a legislator who finds questionable legislation desirable if valid. This is not honest, nor is it expedient."

Mr. Morawetz's Views on the Sherman Act

IN the opinion of Mr. Victor Morawetz, "the actual decisions of the Supreme Court, with the exception of the decision in the *Sugar Trust* case, are consistent with a harmonious construction of the Act [*i.e.*, the Sherman anti-trust law] which would effect its purpose without preventing any business combinations or arrangements necessary to secure economy in production and in trade, and without interfering with any business methods that ever have been regarded as lawful and proper."¹

Mr. Morawetz divides the cases arising under the Act into four classes, and discusses these classes at some length. To quote a few extracts:—

"1. *Cases involving contracts, combinations or conspiracies to restrain the trade or commerce of other persons, or of the public generally.*

"Contracts, combinations or conspiracies by means of physical force, or by means of threats of damage, or boycotting, to prevent other persons, or the public generally, from carrying on trade or commerce are illegal at common law,

¹"The Supreme Court and the Anti-Trust Act," by Victor Morawetz, 10 *Columbia Law Review* 687 (Dec.). An amplification of Mr. Morawetz's article in the *New York Times* of Oct. 9, 1910.

and it is eminently proper that contracts, combinations or conspiracies of that character, when in restraint of interstate or international trade or commerce, should be prohibited by an Act of Congress furnishing effective remedies for its enforcement. . . .

"2. *Cases involving contracts or combinations of public carriers to increase the rates or tolls payable by the public in respect of interstate commerce.* . . .

"These traffic cases are not authority for the doctrine that a contract or combination among merchants or manufacturers would constitute a restraint of interstate commerce, prohibited by the first section of the Anti-Trust Act, on the sole ground that the effect of the contract or combination was to restrict competition among the parties. Railway companies furnish the transportation necessary to enable the public to engage in interstate trade or commerce, but they are not themselves engaged in interstate trade or commerce. In the traffic cases the stoppage of competition was in restraint of interstate commerce and unlawful, not because it restrained commerce of the railway companies which made the contracts or entered

into the combinations, but because its effect was to restrain the interstate commerce of the public by imposing additional burdens upon this trade or commerce. As stated by the Supreme Court, the natural and direct effect of such contracts or combinations was to maintain rates at a higher level than otherwise would prevail. . . .

"3. *Cases involving contracts or combinations that, without restraining the trade or commerce of others and without monopolizing, or attempting to monopolize trade or commerce, simply diminish competition among those contracting or combining.*

"The Supreme Court never has decided that contracts or combinations of this character are prohibited by the Anti-Trust Act. Although *dicta* may be found in the opinions of the court which, taken without regard to the context, might seem to indicate that the court considered that *all* contracts and combinations restricting competition in any degree were prohibited by the Anti-Trust Act, no such conclusion can fairly be deduced from these opinions when considered in their entirety. . . .

"4. *Cases involving attempts to monopolize, or combinations or conspiracies to monopolize any part of interstate or international trade or commerce.*

"According to common usage in modern times, the phrase 'to monopolize commerce' means, by the elimination of competition to secure to some individual or group of individuals control of all or of a largely preponderating part of the commerce in some article. The phrase would not apply to a simple lessening of competition leaving in existence reasonably competitive conditions; but it would apply to the act of concentrating control of the commerce in any article to such a degree as to destroy reasonably com-

petitive conditions, though competition be not wholly destroyed. . . .

"Although a restriction of competition between competitors in a branch of trade may not of itself constitute monopolizing, it may be part of an attempt, combination or conspiracy to monopolize and therefore in violation of the statute. But if a restriction of competition of itself does not constitute monopolizing and is not part of an attempt, combination or conspiracy to monopolize, it cannot by any correct use of language be called 'tending to create a monopoly.' . . .

"The decision in the *Sugar Trust* case was one of the earliest decisions under the Anti-Trust Act and, in the opinion of the writer, cannot be reconciled with the subsequent decisions of the Supreme Court. . . . In the *Sugar Trust* case the question was *not* whether Congress had constitutional power to prohibit a manufacturing corporation engaged in interstate commerce from purchasing a competitive business under *all* circumstances or conditions. The only constitutional question was whether Congress could prohibit the purchase of control of competitive businesses under the specific conditions prescribed in the Act, namely, when the purpose or the effect of the transaction was to monopolize interstate commerce; in other words, the question was whether Congress could prohibit individuals and corporations from monopolizing interstate commerce by means of purchases of competitive businesses. . . . The fact that the Constitution does not confer upon Congress the power to regulate the acquisition, ownership or use of property is no reason for holding that Congress cannot regulate interstate commerce in property, or that Congress cannot prohibit persons engaged in interstate commerce from combining their plants and businesses when

such combination would destroy reasonably competitive conditions in interstate commerce. . . .

"A decision following the supposed authority of the *Sugar Trust* case and holding that the Anti-Trust Act does not prevent the effective monopolization of interstate trade or commerce by combining or vesting in a corporation the plants and businesses of practically all

manufacturers and sellers of an article of interstate commerce surely would not be accepted by the people of the United States as a final solution of the trust problem. Such a decision would probably result in an imperative popular demand for legislation of a socialistic character and possibly it might lead to an amendment of the Constitution."

What Is a "Republican Form of Government"?

THE opponents of the popular initiative and referendum are fond of asserting that those measures are inconsistent with the clause of the federal Constitution guaranteeing a "republican form of government" to citizens of the United States. The meaning of the phrase "a republican form of government" will doubtless be settled, ultimately, in accordance with the political convictions of the American people, whether they come to favor the conservative form of representative government or to substitute for it the newer direct form of popular control. We have doubts whether the Supreme Court will ever construe the phrase in its narrower signification. One of the "Notes" in the *Harvard Law Review* recently threw much light on this interesting question.¹ To quote:—

"The Latin *res publica*, at least as late as the sixteenth century, was altogether colorless as to the form of government it designated. The compound adjective is not found in classical or mediæval Latin. The noun 'republic' and the adjective 'republican' were used by Wilson, the author of the clause in its final form, and by other publicists of the time

in a sense broad enough to include direct democracy. The same thing is true of the use of the corresponding French words *république* and *républicain* by Montesquieu and apparently by Rousseau, the writings of both of whom had a great influence on American political thought of that period. The political party which advocated keeping the government as close to the people as possible was called, shortly after the formation of the Constitution, the Republican party. On the other hand, Madison defines a republic as 'a government in which the scheme of representation takes place,' and contrasts it with a pure democracy. Discussion of the clause under consideration in the constitutional convention indicates that it was directed against insurrection, invasion and monarchical forms.

"The state governments in existence in 1787 must be taken as examples of the republican form, in the sense in which that phrase is used in the Constitution. In spite of the fact that the referendum appears in the formation of some of the state constitutions and in spite of the existence of the New England town government, so close a student of political science as Hamilton believed that the state governments were then

¹ 24 *Harvard Law Review*, 141 (Dec.).

wholly representative. Another of the authors of the *Federalist*, however, points out that the Constitution does not forbid the substitution of other republican forms for those then existing. It seems, on the whole, that 'republican' in the Constitution is ambiguous, and that a positive construction that it had a meaning so narrow as to exclude direct legislation cannot be supported.

"But even if 'republican form of government' does mean representative

government, it might well be contended that a slight tincture of direct democracy would not destroy the representative character of a state government. Furthermore, it is probable that the enforcement of the constitutional guaranty is a political question for Congress and the President rather than for the judiciary."²

² Readers interested in pursuing the subject further are referred to the full citations accompanying this article.

A Foundation of International Peace

AN IMPORTANT event in the unwritten history of international arbitration took place in New York on Dec. 14, when Andrew Carnegie transferred to a board of trustees \$10,000,000 in five per cent first mortgage bonds, the revenue of which will be used to "hasten the abolition of international war" and establish a lasting world peace.

The informal trust deed presented by Mr. Carnegie to the trustees read as follows:—

Gentlemen: I have transferred to you as trustees of the Carnegie Peace Fund, \$10,000,000 of five per cent first mortgage bonds, value \$11,500,000, the revenue of which is to be administered by you to hasten the abolition of international war, the foulest blot upon our civilization. Although we no longer eat our fellowmen or torture prisoners, or sack cities, killing their inhabitants, we still kill each other in war like barbarians. Only wild beasts are excusable for doing that in this, the twentieth century of the Christian era, for the crime of war is inherent, since it decides not in favor of the right but always of the strong. The nation is criminal which refuses arbitration and drives its adversary to a tribunal which knows nothing of righteous judgment.

I believe that the shortest and easiest path to peace lies in adopting President Taft's platform,

who said in his address before the Peace and Arbitration Society, New York, March 22, 1910: "I have noticed exceptions in our arbitration treaties, as to reference of questions of national honor to courts of arbitration. Personally, I do not see any more reason why matters of national honor should not be referred to a court of arbitration than matters of property or of national proprietorship. I know that is going further than most men are willing to go, but I do not see why questions of honor may not be submitted to a tribunal composed of men of honor who understand questions of national honor, to abide by their decision, as well as any other questions of difference arising between nations."

I venture to quote from my address as president of the Peace Congress in New York, 1907: "Honor is the most dishonored word in our language. No man ever touched another man's honor; no nation ever dishonored another nation; all honor's wounds are self-inflicted."

At the opening of the International Bureau of American Republics at Washington, April 26, 1910, President Taft said: "We twenty-one republics cannot afford to have any two or any three of us quarrel. We must stop this, and Mr. Carnegie and I will not be satisfied until all nineteen of us can intervene by proper measures to suppress a quarrel between any other two."

I hope the trustees will begin by pressing forward upon this line, testing it thoroughly and doubting not. The judge who presides over a cause in which he is interested dies of infamy if discovered. The citizen who constitutes him-

self a judge in his own cause as against his fellow-citizen, and presumes to attack him, is a lawbreaker and as such disgraced. So should a nation be held as disgraced which insists upon sitting in judgment in its own cause in case of an international dispute.

I call your attention to the following resolution introduced by the Committee on Foreign Relations in the first session, Fiftieth Congress, June 14, 1888:—

"Resolved by the Senate (the House of Representatives concurring) that the President be, and is hereby, requested to invite from time to time, as fit occasions may arise, negotiations with any Government with which the United States has or may have diplomatic relations, to the end that any differences or disputes arising between the two Governments which cannot be adjusted by diplomatic agency may be referred to arbitration and be peaceably adjusted by such means (resolution not reached on calendar during session, but re-introduced and passed, Senate, Feb. 14, 1890, passed, House, April 3, 1890)."

This resolution was presented to the British Parliament, which adopted a resolution approving the action of the Congress of the United States and expressing that Her Majesty's Government would lend their ready co-operation to the Government of the United States for the accomplishment of the object in view (resolution of the House of Commons, July 16, 1893. For. Rel. 1893, 346,352). Here we find an expression of the spirit which resulted in the first international Hague conference of 1899; the second Hague conference of 1907; eighty treaties for obligatory arbitration between the great nations of the world, our own country being a party to twenty-three of them.

It was my privilege to introduce to President Cleveland in 1897 a committee of members of Parliament of Britain, headed by Sir William Randal Cremer, in response to the action of Congress, proposing a treaty agreeing to settle all disputes that might arise between America and Great Britain by arbitration. Such a treaty was concluded between Lord Pauncefote and Secretary Olney in 1897. It failed of passage by the necessary two-thirds majority of the Senate by only three votes.

There is reason to believe that the British Government has been desirous of having that treaty ratified by our Government, or ready to agree to another of similar character, so that President Taft's policy seems within easy reach of success. If the English-speaking race adopts such a treaty we shall not have to wait long for

other nations to join, and it will be noticed that the resolution of Congress in 1890 embraces any Government with which the United States has or may have diplomatic relations; thus all nations seem still open to the invitation he is requested to give, there being no limitations as to time. If the independence and rights of nations to their respective internal policies were first formally recognized in such treaties, no disputes concerning these elements of sovereignty could arise.

The trustees have power to sell, invest or re-invest all funds, either in the United States or in other countries, subject as respects investments in the United States to no more restriction than is imposed upon savings banks or insurance companies in the State of New York. In order to give effect to this gift, it will be suitable that the trustees herein named shall form a corporation with lawful powers appropriate to the accomplishment of the purposes herein expressed and authorize the conveyance of the fund to such a corporation. No personal liability will attach to trustees for their action or non-action as trustees. They have power to fill vacancies or to add to their number and to employ all officials and to fix their compensation. Trustees shall be reimbursed all expenses incurred in connection with their duties as trustees, including travelling expenses, attending meetings, including expenses of wife and daughter to each annual meeting. The president shall be granted such honoraria as the trustees think proper, and as he can be prevailed upon to accept.

Lines of future action cannot be wisely laid down. Many have to be tried, and having full confidence in my trustees I leave to them the widest discretion as to the measures and policy they shall from time to time adopt, only promising that the one end they shall keep unceasingly in view until it is attained, is the speedy abolition of international war between so-called civilized nations. When civilized nations enter into such treaties as named, or war is discarded as disgraceful to civilized men, as personal war (duelling), and man selling and buying (slavery) have been discarded within the wide boundaries of our English-speaking race, the trustees will please then consider what is the next most degrading remaining evil or evils whose banishment—or what new elevating element or elements if introduced or fostered, or both combined—would most advance the progress, elevation and happiness of man. And so on from century to century without end, my trustees of each age

shall determine how they can best aid man in the upward march to higher and higher stages of developments unceasingly, for now we know that as a law of his being man was created with the desire and capacity for improvement to which, perchance, there may be no limit short of perfection even here in this life upon earth.

Let my trustees therefore ask themselves from time to time, from age to age, how they can best help man in his glorious ascent onward and upward and to this end devote this fund.

(Signed) ANDREW CARNEGIE.

Senator Root has been made permanent chairman of the Board of Trustees, and James Brown Scott is secretary. The other trustees include Nicholas Murray Butler, Joseph H. Choate, Henry

S. Pritchett, Albert K. Smiley, Charles W. Eliot, John W. Foster, Andrew J. Montague, William M. Howard, Thomas Burke, James L. Slayden, Andrew D. White, Robert S. Brookings, Samuel Mather, J. G. Schmidlapp, Arthur W. Foster, Charlemagne Tower, Oscar Straus, George W. Perkins, John Sharp Williams, R. A. Franks, Austen G. Fox, John L. Cadwalader, C. L. Taylor, Robert S. Woodward and Cleveland H. Dodge.

President Taft has consented to be an honorary president of the organization.

Treating the Child as a Criminal

JUDGE LINCOLN FROST told a story at the monthly banquet of the Lancaster County Bar Association, at Lincoln, Neb., November 26, which strongly emphasized the inapplicability of the ordinary criminal procedure to juvenile courts. Judge Frost has for the past three years presided over the juvenile court of Lancaster county. He said:—

The attorney looks upon every law suit as an adversary proceeding, while a case in the juvenile court is a case in the interest of the child. If you will look at the petitions used in the cases filed in the juvenile court of this country—and the same is true generally—you will find every petition is entitled "The State of Nebraska, in the interest of —, a minor."

The following incident, told by Judge Brown, formerly of the juvenile court of Salt Lake City, illustrates how an attorney, who was thoroughly imbued with the spirit of the criminal law, may

entirely overlook the real objects of a trial in the juvenile court.

A certain lawyer, employed to defend a boy caught in a theft, objected to the story being told to the judge as it had been confessed to an officer, on the ground that "this boy shall not incriminate himself with his own testimony." A jury was asked; many witnesses were called to prove what the boy would have told in five minutes. A lengthy trial, costing \$150 and an attorney's fee, resulted in lasting injury to the boy, because he felt less guilty on account of the attempt to justify him and to get him free.

That night when the lawyer entered his home he was met with an exclamation from his little girl: "Oh, papa! Harry stole some apples from Mrs. Fern's yard; Jimmy Peters saw him."

After supper, father said: "Come here, Harry, and tell me about it; I am ashamed that my boy would steal apples. Why did you do it?"

"Well, papa, they looked so nice, I— I—"

"I object to Harry's telling on himself in that way," interrupted the mother, who was a prime mover in the establishment of the juvenile court and had been present at the hearing in court that afternoon.

"But, mother, Jimmy saw him take them."

"That makes no difference," replied the mother. "I will call in Mrs. Smith, Mrs. Green, Mrs. Jones, Mrs. Thomas and Mrs. Franks. We will get Jimmy

and any others you want to tell what they know and after we hear them all the women will decide whether Harry stole the apples. Harry shall not tell on himself. You will have to prove it."

"Wife, this is foolish; Harry knows he stole the apples and we can settle this right here in the family without the whole neighborhood being called in. There is no use branding our boy a thief."

"Are you sure it will be constitutional?" said the wife, with a twinkle in her eye.

Challenges and the Powers of Judges

ASSOCIATE Justice Charles B. Letton of the Supreme Court of Nebraska, in a paper recently presented to the Nebraska State Bar Association, discusses with helpful moderation the problems of law reform in that state. The common criticisms against the courts are taken up one by one, and suggestions are offered for cautious constructive reforms in practice as regards continuances, system of special verdicts and appellate procedure. We quote the portions of the paper which deal with challenges and with the powers of judges, because the object-lesson of the *Crippen* case has shown our American methods to be notably defective in these important respects. The suggestions would not apply to the state of Nebraska alone, but may be of general application:

"*Challenges for Cause.* The problem of elimination to procure twelve impartial men is a difficult one. In these days of popular education the daily and weekly newspaper is in the hands of almost every person who can read the language of the country, and on

this account it is practically impossible in criminal cases of any importance to find a man of ordinary intelligence who has not read newspaper accounts of the occurrence and who has not formed more or less of an opinion or impression from his reading. Most men are not sufficiently nice in the exact shade of the meaning of words to discriminate with a lawyer's refinement between the words 'impression' and 'opinion.' While counsel for defendant seizes upon every 'impression' of the juror as an 'opinion,' the counsel for the state on his part seeks to reduce each 'opinion' to a mere 'impression' and usually the court by asking leading questions endeavors to settle the matter by eliciting from the juror assent to the statutory formula that 'he feels able, notwithstanding such impression or opinion, to render an impartial verdict upon the law and the evidence.' The endeavor to force the description of the condition of jurors' minds into a set formula of words, a kind of Procrustean bed, to define opinions as 'fixed' or 'hypothetical,' or impressions as slight or deep, usually

is of little benefit in ascertaining the crucial fact whether or not the mind of the juror is open to the truth, or whether his mind is in such condition of prejudice against the accused that he cannot dispassionately consider the facts. The fault has not been with the statutes of Nebraska. They are liberal enough in this respect. Perhaps it is open to doubt whether the earlier decisions in this state gave enough weight to the conclusions of the trial judge in passing upon the qualifications of a proposed juror, but in the cases of *Ward v. State*, 58 Neb. 719, and *Jahnke v. State*, 68 Neb. 154, a reasonable and practical doctrine was announced. More regard has in later years been paid to the immense advantage that the observation of the juror during the examination gives the trial judge. Often it is not the spoken word but the whole demeanor that reveals prejudice or shows the lack of it, and this a reviewing court cannot see. If a judge is strong enough to hold his head in times of public clamor, justice will seldom miscarry, either on the side of the accused or state, on account of the retention of a juror whom he believes to be disinterested and honest, even though the juror is frank enough to say he has formed an opinion from newspapers or from rumor.

Peremptory Challenges. In my judgment the state and society in general are severely handicapped as the law now stands regarding peremptory challenges in criminal cases. As a general rule better qualified jurors are to be found among the men selected by the county board and serving upon the regular panel than among talesmen called to fill the panel. I have often seen a jury panel made up of citizens of good standing peremptorily challenged out of the jury box by astute

counsel for defense, apparently actuated by two motives, first, the chance of getting a talesman favorable to the defendant, and second, for the purpose of complying with the rule that before complaint can be made of error in the retention of a juror challenged for cause, the peremptory challenges must first be exhausted. Originally at trials of commoners the King's right of peremptory challenge was unlimited. To balance this the accused was afterward, in treason and felony cases, allowed thirty-five, then twenty challenges, then it was changed again to thirty-five. But nobles were allowed no peremptory challenges. They were tried by their peers who each gave judgment as to the fact.¹ At present, in England, a defendant in a felony case is allowed twenty peremptory challenges, in misdemeanor none is allowed him. The Crown has no peremptory challenges (but may challenge as the names are called over, and is not bound to show the cause of challenge until the panel is gone through). The number of challenges has always been held subject to change as Parliament saw fit to meet the need of the times. I know no sound reason either in law or morals why the limitation of the state's peremptory challenge to three jurors and the defendant's to six would not as amply preserve the rights of the accused as the present disparity of giving the accused six, eight or sixteen peremptory challenges to the state's three or six. But if the powers of the judge were increased there might be no necessity for such a change.

Powers of Judge in Jury Trials. Perhaps the greatest defect in the present method of trial by jury is the unreasonable limitation placed upon the powers of the judge. By some

¹Coke, Littleton, 156 b.

strange method of reasoning the conclusion seems to have been reached that whereas in all trials involving equitable principles a judge may safely be entrusted to consider and weigh the evidence for the purpose of arriving at the truth, and may also be entrusted with the application of the law to the facts and the decision of the case, still, when the same judge presides over a jury trial, he becomes unsafe and untrustworthy, and any power of direction given to him over the deliberations of the jury other than the bald statement of abstract propositions of law would poison the very springs of justice and contaminate the sacred precincts of the jury-room. As a rule the interests involved in actions before a judge sitting as a court of equity are vastly more momentous in a property sense than those tried before a jury. In the one class of cases the trial judge is presumed to be governed by pure motives and to be capable of rendering proper judgment; in the other it seems to be presumed that he is unfit to use his trained faculties of observation, discrimination and comparison in aiding the jury to arrive at the truth from a consideration of the facts. This anomaly does not exist in the federal courts nor in the courts of England. There the presiding judge sums up the whole case and the evidence to the jury, gives his direction on the matters in issue and on the points of law applicable to these matters, and may give his opinion in such matters. He may also comment on failure of defendant to testify if he thinks right.² It may be seriously questioned whether the 'trial by jury' which is sought to be preserved to us by our constitutions and Bills of Rights, now exists or has been preserved for

us; for trial by a jury in a court presided over by a partially muzzled judge uttering abstract propositions of law and set formulas like a phonograph is a very different thing from a common law trial with the judge aiding and assisting the jury to arrive at the right conclusion upon the facts, and pointing out to them the proper principles of law to be applied to the facts thus ascertained.

"I have made some effort to trace the history of the early legislation in the various states which took away these important common law functions of trial judges, but found the task took more time than I could spare. An interesting field here lies open for investigation by the student of legal history. To sum up, either the judge should be left more free in his charge to the jury or the number of peremptory challenges should be more nearly balanced. Judge Taft, William Dudley Foulke and others recommend both of these changes. It is possible that the class distinctions and social conditions in England, which narrow the field from which judges are selected to a choice few, and the manner of selection, have the effect to raise the standard of ability, so that greater power may with safety be entrusted to trial judges there than here. However this may be, I would prefer for the present at least to limit somewhat the number of peremptory challenges rather than to extend the power of the court in criminal cases. Even in England, the *Maybrick* trial and the *Beck* case were notorious examples of mal-administration of criminal law. But in civil cases I think more power of direction should be given the judge, and if this proves a wise change then I would extend it to criminal trials as well."

²Halsbury, "Laws of England," 369.

Reviews of Books

FISHER'S MAITLAND

Frederick William Maitland, Downing Professor of the Laws of England: A Biographical Sketch. By H. A. L. Fisher. G. P. Putnam's Sons, New York; Cambridge University Press. Pp. 179. (\$1.65 net; 5s. net.)

THE late Professor Maitland is perhaps to be regarded the moving spirit of the nineteenth century, with respect to research in the field of English legal history, for in this direction he went far beyond any previous historian of legal or political institutions, like Stubbs or Freeman, and his work was so truly an original and creative force that it must long continue to supply an inspiration not wholly unlike that exercised by the founder of a new school. The writer of this delightful biography, though not a lawyer, is a man of philosophic insight and historical learning, fully capable of appreciating the significance of Maitland's work and the rank which it will assign him among English historians. The book presents the inner workings of Maitland's mind, and it is a biography in the highest sense of the word, that is to say, in the sense of a portrayal of a man's intellectual and moral life. Maitland's aspirations, his enthusiasms, his renunciations and his openmindedness are clearly revealed, and we may see the steady and impressive advance of that procession of discoveries which started from the awakening of a heroic ambition, during that memorable interview in which Vinogradoff first suggested to the young Cambridge scholar the wealth of unexplored treasures which lay mouldering in undeciphered and uncopied mediaeval parchments. Thus it is that the inner life of Maitland is uncovered, with something of Maitland's own vividness of description.

But the charm of the biography is its presentation not only of the mind, but of the man. Not only Maitland's ideals, but his friendships, his kindness and his humor are exhibited, and this is done largely by offering a judicious abundance of his personal letters, not one of which could well have been omitted. The essay is full of sane, discriminating appreciation of a great scholar, who has done perhaps more than any one else to break down the unnatural barrier between history and law, and to demonstrate the interdependence of the community and its legal institutions.

POPULAR LAW-MAKING

Popular Law-Making: A Study of the Origin, History and Present Tendencies of Law-Making by Statute. By Frederic Jesup Stimson. Charles Scribner's Sons, New York. Pp. xii + 390. (\$2.50.)

TO use the author's own words, his work is "not one for lawyers alone; it seeks to cover both what has been accomplished by law-making in the past, and what is now being adopted or even proposed; the history of statutes of legislation by the people as distinct from 'judge-made' law; how far legislatures can cure the evils that confront the state or the individual, and what the future of American legislation is likely to be."

The author is especially qualified to write on his chosen subject, as is proved by the books he has already written on similar subjects. In 1886, he wrote "American Statute Law," an analytical and compared digest of the constitutions and civil public statutes of all the states and territories relating to persons and property. This was followed, in 1892, by a second volume relating to general, business and private corporations. In 1908 he wrote "The Law of

the Federal and State Constitutions of the United States" and "The American Constitution."

The title, "Popular Law-Making," the author construes as "statute-making, the spirit of statutes we have made, that we are making, and that we are likely to make."

When anyone thinks that anything is wrong nowadays, he tries to get a new law passed, not stopping to learn if there are any laws already. Regardless of proper form, he sometimes succeeds in getting his law passed, but so full of contradictions, and occasionally of bad grammar and spelling, that it would be impossible to print it and make any sense.

The first five of the twenty chapters of this book are historical, covering the English idea of law; early English legislation and Magna Carta; re-establishment of Anglo-Saxon law; early labor legislation and laws against restraint of trade and trusts; and other legislation in mediaeval England. Practically the whole of the remainder is an historical and comparative view of American legislation on property rights, regulation of rates and prices, trusts and monopolies, corporations, labor laws, combinations in labor matters, military and mob law, political rights, individual rights, personal and social rights, marriage and divorce, criminal law and police, and governmental functions.

Freak legislation, so-called, is brought out prominently, not in ridicule, but to emphasize the remedy proposed in the final chapter.

"When our forefathers met in national convention to adopt a constitution, one of the first things they did was to appoint a 'Committee on Style,' a committee that does not now exist in any American legislature." The author deplores the lack of uniformity in our

laws. He calls attention to the need of parliamentary draftsmen. Fortunately a long step forward has already been taken by the formation of Legislative Reference Sections in connection with many of our state libraries, following, in a measure, the idea as first developed in Wisconsin. It is rumored that a movement is on foot to organize a bureau, to be supported by private enterprise, to carry on this same work.

The author points out that "not only our office-holders, but we ourselves, are born, labor, inherit, possess, marry, devise and combine, under a perpetual plebiscitum, referendum and recall," and hopes that he has made some suggestions which will awaken an interest in the importance of his subject.

Would that every legislator could put aside self-interest, would cease to play the political game, and, before taking his office, be compelled not only to read but to study "Popular Law-Making," then would the evils attending present statute-making practically disappear and we would learn at once "what is the law."

THE LAWYER'S OBLIGATIONS

Ethical Obligations of the Lawyer. By Gleason L. Archer, Dean of the Suffolk School of Law, Boston, author of *Law Office and Court Procedure*. Little, Brown & Co., Boston. Pp. 367. (\$3 net.)

AT THIS time when the various associations of the Bar through the country are devoting a great deal of time and care to preparation and discussion of codes of ethics for lawyers any thorough and scholarly treatise on the subject would be very welcome. In the author's own preface to the present work we find the following complimentary estimate of the scope of the book:—

This volume enters into every question of professional deportment that can ordinarily confront the lawyer. It does not lay down platitudes and commands without the reasons

therefor, but discusses each proposition, pointing out the why and wherefore of the rule. It is practical. It enters into details. It takes up each detail concretely and solves it, instead of passing it over with a flourish of general language that means nothing definite to the reader.

A careful reading of the book shows that it falls far short of the really impossible scope that the author promises. Moreover, it contains much that seems entirely out of place in a book on ethical obligations and some things that seem to us absolutely incorrect. On page 36 we are told that one of the duties that distinguishes a lawyer from a layman is the duty not to disclose confidential communications from those with whom he has business dealings. Heretofore we always supposed laymen and lawyers were alike as to this duty. On page 53 the lawyer is advised to have law books in his office, and if he should be so young and poor as to be unable to buy standard works, he is advised that "fillers" consisting of his state's old session laws, may often be obtained for little or nothing. The author's ethical conception of such practice is that "Law books are all alike to the ordinary client, so far as his estimate of value is concerned." Perhaps the most striking proposition to be found in this book on ethics is that "leaving the office door ajar is a commendable practice," lest the unwary client might otherwise chance into the office across the hall. That doctrine is elaborated on pages 56 and 57.

The chapters on "The Lawyer in Business," and "Liabilities of a Lawyer to his Client," have nothing to do with ethical obligations, and the chapter on "Disbarments and Suspension" is a very incomplete and inadequate statement.

As a whole, the book is a mixture of ethics, ordinary expediency and advice to young lawyers. There is today a considerable quantity of literature upon

the subject of legal ethics, some of it by our judges and some by such renowned authorities as Bentham, Pollock and Sharswood. But our author does not refer to any authorities excepting Hoffman's Resolutions and the Code adopted by the American Bar Association. The book may be of interest and help to the young man who is just leaving the law school, but even there the value of the work is seriously marred by its continual mixing of ethics and expediency.

WALKER'S SHERMAN LAW

History of the Sherman Law of the United States of America. By Albert H. Walker, of the New York bar. Albert H. Walker, New York. Pp. xiii, 312. (\$2.)

THE purpose and scope of Mr. Walker's little book on the Sherman anti-trust law are well stated by the author in his preface, where he says:—"The Sherman Law is a Magna Carta among the Statutes of the United States. And this history of that law has been written to condense, upon three hundred and twelve pages, the light relevant thereto, which was originally diffused through some thousands of pages of speeches of statesmen and of decisions and opinions of judges."

It is quite plain from a reading of the book that the author has gone over a great mass of *Congressional Records*, lawyers' briefs and judicial opinions for his material. All this he has carefully analyzed and condensed and put in concise, readable and logical form. The history starts with an account of the original proposal of an anti-trust act by Senator Sherman, the Judiciary Committee's offer of a substitute bill drawn by Senator Hoar and its final passage in the form offered by the Committee. Then the author takes the act itself and analyzes it clause for clause with especial reference to the discussions in Con-

gress regarding it. After that comes a consideration of the decisions of the courts, arranged by Presidential administrations.

Up to the time of Mr. Roosevelt the author is able to take up every decision whether raised by the government or by private parties. In all there were only some forty cases. But after Roosevelt's coming into the Presidency the cases were so numerous that it was not feasible in this short work to take up any but the more important decisions on those involving new points.

The book will be of principal interest and value to the great mass of lawyers and laymen who have not made a close study of the statute or the decisions upon it. Those men know the present importance of the Sherman anti-trust act, but they have a slightly vague impression as to its terms, its scope and its interpretations. The present work gives us a concise but complete statement of the law and its passage and its meaning. It is so condensed that even the busy man can afford to read it all, and yet it is not too condensed to cover its whole subject well. Moreover, the well-rounded view of the whole statute and its meaning which this book gives us, should be very helpful as a basis or foundation from which to study any special features of the enactment, or its application to any special or novel set of facts.

HUBBELL'S LEGAL DIRECTORY

Hubbell's Legal Directory for Lawyers and Business Men. Forty-first year, 1911. Hubbell Publishing Co., New York. Pp. 1479 + 439 (\$5.35 delivered.)

THIS standard directory continues gradually to grow in size with the business growth of each succeeding year. The new volume differs little from predecessors in general appearance, but the text has been thoroughly revised

to date, the synopsis of laws of the various states retaining its practical value for purposes of convenient reference.

The work abounds in information of use to the practitioner in every part of the country, in the form of court calendars for 1911, instructions for taking depositions and the execution and acknowledgment of deeds, synopsis of the patent laws and laws concerning the federal jurisdiction and practice, lists of leading attorneys in over four thousand cities and towns, of prominent banks and bankers, United States Consuls, etc.

NOTES

The Virginia State Bar Association departed from the usual custom last year and held its twenty-second annual meeting in conjunction with the Bar Association of Maryland, at Hot Springs, Va., July 26, 27 and 28. The report of the former contains among others these papers read before both Associations meeting jointly: "Grotius, and the Movement for International Peace," by R. Walton Moore, president of the Virginia association; "How far the United States Supreme Court may be taken as a model for an International Court of Arbitral Justice," by Hon. A. J. Montague.

Frederick V. Holman, Esq., president of the Oregon Bar Association, in his annual address delivered last November, took for his subject, "Some Instances of Unsatisfactory Results under Initiative Amendments of the Oregon Constitution." This address, now issued in pamphlet form, is an able and important document. Mr. Holman concludes with the remark: "I have endeavored in this address to show the danger and impracticability of the people making radical changes in a state constitution without considering, and in contravention of, the history, the principles and the fundamental law of a republican form of government, and in opposition to the traditions and to the genius of our institutions."

Charles A. Boston, Esq., of the New York bar, delivered an address last October on the Proposed Code of Professional Ethics of the New York County Lawyers' Association, at the request of that body, and the address was printed in December in accordance with a vote of the Association. The proposed code is very short, designed, as Mr. Boston appropriately says, "to be a guide to those who need instruction, a warning to those who may need rebuke, and the basis for a healthy and uplifting sentiment which will improve the practice at the bar through the general recognition of undisputed principals." Canon 10 was one of the subjects which gave rise to most controversy in the Association, and Mr. Boston suggests that this canon should read as follows: "He should counsel and maintain only

such actions, proceedings and defenses as appear to him to be just and legal or legally debatable; for the security and preservation of individual rights secured by the constitution or laws, he may defend on a prosecution for crime one whom he believes to be guilty of the offense charged. Even though apprised of the guilt of the accused, the lawyer is bound in the case of a trial to insure a fair trial and to prevent conviction, save pursuant to the law in that case made and provided."

BOOKS RECEIVED

RECEIPT of the following new books is acknowledged:—

The Conservation of Natural Resources in the United States. By Charles Richard Van Hise. Macmillan Co., New York. Pp. xiv, 379 + 21 (appendices) + 11 (index). (\$2.)

The Early Courts of Pennsylvania. By William H. Loyd of the Philadelphia bar, Gowen Fellow in the Law School of the University of Pennsylvania. Boston Book Co., Boston. Pp. 273 + 14 (appendix and index). (\$3.50.)

A Treatise on the Law of Trusts and Trustees. By Jairus Ware Perry. Sixth edition, revised and enlarged by Edwin A. Howes, Jr. Little, Brown & Co., Boston. V. 1, pp. clxvii (contents and table

of cases) + 774; v. 2, pp. xviii, 739 + 128 (index). (\$13 net.)

The Principles of International Law. By T. J. Lawrence, M.A., LL.D., Member of the Institute of International Law, Honorary Fellow of Downing College, Cambridge, Sometime Professor of International Law in the University of Chicago. 4th edition. D. C. Heath & Co., Boston. Pp. xxi, 732 + 13 (index). (\$3.)

The American Commonwealth. By James Bryce. New edition, completely revised throughout, with additional chapters. V. 1, The National Governments; The State Governments. V. 2, The Party System; Public Opinion; Illustrations and Reflections; Social Institutions. Macmillan Co., New York. V. 1, p. xv, 679 + 62 (appendix); v. 2, pp. vii, 933 + 5 (appendix) + 22 (index). (\$4.)

A Law Dictionary; containing definitions of the terms and phrases of American and English jurisprudence, ancient and modern, and including the principal terms of international, constitutional, ecclesiastical and commercial law, and medical jurisprudence, with a collection of legal maxims, numerous select titles from the Roman, modern Civil, Scotch, French, Spanish and Mexican law, and other foreign systems, and a table of abbreviations. By Henry Campbell Black, M.A. 2d edition. West Publishing Co., St. Paul. Pp. vi + 1238 + 76 (appendix). (\$6.)

Index to Periodicals

Articles on Topics of Legal Science and Related Subjects

Administrators and Executors. "Power of Personal Representative to Continue Decedent's Business." By Theodore F. C. Demarest. 23 *Bench and Bar* 96 (Dec.).

The first instalment of a study of the law of New York on this subject.

Bankruptcy. "Proof of Unmatured Claims in Bankruptcy." By Garrard Glenn. 10 *Columbia Law Review* 709 (Dec.).

A cogent argument for the amendment of the National Bankruptcy Act so as to be similar to the present English statute in regard to unmatured claims. "Lord Hardwicke declared, over a century ago, that the privilege of creditors to prove against the bankrupt's estate ought to be 'co-extensive and commensurate' with the privilege of the bankrupt to a discharge from his debts."

Basis of Law. *See Governments.*

Claims against the Government. "The Element of Tort as Affecting the Legal Liability of the United States." By Charles C. Binney. 20 *Yale Law Journal* 95 (Dec.).

"It may therefore now be regarded as settled that in the case of claims 'founded upon the Constitution of the United States, or any law of Congress, or upon any regulation of an Executive Department,' the element of tort, even if present, does not prevent the court from taking jurisdiction. . . . This doctrine has not yet been applied to suits on patents, but there is no reason why this should not be done."

Copyright. "The Position of Fine Art in the New Copyright Bill." By M. H. Spielmann. *Fortnightly Review*, v. 88, p. 1047 (Dec.).

"The bill on broad lines is to be welcomed," but this critic finds it not free from objections; for example, the architect has more to lose than to gain, and the picture dealer is badly hit.

"The New Copyright Bill." By Harold Hardy. 130 *Law Times* 121 (Dec. 10).

A satisfactory summary of its provisions, embodying some criticisms.

Corporations. "Impolicy of Modern Decision and Statute Making Corporations Indictable and the Confusion in Morals thus Created." By N. C. Collier. 71 *Central Law Journal* 421 (Dec. 16).

"It may be that in such offenses as nuisance, whether by nonfeasance or misfeasance, it is better that a corporation should be proceeded against directly, but it seems to me that we will come greatly nearer to reducing corporate criminal violation when we get back to the common-law theory, and more convincing will be the thought that nobody can authorize anybody or anything to commit a crime. Then all agents of corporations will be like agents of individuals. If they violate law there will be no force or power to stand between them and its vindication."

"The Practical Features of Corporate Organization and Management." By Adrian H. Joline. 10 *Phi Delta Phi Brief* 201 (Jan.).

"The creation of corporations and the preliminary issue of their securities ought not to be devolved upon what are known as *dummies*. It is almost a rule that in the organization of companies, the requirements of the law are technically complied with by conducting the initial proceedings with boards composed of clerks. The reason for this is not, I think, any desire on the part of the real promoters to avoid any statutory liability, but only the natural dislike of men of large affairs to be bored by what they regard as mere legal formalities. They make their business plans and turn them over to their lawyers so that all legal requirements may be observed. But, in my view, it would be far better if these gentlemen gave their personal attention to the initiatory details and realized that the statutes regulating the creation of corporations, in spirit at least, call for an intelligent exercise of judgment on the part of the organizers and not the simply mechanical action of a few subordinates who only do what the lawyers tell them to do."

See Federal and State Powers.

Criminal Law. "Statutory Abolition of the Defense of Insanity in Criminal Cases." By John R. Rood. 9 *Michigan Law Review* 126 (Dec.).

The author is in sympathy with the recent recommendation of the New York State Bar Association that the defense of insanity be abolished. A statute of the state of Washington has been held unconstitutional on the ground that it violated the provisions of the state constitution that "No person shall be deprived of life, liberty or property without due process of law," and "The right of trial by jury shall remain inviolate." This decision was rendered in the case of *State v. Strasburg*, 110 Pac. 1020. The writer subjects this decision to an impartial and extended criticism. He believes the judgment, which was rendered last September, to have been unsound, and thinks the statute in question perfectly constitutional.

"Criminal Conspiracy Needing Overt Act to Make it Indictable." By N. C. Collier. 71 *Central Law Journal* 387 (Dec. 2).

"A man who conspires with another is as morally guilty under the statutory as the common-law rule of conspiracy. He sets in motion a wrong as much in one case as the other, and his responsibility for consequences should be as

severe in one case as the other. When Judge Wood evolved the *locus penitentie* idea, he applied it to an inchoate offense. When Judge Sanborn extended it, he wiped out a completed offense, and, thereby, seems to have created a rule opposed to that recognized by the common law."

See Corporations.

Criminal Procedure. "Criminal Procedure in England." By Prof. John D. Lawson and Prof. Edwin R. Keedy. 1 *Journal of Criminal Law and Criminology* 748 (Jan.).

The second part of their report to the American Institute of Criminal Law and Criminology (see 23 *Green Bag* 36). The detailed account of the English system is continued, with reference to attitude of counsel in trials, general comments of counsel, functions and attitude of trial judge, summing up by trial judge, legal aid for poor prisoners, prisoner at trial, functions of police, jury and their verdict, expedition, the Court of Criminal Appeal, criminal appeals in general, rules of court and uniformity of sentence. The authors conclude their descriptive report with these highly important recommendations:—

"1. All objections to the indictment should be made before evidence is heard, and errors in matter of form amended at once.

"2. The prosecuting attorney and counsel for the defense should before trial consider and discuss the qualifications of the individual members of the jury panel and agree to the dismissal of any one clearly incompetent to be a juror.

"3. The *voir dire* should be limited to the asking of questions strongly tending to show incompetency or bias in the present trial.

"4. All prisoners on trial upon indictment, who are unable to employ counsel, should be furnished with legal assistance throughout the trial, including the arraignment.

"5. The prosecuting attorney, instead of being a partisan, should investigate the case from a non-partisan standpoint and should make an impartial presentation of the evidence to the jury.

"6. The fee system, wherever it exists, for the compensation of prosecuting attorneys, should be abolished.

"7. Counsel for the prisoner should defend him by endeavoring to disprove his guilt, and never by injecting error into the record.

"8. The trial judge should not be a mere presiding officer, but should take an active and controlling part in the trial. He should restrict counsel to the asking of relevant questions. He should promptly overrule and discourage technical objections. He should never permit counsel to intimidate or improperly to confuse a witness. He should sum up the evidence to the jury and direct them as to the law applicable thereto.

"9. New trials should never be granted for technical errors, but only to prevent miscarriage of justice.

"10. Prosecutions for minor offenses, where the accused is not likely to evade the hearing, should be begun by summons, as in civil cases."

"Public Defense in Criminal Trials." By Prof. Maurice Parmelee, University of Missouri. 1 *Journal of Criminal Law and Criminology* 735 (Jan.).

A striking paper, as may be seen from this extract: "The logical sequel to public defense would, I believe, be free civil justice; that is to say, the employment of attorneys by the public for the pleading and defense of civil cases. There is no more equality before the law for rich and poor in the civil courts than there is in the criminal court, for the possibility of winning his case, however much in the right he may be, for the plaintiff or defendant in a civil suit, depends very largely upon his ability to secure efficient counsel. There will not be justice for all until both criminal and civil procedure is made free."

"Reform of Criminal Procedure." By M. C. Sloss, Justice of California Supreme Court. 1 *Journal of Criminal Law and Criminology* 705 (Jan.).

"I believe the constitution should be so amended as to give the higher courts power, in criminal appeals, to review questions of fact as well as of law, to the extent necessary to determine whether or not any error of law, or any omission, has, in the judgment of the court, worked a substantial injustice to the appellant. If it is found that no such injustice has been done, the conviction should stand. . . .

"The three-fourths rule has the great advantage of permitting a verdict, notwithstanding the opposition of one or two stubborn or corrupt men who may have gotten into the jury box. I see no reason why this rule should not work equally well in criminal cases. . . .

"If, in any situation outside of a courtroom, a person is accused of wrongdoing, the first thought of the accused is to demand an explanation of the circumstances which have created suspicion. If such explanation is refused the natural inference is that of guilt. Why should not the mental processes that influence thought and action in other relations of life have weight in criminal trials?"

Diplomacy. "American Influence on Japanese Diplomacy." By Masujiro Honda. *Editorial Review*, v. 3, p. 1229 (Dec.).

The first of a series of three articles, this one covering the period from the opening of the country to the overthrow of the feudal government.

Employer's Liability. See Workmen's Compensation.

Evidence. See Expert Testimony.

Expert Testimony. "Needed Reforms in the Law of Expert Testimony." By E. F. McDermott. 1 *Journal of Criminal Law and Criminology* 698 (Jan.).

"It seems to me clear that the legislature has the power (1) to regulate the selection or calling of experts or opinion-witnesses and (2) to regulate their compensation. . . . As litigants with most

money at their command may get the greatest number of experts and the most expensive experts, the court should have the right: (1) to prescribe a list of eligible men; (2) to limit the number to be called, and (3) to fix the compensation. No witness in any case should have a contingent fee."

Federal and State Powers. "Powers of Regulation Vested in Congress." By Max Pam. 24 *Harvard Law Review* 77 (Dec.).

This article will be found to contain an able argument for federal incorporation, the subject being viewed in the light of recent decisions of the United States Supreme Court.

Freedom of Speech. "Criticism of Courts by Lawyers and Laymen." By W. J. Fitzpatrick. 10 *Phi Delta Phi Brief* 187 (Jan.).

"It is the well-known duty of every citizen, regardless of his calling or profession, to aid the courts in the administration of justice, and defend the courts in the fearless performance of their duty."

Government. "Law and Force." By W. G. Hastings. 10 *Columbia Law Review* 740 (Dec.).

Delightfully stimulating, though hardly any argument is needed to prove that Korkunov is right and Tolstoi is wrong, as to whether the law is or is not founded on force. Mr. Hastings quotes Korkunov:—

"Inadmissible is the law which is supported completely and exclusively by constraint alone; inadmissible a state of things where no one fulfils voluntarily his juridical duty, where it is necessary to constrain everybody to obedience of the law. It is inadmissible because what power is there to be charged in such case with exercising the right of constraint?"

The writer adds:—

"Constraint of some sort is inevitably associated with human laws: but is it wholly, or predominantly, or, necessarily, in any degree, a merely physical constraint? . . . It may be granted that uniformity of social action will be enforced more or less thoroughly by the same forces which first inaugurated the establishment of that uniformity and that force is among those means. But it is not the only, nor by any means the strongest, one at the command of the social body, and it is nothing less than a libel upon its rules to make their connection with brute force the test or basis of their validity.

"It is a libel also upon the human nature which in all ages and climes has required that brute force, if it must be used by the body politic for purposes of self-preservation, shall at least be subjected to the rules of law."

"Judicial Legislative Estoppel." By R. Mason Lisle. 22 *Yale Law Journal* 110 (Dec.).

If a corporation adopts amendments to its charter which are not authorized and in pursuance of such amendments enters into contracts, the court, if it carelessly upholds such contracts instead of declaring them *ultra vires*, is estopped from future denial of the power of the corporation to negotiate similar contracts. This is what the writer means by judicial legislative

estoppel. Instances of such defeat of the legislative intention have been rare, but there always is the danger that a judicial slip may make the corporation superior to the legislature which created it.

"Legislative Powers that may not be Delegated." By Chief Justice James B. Whitfield, Supreme Court of Florida. 20 *Yale Law Journal* 87 (Dec.).

"The legislature may not delegate the general law-making power and other specific powers that are by the constitution vested exclusively in the legislature. Power to determine primarily the subjects, character and extent of governmental regulations or burdens, or to enact or to amend a law, or to change the rules of law, or to declare what the law shall be, or to exercise an unrestricted discretion in applying a law, or to create an office, may not be delegated by the legislature."

Great Britain. "The British Elections." By "Britannicus." *North American Review*, v. 193, p. 99 (Jan.).

An extremely interesting statement of present political issues and developments in England, written possibly from a Liberal point of view, but with no little detachment and insight into the inner meanings of the situation.

"The Question of the House of Lords." By W. S. Lilly. *Nineteenth Century*, v. 68, p. 1011 (Dec.).

An article the writer of which endeavors to support the reform of the House of Lords, which he earnestly advocates with reference to the theories of Aristotle and Kant.

"The Crisis in Great Britain." By Sydney Brooks. *Independent*, v. 69, p. 1312 (Dec.).

A short, clear statement of the issues now before the country, by one of the best known English publicists.

"Is there a Conservative Party?" By J. A. R. Marriott. *Nineteenth Century*, v. 68, p. 1134 (Dec.).

A strong and able paper in defence of the Conservative party from the insinuation that it is today "an organized hypocrisy."

"Home Rule: A Live Issue." By An Outsider. *Fortnightly Review*, v. 88, p. 1027 (Dec.).

An informing argument in favor of Home Rule, published in a Unionist magazine.

See also Federal and State Powers. For Separation of Powers, see Legal History, and also p. 76 *supra*.

Insanity. See Criminal Law.

Insurance. "The Meaning of Fire in an Insurance Policy against Loss or Damage by Fire." By Edwin H. Abbot, Jr. 24 *Harvard Law Review*, 119 (Dec.).

A complete recapitulation of the law, sustained by a full review of authorities.

Interstate Commerce. See Federal and State Powers, Railway Rates.

Juries. "The Jury System of Cook County, Illinois." Carl A. Ross. 5 *Illinois Law Review* 283 (Dec.).

Legal Education. "The Place of English Legal History in the Education of English Lawyers." By W. S. Holdsworth. 10 *Columbia Law Review* 723 (Dec.).

"The history of legal institutions, *i.e.*, the history of the courts and their jurisdiction, should be taught at the very beginning of the student's course. . . . In this way the student will get some idea (1) of the form and mechanism of the state, the law of which he is about to learn, and (2) of the judicial machinery by which that law has been built up. . . . In the second place the general outlines of the history of the law should be made part of the final examination. This must be made part of the final examination because it is impossible to deal adequately with the history of a technical subject till its outlines have been mastered—a fact of which Coke had some perception when he advised the student to read first the more recent and then the earlier cases. . . .

"The outlines of such knowledge must be acquired if at all in the lawyer's student days. If these outlines are then acquired they can and will be added to in later years; for historical methods and historical evidence will be familiar things, and the history of the law will not be a sealed book written in an unknown tongue."

Legal History. "The Establishment of Judicial Review—I." By Edward S. Corwin. 9 *Michigan Law Review* 102 (Dec.).

The first of two articles forming Chapter IV of the author's work on "The Growth of Judicial Review." The author aligns himself with the opponents of Savigny, insisting on the "rationalistic background of American constitutional history," and holding that the Fathers sought to apply not mere usage but "the reasoned and sifted results of human experience." It is in the light of this perspective that he traces the history of judicial limitations on legislative action in the American commonwealth. The constitutional convention is so reviewed as to show the nature of the concessions made by the states' rights party.

"Selden as Legal Historian." By Harold D. Hazeltine. 24 *Harvard Law Review* 105 (Dec.).

An account of Selden's works, his methods, his "lofty conception of history and its uses," his approach to the modern notion of social and legal development, his reliance on ancient *diplomata* as preferable to printed sources. This paper is only the first installment of an inspiring essay on a great historical scholar.

See Legal Education.

Legislation. "The Legislative Reference Bureau of Pennsylvania." By James McKirdy. 59 *Univ of Pa. Law Review* 151 (Dec.).

The bureau was established by an Act passed in 1909. Hopes are expressed that much good will come not only from the use of the bureau

as a reference library but from the bill-drafting division.

See Government, Legal History.

Literature. "Law from Lay Classics: The Trial of the Rebellious Diabolonians." By John Bunyon. 5 *Illinois Law Review* 300 (Dec.).

Marriage and Divorce. "Divorce in Canada and in the United States: A Contrast." By F. P. Walton, Dean of Faculty of Law, McGill University. 30 *Canadian Law Times* 975 (Dec.).

"In Canada the ancient view of marriage as a life-long union of a man and a woman still holds the field, whereas in the United States marriage is coming to be regarded as a contract of a much less permanent character, which may be terminated without much difficulty by either party.

"It would appear that divorce has now become a primary necessity of life in the Republic, while in the more conservative northern half of the continent it remains the luxury of the few."

Master and Servant. "Liability of Master for Willful or Malicious Acts of Servant—I." By Floyd R. Mechem. 9 *Michigan Law Review* 87 (Dec.).

The first of two articles dealing with the authorities bearing on the general doctrine of non-liability, marked by keen scrutiny and intelligent classification of the cases, which are copiously cited and annotated.

Mining. "The Mining Law of Ontario." By S. Price, K. C. 30 *Canadian Law Times* 965 (Dec.).

Concluded from the last number of this journal (23 *Green Bag* 42).

Newfoundland Fisheries Arbitration. "The North Atlantic Coast Fisheries Arbitration." By Robert Lansing. 59 *Univ. of Pa. Law Review* 119 (Dec.).

A luminous summary of the various issues of the case by one who was in attendance at the sessions of the Hague Tribunal.

Old Age Pensions. "How to Improve and Extend Our National Pension Scheme." By A. Carson Roberts. *Nineteenth Century*, v. 68, p. 957 (Dec.).

Outlining a scheme for a contributory system under which a surplus would accumulate that would satisfy the requirements not only of old age pensions but of workmen's compensation laws.

Pardoning Power. "The Grounds of Pardon in the Courts." By Prof James D. Barnett. 20 *Yale Law Journal* 131 (Dec.).

"It would seem that there are three causes of the persistence of the doctrine of 'grace' in the courts. First, on account of the theory of the separation of powers it is difficult for the courts logically to justify the grounds upon which pardons are usually granted, and should be granted, in actual practice. Again, language suited to the theory of the personal rule of the

absolute monarch has been retained in the modern democracy where the executive is but an agent of the sovereign. Last is the pervading influence of the analogy of 'the divine attribute.'"

Penology. "Crime and Punishment: The Influence of the Study of the Results of Prison Punishments on the Criminal Law." By George W. Kirchwey, Dean of Columbia Law School. 1 *Journal of Criminal Law and Criminology* 718 (Jan.).

A stimulating review and comparison of the various theories of punishment, showing the emphasis which in recent times has been placed upon the reformative idea.

See Pardoning Power.

Pleading. "Objections to Present Illinois Pleading, with Suggested Remedies." By Prof. Clarke B. Whittier, University of Chicago, 5 *Illinois Law Review* 257 (Dec.).

The following defects are discussed in detail: (1) the requirement that the pleadings state the facts constituting a cause of action or defense; (2) permitting objections to pleadings for defects in form; (3) the separation of law and equity so far as concerns procedure; (4) the existence of forms of action; (5) the power to object to the pleadings by motions in arrest of judgment, *non obstante veredicto*, or the like, or by an assignment of error; (6) our present illiberality as to amendments.

See Criminal Procedure.

Procedure. "A Proposed Judicature Act for Cook County, Illinois." By Albert M. Kales. 5 *Illinois Law Review* 265 (Dec.).

"I have had a deep-rooted desire to know what this organization of the English courts under the recent Judicature Acts was, and to observe how it would look if translated into Cook County. It has been my pleasure, therefore, to study the English Judicature Acts first-hand and to remodel them to suit Cook County. . . .

"Practically all the proposals made are utterly and hopelessly unconstitutional. This is not, however, my fault, but the fault of certain estimable gentlemen who drafted our constitution of 1870."

See Criminal Procedure, Pleading.

Professional Ethics. "The Lawyer: Our Old Man of the Sea." By Ignotus. *Westminster Review*, v. 174, p. 671 (Dec.).

"Legalism" is denounced as the "seamy side" of the great achievements of the English people, "a dire discredit to our race in America." We are told that "verdict-snatching is the most lucrative of all the arts."

Railway Rates. "Shall Railway Rates be Raised?" By Walker D. Hines. *Outlook*, v. 96, p. 815 (Dec. 10).

The burden of the expense for improvements is made one of the grounds for an increase of rates by this writer, who is chairman of the

executive committee of the Atchison, Topeka & Santa Fé Railway Company.

"The Railroads and the People." By E. P. Ripley. *Atlantic*, v. 107, p. 12 (Jan.).

The public has been unfair in that it has habitually refused to give due weight to the fact that no rebate was ever given which was not received by some one; and that the recipients were just as guilty as the givers; or to the further fact that the railways tried repeatedly to stop rebating, and did more than any one else to get passed the Elkins Act of 1903, which did more to suppress that evil practice than any other piece of legislation.

Street Railways. "The Interurban Electric Railway as an Additional Burden upon the Streets and Highways." By Isaac C. Sutton. *59 Univ. of Pa. Law Review* 156 (Dec.).

"To sum up, we find that the question of additional servitude is based, by the predominant weight of authority, upon the question whether the operation of the railroad or railway, upon the street or highway, is consistent with the uses for which they were intended in the original dedication and appropriation, and the courts are also taking more into consideration the question whether the local public service rendered by the interurban railway outweighs the burden imposed by it upon the streets and country roads."

Tariff. "Making a Tariff Law." By Samuel M. Evans. *Journal of Political Economy*, v. 18, p. 793 (Dec.).

"The present system of tariff-making would be wrong, because it requires such excessive labor on the part of members of Congress, even if it resulted in a perfect law. But in the very nature of the system it cannot result in a perfect law. What was done to the cloth clauses of the cotton schedule was done to nearly every other schedule in the bill. And it is a physical impossibility for any one member or any set of members of Congress to gather enough information intelligently to pass upon the vast number of schedules in a tariff law. The natural result is a law based upon *ex parte* information given by those who have an interest in the workings of the tariff law, an interest in a high tariff."

Unemployment Insurance. "Experiments in Germany with Unemployment Insurance." By Elmer Roberts. *Scribner's*, v. 49, p. 116 (Jan.).

A general account of the system as it exists in several German cities, helpful in showing the reader where to look for statistics and other important material on the subject.

Uniformity of Laws. See **Workmen's Compensation.**

Wills. Wills Number. 17 *Case and Comment* (Dec.).

This is an interesting special issue with several short articles on some aspects of the law of wills. These include the following: "Law Governing Construction of Devise of Real Property," by George H. Parmele, author of *Parmele's Whar-*

ton on Conflict of Laws; "Lay Views of Testamentary Capacity," by Henry C. Spurr; "Some Wills of Noted Lawyers," by Walter M. Glass; "The Drawing of Wills," by Albert S. Osborn; "The Antiquated Seal," by Harry Shel mire Hopper of the Philadelphia Bar; "The Importance of the Last Will and Testament," by Virgil M. Harris, trust officer of the Mercantile Trust Company of St. Louis.

See **Administrators and Executors.**

Workmen's Compensation. "The Uniform Act for Workmen's Compensation in Illinois." Editorial. By J. H. W[igmore]. *5 Illinois Law Review* 306 (Dec.).

"The most promising event for speedy progress in solving the employers' liability problem was the Conference of Commissioners at Chicago Nov. 10-12, 1910. The conference was called by the Massachusetts Commission, and the thirty delegates who attended represented the following state commissions: Wisconsin, New York, Massachusetts, Ohio, Minnesota, Connecticut, Illinois, New Jersey, Montana, and also the federal Commission and the committee of the national conference of Commissioners on Uniform State Laws. . . . The drafting committee met again for a final session in Minneapolis on Nov. 19. The draft act is now in circulation among the various Commissions."

"The Federal Employer's Liability Act." By John L. Hall. *20 Yale Law Journal* 122 (Dec.).

The author, quoting from the decision in *Sherlock v. Alling*, 93 U. S. 104, considers this an Act "not directed against commerce or any of its regulations, but relating to the rights, duties and liabilities of citizens and only indirectly and remotely affecting the operations of commerce."

See **Old Age Pensions.**

Miscellaneous Articles of Interest to the Legal Profession

Banking. "The House of Morgan." By John Moody. *Independent*, v. 69, p. 1380 (Dec. 22).

An account of the history of this great banking house and of its powerful position in American finance and business.

"The Life Story of J. Pierpont Morgan." By Carl Hovey. *Metropolitan*, v. 34, p. 461 (Jan.).

On his return from Europe in 1885, Mr. Morgan came on the scene of unscrupulous and ruinous competition among railroads. The two "sore spots" were the West Shore and the South Pennsylvania. He reorganized these roads, the former being acquired by the New York Central and the latter by the Pennsylvania. The story is vividly told.

See **Railways.**

Disarmament. "A British View of American Naval Expenditure." By Alexander G. McClellan. *Atlantic*, v. 107, p. 34 (Jan.).

"Britain may be top-hole man in the naval world, Germany top-hole man in the military

world, but America is top-hole man in the commercial world, which after all bosses the other two. Peace, as we all know, lasts longer than war; and a nation which can dictate to others, without bullying, in times of peace and war, using only trade as a weapon, needs no other."

Foreign Commerce. "How America Got into China." By Frederick McCormick. *Century*, v. 81, p. 344 (Jan.).

"The American government took steps to wrest from European finance an equal place for America as a money-lender, merchant and useful friend to China. The crisis came in 1909. . . . This [situation] could not be effectually dealt with on treaty rights; what was needed was a basis of material interests."

Labor Unions. "Ostistown of the Open Shop." By Frederick Palmer. *Hampton's*, v. 26, p. 29 (Jan.).

The story of the labor troubles of Los Angeles, interesting in connection with the recent wreck of the *Times* office.

Mormonism. "Under the Prophet in Utah, II." By Frank J. Cannon. *Everybody's*, v. 24, p. 29 (Jan.).

The inner history of the anti-polygamy manifesto issued by the Mormon Church in 1890, written by one who accuses the present leaders of the Church of treachery in repudiating that "revelation."

Party Politics. "American Affairs." By A. Maurice Low. *National Review*, v. 56, p. 953 (Dec.).

"In America there are nominally two parties and every man calls himself Republican or Democrat, but as a matter of fact there is always a third party and it is the third party that decides elections. . . . This year the Independents voted against Mr. Roosevelt, twice before the Independents voted for him."

"Personalities and Political Forces." By Prof. Albert Bushnell Hart. *North American Review*, v. 193, p. 83 (Jan.).

Col. Roosevelt did more, Prof. Hart thinks, for the perpetuity of his party and the welfare of his country, during the year 1910, than any other Progressive Republican. Most of the Osawatomic principles must reappear in the Republican platform of 1912 if the party is to have any chance of success.

"Will the Democratic Party Commit Suicide?" By George Harvey. *North American Review*, v. 193, p. 1 (Jan.).

Urging not revision by schedule, but downward revision; so carried out as not to disturb legitimate business, "by heeding the fundamental principles enunciated by Walker in 1846 and by adopting the method of gradual reductions effected by Jackson in 1833."

"Theodore Roosevelt—Please Answer." By M. E. Stone, Jr. *Metropolitan*, v. 34, p. 415 (Jan.).

Beginning as the foe of grafters, bosses and mechanics, Roosevelt, it is charged, "suddenly began to eat out of the hand of the regular organization." How does the defender of the merit system explain the cases of Leonard Wood, Loomis, Paul Morton and Cortelyou? When Platt offered him the Republican nomination for Governor, he threw over the Independents on whose ticket he had agreed to run, with what one biographer calls one of the cleverest pieces of political manipulation in the history of the United States.

"The Progressive Hen and the Insurgent Ducklings." By William Allen White. *American Magazine*, v. 71, p. 394 (Jan.).

The reform movement, we are told, is greater than its leaders; it is not sufficient to work with agencies at hand, as Roosevelt has done, but they must be created, as La Follette has done in Wisconsin; a cause is to triumph, not a man or a machine.

Pensions. "The Pension Carnival, IV." By William Bayard Hale. *World's Work*, v. 21, p. 13917 (Jan.).

Treating of the favorite frauds practised on the government, by masqueraders, rogues, perjurers, fake-veterans and bogus widows.

Political Corruption. "What are you Going to Do About It? VI, Senator Gore's Strange Bribe Story." By Charles Edward Russell. *Cosmopolitan*, v. 50, p. 151 (Jan.).

Dealing with the McMurray contracts and the Indian land question in Oklahoma.

Railways. "Masters of Capital in America: The Inevitable Railroad Monopoly." By John Moody and George Kibbe Turner. *McClure's*, v. 36, p. 324 (Jan.).

This is a striking and dramatic chapter of economic history, which treats of the culmination of the movement toward combination of railway capital. The rise of the late E. H. Harriman, the effect of his power on the fortunes of the Morgan-Hill alliance, and the Northern Securities episode in Mr. Morgan's career, are graphically presented.

See Banking.

Religion. "What Jesus Thought of the Law and those Belonging to It." By Elijah Green. leaf. *Westminster Review*, v. 174, p. 658 (Dec.).

Reviewing the Scriptural narrative for the purpose of showing how Jesus disregarded the Mosaic law and how he believed in its execution not by man, but by the Almighty.

Tariff. "The Lemon in the Tariff." By Samuel Hopkins Adams. *McClure's*, v. 36, p. 353 (Jan.).

This title is not figurative but literal, the sourness of the discussion being confined to a special schedule of the tariff. "Crack! goes the whip. The traders fall into line. The schedule passed, 44 to 28. By such men and such measures are we, the people of the United States, taxed, one and all of us."

"The Mysteries and Cruelties of the Tariff: A Tariff-Made State." By Ida M. Tarbell. *American Magazine*, v. 71, p. 349 (Jan.).

Miss Tarbell takes for her target the manufacturing industries of the state, and is particularly severe upon their alleged practices toward child labor, practices necessarily destined to be modified by the new factory inspection law which goes into effect this month.

Taxation. "The Things that are Caesar's;

II, The Tribute of the Corporations." By Albert Jay Nock. *American Magazine*, v. 71, p. 302 (Jan.).

Having previously sought to expose discrimination between the rich man and the poor man in the New York personality tax laws, this author now seeks in a second instalment to show similar discrimination against small corporations and business firms in favor of large, powerful ones.

Latest Important Cases

Defamation. "*Panama Libel*" Case—*Publication by Circulation of Copies within a Federal Reservation Not a Separate Offense of which Federal Courts can Take Notice.*—*State Powers.* U. S.

The United States Supreme Court on Jan. 3 unanimously affirmed the decision of the United States Circuit Court rendered at New York City a year or two ago, which quashed the indictment of the Press Publishing Company for expressing opinions in the *New York World* reflecting on the honor of men believed to have derived pecuniary benefit from the sale of the Panama Canal to the United States.

The opinion of the Court, written by Mr. Chief Justice White, dealt entirely with the act of Congress of 1898 under which the indictment was brought, and the effect of which was to incorporate the criminal laws of the several states into the federal law, so as to make them applicable to federal reservations.

The Court said that investigation plainly showed:—

"First, that adequate means were afforded for punishing the circulation of a libel on a United States reservation by the state law and in the state courts without the necessity of resorting to the courts of the United States for redress;

"Second, that resort could not be had to the courts of the United States to punish the act of publishing a newspaper libel by circulating a copy of the newspaper on the reservation, upon the theory that such publication was an independent offense, separate and distinct from the primary printing and publishing of the libelous article within the State of New York, without disregarding the laws of that state and frustrating the pl.in purpose of such law, which was

that there should be but a single prosecution and conviction."

Cf. 21 Green Bag 644.

Involuntary Servitude. *Thirteen Amendment Not Violated by Statute Actually Regulating Negro Labor—"Peonage" Law of Alabama Invalid Not for Discrimination, but Because it Tends Toward Involuntary Servitude.* U. S.

The Alabama "labor contract" law made it a misdemeanor for any person to enter in to a contract to labor, receive advance pay, and then fail to do the work without refunding the money advanced. The breach of the contract was made *prima facie* proof of intent to defraud, and under a rule of Alabama law the laborer was not permitted to rebut this proof by testifying as to his unexpressed intention at the time of making the contract. The law had been upheld as constitutional by the Supreme Court of Alabama.

In the case of Alonzo Bailey, a negro, the Supreme Court of the United States was asked to rule upon the constitutionality of the act. The Department of Justice was allowed to participate in the arguments as *amicus curiae*, claiming that the Thirteenth Amendment had been violated.

Mr. Justice Hughes, who announced the opinion of the Court, said that as there was nothing in the statute discriminating against negroes, the point that Bailey was a negro could not be considered by the Court, and the case would be treated as if it had come from New York or Idaho.

The Court said that the statute had the effect of making breach of contract a misdemeanor without saying anything about intent to defraud, and held that a state could not reduce a person to involuntary servitude by making his failure to pay a debt a crime.

Monopolies. Conspiracy in Restraint of Trade May be Continuing Offense—Statute of Limitations.
U. S.

In the cases of Gustav E. Kissel and Thomas B. Harned, indicted for conspiracy in restraint of trade in July, 1909, where the defendants pleaded the statute of limitations, on the ground that the offense for which they were indicted was committed more than three years back, Judge Holt held that the indictments were barred by the statute and quashed them more than a year ago (see 21 *Green Bag* 645).

The Supreme Court of the United States has now expressly overruled Judge Holt, emphatically dissenting from his view that "a conspiracy in restraint of trade is nothing but a contract or agreement between two or more persons in restraint of trade." Upon this view Judge Holt based his conclusion that the "continuing offense" theory of conspiracy would not apply to a conspiracy made unlawful by the Sherman act.

Mr. Justice Holmes, in announcing the opinion of the Court Dec. 12, examined the argument that a conspiracy is a completed crime as soon as formed, as would be the case where a conspiracy were merely a contract. The Court said: "The indictment charges a continuing conspiracy. Whether it does so with technical sufficiency is not before us. All that we decide is that a conspiracy may have continuance in time, and that where, as here, the indictment, consistently with the other facts, alleges that it did so continue to the date of filing, that allegation must be denied under the general issue and not by a special plea. Under the general issue, all defenses, including the defense that the conspiracy was ended by success, abandonment or otherwise more than three years before July 1, 1906, will be open and unaffected by what we now decide." 67 *Legal Intelligencer* (Philadelphia) 656 (Dec. 23).

Anthracite Coal Trust—Blocking Establishment of Competing Route Unlawful Restraint of Trade.
U. S.

The Reading Company and many other corporations composing the so-called anthracite coal trust were found not to have violated the Sherman act by the United States Circuit Court for the northern district of Pennsylvania, Dec. 8. But the Government was successful in one instance, that of the Temple Iron Company, which was held to be an illegal combination. Judge George Gray said: "A careful consideration of the very able argument and brief of the counsel for the Government does not convince us that

the evidence discloses any such general contract, combination, or conspiracy among the defendants in restraint of trade or commerce among the several states, or to monopolize any part of the trade or commerce among the same."

Of the acts of the Temple Iron Company he said: "The combination brought about the abandonment of the project [for a route from the Wyoming coalfield in Pennsylvania to tidewater in the state of New York] and the possibility of a competing road in interstate commerce was for the time being frustrated. I cannot escape the conclusion, therefore, that the decree of this court should denounce as illegal the combination by which this result was brought about if a decree for an injunction under the prayers contained in the petition can be founded upon such denouncement."

Judge Buffington agreed with Judge Gray, except in one respect in which he went further, holding the 65 per cent contract existing between the big corporations and the independent companion unlawful. Judge Lanning dismissed all the contentions of the Government.

Negligence. Assumption of Risk in Case of Passenger Riding on Platform of Street Car—Notice Warning Passengers Equivalent to Invitation.
D. C.

A decision has been rendered in the Court of Appeals of the District of Columbia which, if it proves a precedent, may have a decided bearing upon the crowded street car problem of other cities. It was in effect that a man injured by being thrown from the platform of a crowded car when rounding a curve has ground for action for damages against the company.

Abraham Hart sued the Capital Traction Company for damages in the Supreme Court of the District, and was beaten on the ground that in standing on the rear platform he assumed the risks. He appealed and Mr. Justice Van Orsdel of the Court of Appeals held that Hart had a right of action. 38 *Washington Law Reporter* 716 (Nov. 11).

The Court said: "The defendant cannot deliberately permit and create a custom of hauling passengers on the platforms of its cars, and escape liability for accidents occurring through their operation with relation to those particular passengers. Neither can the railway company escape the obligation imposed by the custom by posting a notice, as was done in this case, warning passengers that it is dangerous to ride on the platforms. The custom thus established is equivalent to an invitation to passengers to occupy and ride upon the platforms, and the

mere posting of such notice will not relieve it from liability. . . .

"It is beside the case that, in this instance, the plaintiff was occupying the platform when there were vacant seats inside the car. He was riding in one of the customary places afforded by the company for hauling passengers, and he was entitled to rely upon the company's operating its cars in the usual and customary manner in which they are run with respect to the safety of all passengers. . . . The plaintiff, when he entered the car, was undoubtedly required to occupy the safest place afforded him—in this instance, a seat. Instead, he took his position on the platform, and in so doing he assumed the additional risk attendant upon this position when the cars were being operated in the usual and customary manner. He was entitled to have the jury say whether they were so operated. If they were not, and the unusual condition was due to the negligence of defendant's employees, and such negligence was the proximate cause of the accident, he had a right to recover."

Partnership. Voluntary Sale of Interest in Good Will—Solicitation of Business of Customers of Former Firm. N. Y.

In *Van Bremen v. Asche*, decided Nov. 22, the New York Court of Appeals held that when there has been a voluntary sale by two members of a partnership to its third member of all their right, title and interest in the firm assets and good will, and the two retiring members then set up a similar business of their own, they are not at liberty thereafter to solicit business of the customers of the former firm. When they have disposed of their interest in the good will, an injunction may issue to restrain them from interfering with that which was a part of it. 44 *N. Y. Law Jour.* 965 (Dec. 6).

The Court (Willard Bartlett, J.) said: "If the sale of the good will upon the ordinary dissolution and liquidation of a partnership imported the same obligation as that which arises upon a voluntary sale not to solicit trade from customers of the old firm, merchants who had been in trade as partners of undesirable associates would constantly find themselves by the mere fact of the dissolution of the firm they desired to leave disqualified from seeking future business from those who might be their most desirable customers. Such a restriction should be imposed and is imposed only when the transfer of the good will is a free affirmative act, and is made under such circumstances that it would be bad faith on the part of the vendor to avail himself as against the vendee of any special knowledge

or advantage derived by him from the business whose good will he has voluntarily sold."

Race Distinctions. Separation of Races—Meaning of "Colored." D. C.

The plaintiff in the case of *Wall v. Oyster* gave no ocular evidence of being a negress. Notwithstanding her father's contention that she was white, not colored, she was compelled to attend one of the separate public schools for colored children in the District of Columbia. The child has flaxen hair and blue eyes. Mr. Justice Wright of the District Supreme Court several months ago refused to order the Board of Education to admit her to the white schools. In his decision he said: "Persons of whatever complexion who bear the negro blood in whatever degree and who abide in the racial status of the negro are 'colored' in the common estimation of the people. The child at bar has acquired no racial status personal to itself; its status of necessity is that of its father."

The Court of Appeals of the District affirmed this decision Dec. 5. 38 *Washington Law Reporter* 794 (Dec. 16). Chief Justice Shepard said in his opinion:—

In the case of *State v. Treadaway*, 52 So. Rep. 500 (1910), "The views of the majority were thus expressed by Mr. Justice Prevosty: 'There is a word in the English language which does express the meaning of a person of mixed negro and other blood, which has been coined for the very purpose of expressing that meaning, and because the word negro was known not to express it, and the need of a word to express it made itself imperatively felt. That word is the word "colored." The word "colored" when used to designate the race of a person is unmistakable, at least in the United States. It means a person of negro blood pure or mixed; and the term applies no matter what may be the proportions of the admixture, so long as the negro blood is traceable.'

"While this view accords with our own observation of the popular meaning of the word 'colored' we would not rest our conclusion upon such an uncertain foundation.

"The most reliable sources of information in this regard are the dictionaries which are universally accepted as the best exponents of the popular meaning of the words of the language. It is sufficient to say, without quoting from them, that these show that the word 'colored' as applied to persons or races is commonly understood to mean persons wholly or in part of negro blood, or having any appreciable admixture thereof."

Railway Passes. Condition Subsequent and Covenant to Keep it Running with the Land. N. Y.

A contract which binds a railway and its assigns to furnish free transportation in return for a consideration is not a covenant running with the land which will bind assignees of the company, was the holding of the New York Court of Appeals in *Munro v. Syracuse, Lake Shore and Northern Ky. Co.*, decided Dec. 13. 44 *N. Y. Law Jour.* 1299 (Dec. 29).

Plaintiff's predecessors, as parties of the first part, made an indenture with the defendant's predecessor, a railroad company, party of the second part, whereby the former, in consideration of one dollar and other covenants and conditions, granted to the latter a strip of farm land for railroad purposes. One of the conditions was that the company should issue annually a pass over its road to the parties of the first part, and it was recited that on failure to perform the conditions all rights should revert to the parties of the first part, their successors and assigns, and that the agreement should be binding upon the heirs, successors and assigns of the parties thereto. On the subsequent foreclosure of a mortgage upon all the property of the railroad company, to which action neither the plaintiffs nor their predecessors were parties, title passed to the defendant railroad company, and it refused to honor plaintiff's passes. In an action for specific performance and for damages it was held that the suit could be maintained; that the provision with respect to passes amounted to a condition subsequent and a covenant to keep it running with the land. (The case is discussed editorially in 44 *N. Y. Law Jour.* 1302, Dec. 29.)

Sureties. Double Insurance—Contribution—Law of the Forum—The Law Applicable—Weight to be Attached by English Courts to American Decisions. England.

A novel point was decided by Mr. Justice Hamilton on Nov. 15, in the English High Court of Justice. The American Surety Company of New York had insured the National Park Bank against the defalcations of a certain employee to the extent of \$2,500. Other employees of the bank, to the number of approximately one hundred, were also covered by the same policy in varying amounts. The National Park Bank had further secured from certain English Lloyds Underwriters insurance to the amount of \$200,000, covering all its employees and various other risks as well, without specifically apportioning the total amount among them.

The employee insured in the sum of \$2,500 embezzled \$2,680, and the American Surety Company paid \$2,500 of the loss to the National Park Bank and then sued one of the Lloyd's underwriters for his proportion of contribution, claiming that he should contribute (to the amount in which he was liable) in the proportion that \$200,000 bears to \$2,500. The defendant admitted liability to contribute but denied that the measure of contribution was as stated by the plaintiffs, and alleged that the proper amount was a sum to be ascertained by calculating the proportion that \$2,680 bears to \$2,500. It was further contended by the plaintiff that the law applicable in New York was the law to be applied in the present case.

On this point the Judge ruled against the plaintiff, but decided to take the evidence of experts, which the parties desired to adduce, in order to save a new trial in case an appeal were had and the appeal court found he was wrong. In his opinion, the learned Judge held, in short, that the duty of contribution did not depend on contract, but on principles of equity, and that the party required to do equity must be subject to the court dealing with the matter. A number of American cases had, he said, been cited on either side, and he had considered their effect. American authorities were consulted in the English courts for edification, but with regard to their weight it was worth recalling the remarks of Lord Justice James, that while cases in the United States Supreme Court were entitled to respect, cases in state courts were of comparatively little value. Analogies from marine or fire insurance did not carry the matter any further, and the result was that the case came before him as a case of first impression. The defendants never contemplated taking a \$200,000 risk on each employee independently. The principle put forward by the plaintiff for assessing the contribution must fail. He accepted the defendant's theory that the underwriters should bear a proportion of the whole loss of \$2,680 in the ratio of 2,680 to 2,500.

It is of interest to note that the plaintiff's expert in American law relied on a number of fire insurance cases of which *Home Ins. Co. v. Baltimore Warehouse Co.* (93 U. S. 527) is a type, while the defendant's expert relied chiefly, in the absence of any direct authority upon the point in America, upon *Burnett v. Millsaps* (59 Miss. 333) and *Cherry v. Wilson* (78 N. C. 164) as being the only cases decided in America where the facts were in any way similar to those at issue in the case under review.

The Editor's Bag

A MERIT APPOINTMENT

IT was with genuine pleasure that we viewed the promotion of Mr. Justice White to the exalted office of Chief Justice of the United States. To begin with, we confess to a wholly unpretended and ineradicable admiration for the largeness of mind, heart, character and learning of the new head of the American judiciary. The appointment must be gratifying to all who feel that a great lawyer should preside over the Court and that the Chief Justice should not merely direct its business but should dominate its opinions and mould its policy. It is commonly said, to be sure, that the powers of the Chief Justice are no greater than those of his associates, but the post is one of commanding influence, and if the Chief Justice is a jurist of first rank he can hardly fail to exercise more real and more lasting power than any other officer of the United States. We believe it to have been the intent of the framers of the Constitution that this power should be exercised, and if it had been more steadily exercised in the past no one can deny that the traditions of the Court would have been enriched and increased coherence would have been given to the course of judicial decision.

We have no desire, however, to exaggerate the abilities of the new Chief Justice at the expense of those of his associates. It is not easy to single out the greatest jurist from a

court rich in ability and in learning. We have long admired the opinions of the Chief Justice, but we have also admired those of Mr. Justice Harlan and at least one other Associate Justice whom it would be invidious to name. Personal comparisons are not always delicate, and it is sufficient to say that Mr. Justice Harlan would have made an acceptable Chief Justice. At all events, the appointment went to one on whom force of intellect combined with dignity of office cannot fail to bestow the real leadership of the Court.

The opinion was expressed in the Editor's Bag a few months ago that Mr. Justice Hughes' promotion would be amply justified by his executive ability and comparative youth, and there is nothing in that view to retract; but Mr. Justice White's promotion showed a different and in our judgment a higher conception of the functions of the Chief-Justiceship, and it was altogether proper that one of the older and more experienced judges should take precedence of a new and untried member.

In some quarters the opinion has been expressed that the promotion of an Associate Justice may constitute a dangerous precedent. If Mr. Justice Hughes should some day succeed Chief Justice White, we are nevertheless sceptical as to whether a precedent would be created which would bind the action of future Presidents. All precedents were disregarded by Mr. Taft in making this appointment, yet he

might readily have felt himself bound by them. Instead, he applied the principle of the merit system to the Supreme Court, making what was distinctly a merit appointment, and the merit system is necessarily independent of precedents and dispenses with red tape in determining the qualifications of candidates. Doubtless the hands of future Presidents will be left entirely free.

Even if the promotion of Associate Justices should become the usual mode of selecting the Chief Justice, the consequences of honorable rivalry among aspirants for the honor are not to be feared, it is only the clandestine activity of judges willing to stoop to petty intrigue that is to be dreaded. And under the merit system there is always a diminishing possibility of judges of the sort likely to make improper use of their position finding themselves on the bench of the Supreme Court.

your grievances. If you have propositions that answer your opponent's positions and are full of your case, you will soon make the Court see what those propositions are.

"There are some superstitions connected with appellate practice. There is a superstition that sometimes appellate courts go to sleep during an oral argument. But do not let this disconcert you or deter you from your argument. It is a mere fanciful pleasantry. The Court does not sleep. If a judge settles back in his chair and closes his eyes he is not asleep. He is but indulging in a spell of philosophical introspection. Furthermore, if the countenance of the good judge whose eyes are closed assumes a placid expression of benign and settled repose, he is still not asleep in a vulgar sense. What you see is but the outward expression of the inward judicial grace of calmness."

LOOK THE COURT IN THE EYE

GOOD suggestions, particularly helpful to young lawyers in the preparation and conduct of their cases, were offered by Mr. Justice Lamm of the Supreme Court of Missouri in a recent address. To quote:—

"Avoid reading your statement if long and complicated. Most men read indifferently well. Besides, you can rest with some degree of assurance on the proposition that most judges on an appellate bench can read for themselves. Stand at the counsel table and look the Court in the eye. If you are timid at the start take courage from the fact that, if you are full of your case, that fullness of knowledge is bound to come forth as you go on. If you have real complaints to make of the rulings below you will soon tell the upper Court of

OBITER DICTA

THE Justice of the Peace in a Georgia town was a universal favorite and was noted for the amount of his profanity and the very original character of his oaths. It was said that while he swore in almost every sentence he uttered, he never repeated the same combination of cuss-words more than once.

While fox-hunting last fall he fell under his horse and was seriously injured, and that evening several of his neighbors called to inquire as to his condition.

When they saw the physician and the clergyman coming from the sick room together they were apprehensive and hastily asked for news of the invalid.

It was the minister who replied: "Hush! don't make any noise; he is

getting better, he can now just swear above his breath."

INCIDENTS IN LINCOLN'S LIFE AS A LAWYER

SENATOR DEPEW recently recalled some interesting anecdotes concerning Abraham Lincoln's experience as a lawyer:—

"Mr. Lincoln often remarked to me that it was accident that stimulated his ambition to enter the legal profession. He told it in these words:—

"One day a man who was migrating to the West drove up in front of my store (at New Salem, Ill.) with a wagon which contained his family and household plunder. He asked me if I would buy an old barrel for which he had no room in his wagon, and which he said contained nothing of special value. I did not want it, but to oblige him I bought it, and paid him, I think, half a dollar for it. Without further examination I put it away in the store and forgot all about it. Some time after, in overhauling things, I came upon the barrel, and emptying it upon the floor to see what it contained, I found at the bottom of the rubbish a complete edition of Blackstone's Commentaries. I began to read those famous works, and the more I read the more intensely interested I became. Never in my whole life was my mind so thoroughly absorbed. I read until I devoured them.'

"After his admittance to the Springfield bar in 1836, Lincoln rode several miles to witness a trial by jury. This incident afterward became the theme of one of his best stories with which he was wont to regale us.

"The court, I remember,' said Mr. Lincoln, 'was held at a small town in the Eighth Judicial Circuit of Illinois.

On account of the absence of a courthouse, the town school, much to the joy of its scholars, was brought into use. The circuit judge, an elderly, portly man, had had a bad touch of the gout, and the master's hard wooden chair in which he sat became decidedly uncomfortable as a long uninteresting case dragged through the hot afternoon. Finally the opposing lawyers finished, and he arose for the final address.

"Gentlemen of the jury," he began, savagely brushing a pair of hungry flies from his shiny bald head, "you have heard all the evidence. You have also listened to what the learned counsel have said. If you believe what the counsel for the plaintiff has told you, your verdict will be for the plaintiff; but if on the other hand you believe what the defendant's counsel has told you, then you will give a verdict for the defendant. But if you are like me, and don't believe what either of them has said, then I'll be hanged if I know what you will do!"'

"To the majority of his admirers Abraham Lincoln's greatest legal triumph was the acquittal of an old neighbor named Duff Armstrong, who was charged with murder in the first degree.

"There were several witnesses who testified that they had seen Armstrong commit the deed one night at a time ranging from half after ten to twelve o'clock.

"It was a great surprise to those present at the trial when Lincoln attempted no cross-examination, except to persuade the witnesses to state positively that they were able to see the act distinctly on account of its being a bright moonlight night.

"When Lincoln addressed the Court, he announced that the only defense he wished to submit was an almanac,

which proved conclusively that there was no moon on the night the deed was said to be committed.

"On this testimony Armstrong was acquitted, while every witness was seen to have committed perjury.

"I recall hearing of a lawyer who was opposed to Mr. Lincoln trying to convince a jury that precedent was superior to law. When Lincoln rose to answer, he told the jury he would argue his case in the same way. 'Old Squire Bagly,' said he, 'came into my office and said, "Lincoln, I want your advice as a lawyer. Has a man what's been elected justice of the peace a right to issue a marriage license?" I told him he had not, when the old squire threw himself back in his chair very indignantly, and said, "Lincoln, I thought you was a lawyer. Now, Bob Thomas and me had a bet on this thing, and we agreed to let you decide; but, if this is your opinion, I don't want it, for I know a thunderin' sight better, for I have been squire now eight years and have done it all the time."'

"Mr. Lincoln himself told me once that, in his judgment, one of the best things he ever originated was this. He was trying a case in Illinois where he appeared for a prisoner charged with aggravated assault and battery. The complainant had told a horrible story of the attack, which his appearance fully justified, when the district attorney handed the witness over to Mr. Lincoln for cross-examination. Mr. Lincoln said he had no testimony, and unless he could break down the complainant's story he saw no way out. He had come to the conclusion that the witness was a bumptious man, who rather prided himself upon his smartness in repartee, and so, looking at him for some minutes, he inquired, 'Well, my friend, what ground did you and my client fight over?'

The fellow answered, 'About six acres.' 'Well,' said Mr. Lincoln, 'don't you think this is an almighty small crop of fight to gather from such a big piece of ground?' The jury laughed, the Court and district attorney and complainant all joined in, and the case was laughed out of court."

MORE NEARLY ACCURATE

A TOWN in New Jersey had until recently as its sole representative of the majesty of the law a Justice of the Peace who was noted for his abundant good nature and also for his love of good whisky, which he consumed in more than ordinary quantities.

A few weeks ago he died, and the clergyman in his funeral address dilated upon the good qualities of the deceased and described him as a "man filled with the milk of human kindness." At that moment a man in the rear of the church observed to his neighbor in a shrill and penetrating voice: "The parson would have been a little more accurate if he had said the 'milk-punch of human kindness.'"

"INSULT THE JUDGE"

MR. Justice Oliver Wendell Holmes of the United States Supreme Court recently recalled a personal anecdote connected with the late Gen. Benjamin F. Butler.

"Gen. Butler was on his way to Boston to try a case before Judge Shaw. I met him on the train, and asked if I might look at the notes on the case. Butler acquiesced. To my astonishment I saw written at the top of page 1, 'Insult the Judge.'

"'You see,' said Butler, in answer to my question, 'I first get Judge Shaw's ill will by insulting him. Later in the case he will have decisions to make

for or against me. As he is an exceedingly just man, and as I have insulted him, he will lean to my side, for fear of letting his personal feeling against me sway his decision the opposite way.' "

A GAME OF SCIENCE

ONE of Mark Twain's stories concerning the game of seven-up or old sledge is reproduced by the *Boston Transcript*. Some Kentucky boys were arrested for playing this game, under the usual charge of playing a game of chance. When they were brought before the judge their lawyer claimed that this game was not a game of chance, but was a game of science. The Court, puzzled, asked for a suggestion, and the lawyer declared that if a jury of six gamblers well acquainted with the game in a scientific way and six deacons be impaneled with a pack of cards their decision ought to be determinative. So the story goes:—

"There was no disputing the fairness of the proposition. Four deacons and the two dominies were sworn in as the 'chance' jurymen, and six inveterate old seven-up professors were chosen to represent the 'science' side of the issue. They retired to the juryroom.

"In about two hours Deacon Peters sent into court to borrow \$3 from a friend. (Sensation.) In about two hours more Dominie Miggles sent into court to borrow a 'stake' from a friend. (Sensation.) During the next three or four hours the dominie and the other deacons sent into court for small loans.

"The rest of the story can be told briefly. About daylight the jury came in, and Deacon Job, the foreman, read the following verdict:—

" 'We, the jury in the case of *The Commonwealth of Kentucky v. John Wheeler et al.*, have carefully considered the point of the case, and tested the merits of the

several theories advanced, and do hereby unanimously decide that the game commonly known as old sledge or seven-up is eminently a game of science and not of chance. In demonstration whereof it is hereby and herein stated, iterated, reiterated, set forth and made manifest that, during the entire night, the "chance" men never won a game or turned a jack, although both feats were common and frequent to the opposition; and furthermore, in support of this, our verdict, we call attention to the significant fact that the "chance" men are all broke and the "science" men have got the money. It is the deliberate opinion of this jury that the "chance" theory concerning seven-up is a pernicious doctrine and calculated to inflict untold suffering and pecuniary loss upon any community that takes stock in it.' "

A TARIFF ARGUMENT

A PORTLAND, Maine, attorney who is a member of the Cumberland Club, once Tom Reed's favorite idling place, is known for his capacity in argument. He is an ardent protectionist and has steadily preached that a high tariff is the greatest blessing that has ever been devised.

The attorney has what he and his wife consider a jewel of a servant in an Irish girl named Rosy, and Rosy's one fault has been that she always managed to draw her wages before they were due, and despite efforts to evade her evident desire to buy automobiles on a trolley car income she has never had the balance on the right side of the account.

Last summer Rosy received word from the "ould counthry" that her mother was dead, and of course she had to send some money to "th' bhoys," so that the attorney began to feel like

a banker financing a transcontinental railroad scheme. The limit had apparently been reached when Rosy came to him for a "loan" of two dollars.

"Oh, I don't know, Rosy," said her employer, "you are living on your wages for month after next, now. What do you want it for?"

"Shure, yer Honor," said Rosy (she always addresses him with due formality), "Oi wants to hiv a couple iv masses said for the ripose iv me mother's soul."

"But," expostulated the lawyer, "I thought that masses were only fifty cents apiece."

"Faith, yer Honor," said Rosy, "an' they used to be, but hivent yez read in th' papers, yer Honor, how th' price

iv all necissities has wint up becaus' iv th' new-fangled tariff?"

Rosy had won the debate.

AN HONEST VERDICT

"I'LL see that you get a cold \$500," I whispered the defendant's lawyer to the foreman of the jury, "if you can bring in a verdict of manslaughter."

And when they returned to the court room, sure enough that was the verdict. The lawyer profusely thanked the juror as he paid him the money, assuring him he thought he must have had hard work to do it.

"Yes," sighed the juror, reflectively, "it was tough work, but I got 'em together after awhile. You see, all the rest were for acquittal."

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, facetiae, and anecdotes.

USELESS BUT ENTERTAINING

Lord Westbury when at the bar was an impatient man with his juniors. On one occasion a junior repeatedly urged his leader to take a certain point, which the latter persisted was contemptible. The case went badly, and at last the leader took his junior's advice. The argument produced a marked effect on the judge, and in the end judgment was given for Lord Westbury's client. After glancing at the judge, he turned around to his junior. "I do believe," he muttered coldly, "this silly old man has taken your absurd point."
—*Canada Law Journal.*

"Johnny, did you take that jam? Answer me this instant!"

"What jam, Ma?"

"You know very well what jam. Did you take it?"

"That's a leading question, ma. I can't incriminate myself."

"JOHNNY!"

"And besides, ma, it's no crime to take jam, because there's no mention of black-berry jam in the Constitution."

"Johnny, I'm losing patience. Once more, did you take that jam?"

"Ma, I'd like a delay until next fall to prepare my case. My witnesses have gone to Europe."

"You're overruled. If I waited you might destroy the evidence."

"Then I want a change of venue."

"Overruled. This is just as good a place as the woodshed."

"Can I have a *habeas corpus*, Ma?"

"Johnny, you're hurting your own case by all this quibbling. Come now, did you take it or didn't you?"

"Ma, I'd like to appeal the case to some court that isn't in session."

"Nonsense. This court is capable of trying it. If you're guilty I want to know it, and if you're innocent I should think you'd be glad to have a chance to prove it. Are you guilty or not guilty?"

"NOT GUILTY, MA!"—*Chicago Tribune.*

A newly-made magistrate was gravely absorbed in a formidable document. Raising his keen eyes, he said to the man who stood patiently awaiting the award of justice: "Officer, what is this man charged with?"

"Bigotry, your worship. He's got three wives," replied the officer.

The new justice rested his elbows on the desk and placed his finger tips together. "Officer," he said somewhat sternly, "what's the use of all this education, all these evening schools, all the technical classes an' what-not? Please remember, in any future like case, that a man who has married three wives has not committed bigotry but trigonometry. Proceed."
—*Lincoln State Journal.*

The Legal World

Important Trust Prosecutions

The movements of the Department of Justice seem to have been materially influenced by the decision of the United States Supreme Court in the cases against Kissel and Harned, in which the "continuing conspiracy" doctrine was laid down (p. 99 *supra*). Attorney-General Wickersham was led to express the opinion that this decision had furnished the Department with the weapon needed to strike a crushing blow at both the sugar and beef combinations and the men behind them. Pleadings of the statute of limitations will no longer be able, he declared, to tie up cases of violation of the Sherman law.

This development, combined with the policy of the Administration to prosecute violations of the Sherman act criminally whenever the evidence made out a good basis for a criminal action, brought about the dropping by the Government of the civil case against the National Packing Company. In this suit strong evidence had already been prepared, but United States Attorney Sims was successful on December 27, in his motion that Judge Kohlsaas, in the District Court at Chicago, dismiss the civil suit, in order it was said that the packers under indictment might not secure immunity through their testimony in the civil suit.

The meat packers promptly attacked this dismissal, but on Jan. 3 Judge Kohlsaas ruled against them in the Circuit Court, holding that the Government had a right to dismiss the suit in equity. The meat packers had also applied to Judge Carpenter, in the District Court at Chicago, to sustain their plea that the criminal suit was barred by the injustice granted in 1903 by Judge Grosscup, but Judge Carpenter ruled against them on this point on Jan. 9.

Indictments were returned by the federal grand jury at Detroit Dec. 6, against sixteen firms and thirty-two individuals alleged to have obtained control of eighty-five per cent of the annual output of enamel iron bathtubs, sinks, etc., in the United States. Attorneys representing some of these individuals came to Washington, and asked that their clients be let off with fines, but they were given to understand, it is said, that jail sentences would be insisted upon. One of the defendants, however, who pleaded not guilty, was allowed by Judge Swan, in the District Court at Detroit, to withdraw the plea and file a demurrer, and this case, that of J. A. Frauenheim of Pittsburgh, may be brought to trial early in March.

As a result of the United States Supreme Court decision that the indicted officials of the Sugar Trust must stand trial, United States Attorney Wise of New York City announced on Dec. 14 that he would push the criminal indictments of all the men "higher up" in the sugar frauds, and that these cases would be ready for presentation in court in about three months.

Early developments in the prosecutions of the glass and electrical trusts are also likely.

The Judicial Settlement Society

The Conference of the American Society for Judicial Settlement of International Disputes held its session in Washington, Dec. 15-17. Senator Root spoke on the first day on "The Importance of Judicial Settlement," and Mr. Justice Riddell of the High Court of Ontario talked on "The International Relations Between the United States and Canada." John W. Foster discussed the question, "Were the Questions Involved in the Foreign Wars of the United States of Such a Nature that They Could Have Been Submitted to Arbitration or Settled Without Recourse to War?" Dr. Benjamin Ide Wheeler, president of the University of California, also spoke, and Andrew Carnegie discussed "The Moral Issue in War."

Mr. Carnegie characterized "the appeal to conscience, not to the pocket," as the paramount question. He declared that the "enormous sums nations are now spending upon instruments for war are ominously excessive," and added that he did not believe the mere cost of war or the greater cost of armaments meant to prevent war would prove the most effectual deterrent to war itself.

At the second session of the conference John Hays Hammond presided. The program included the following addresses: Frederick D. McKenney, "Some Practical Objections to the Present Hague Court"; A. H. Snow, "The Development of the American Doctrines of Jurisdiction of Courts over States"; Professor Eugene Wambaugh of Harvard, "Whether the Growth of Law is Aided by Courts rather than by Commissions"; H. B. F. McFarland, "Obstacles in the Way of Proposed Permanent Court"; Charles Noble Gregory, "Aviation as Affecting the Judicial Settlement of International Disputes"; and J. H. Ralston, "Some Considerations as to International Arbitral Courts."

At the third session, James Brown Scott presided. The Minister of France was the first speaker. He was followed by these speakers: Andrew J. Montague, "The Supreme Court as a Prototype of an International Court"; Simeon E. Baldwin, "Evolution of the International Court"; Francis B. Loomis, "The Price of Peace," and David Starr Jordan, "The Waste of Nations."

Theodore Marburg presided at the session Saturday morning. The addresses were as follows: "Defects of Arbitration as a Means of Settling Disputes," Charles W. Eliot; "The Jurisdiction of the Supreme Court of the United States over the Controversies of the States a Prototype in the International Court of Arbitral Justice," Frederick N. Judson; "The Source of International Law," F. W. Hirst; "Some Reasons Why Judicial Methods for Settlement of International Disputes are Superior to Other Methods," Rear Admiral Stockton, U. S. N.; "Between Diplomacy and War," Harry Pratt Judson; "Some of the Things That Must be Done in Order to Secure a Permanent Judicial

Court for the Settlement of International Difficulties," Edwin Ginn.

At a banquet Saturday night, with General Stuart L. Woodford as toastmaster, the speakers were President Taft, Joseph H. Choate, Major-General Frederick D. Grant, U. S. A.; Representative Richard Bartholdt of Missouri, Thomas Nelson Page, Martin W. Littleton and W. Bourke Cockran.

President Taft, addressing the Society, said his purpose in outlining the preparedness of the United States for war "at a peace meeting" was to show by contrast the great worthiness of the movement for a permanent court of arbitral justice and universal peace. The President summarized the condition of the national defenses and urged that a policy of "wise military preparation" be pursued. Speaking of the achievements of courts of arbitration, he said: "If now we can negotiate and put through a positive agreement with some great nation to abide the adjudication of an international arbitral court in every issue which cannot be settled by negotiation, no matter what it involves, whether honor, territory or money, we shall have made a long step forward by demonstrating that it is possible for two nations at least to establish, as between them, the same system of due process of law that exists between individuals under a government."

Bar Associations

American Bar Association.—Boston has been chosen as the place for holding the 1911 convention of the American Bar Association. The date has been set as Aug. 29-31.

Michigan.—The Michigan State Bar Association will hold its annual meeting in Battle Creek in the latter part of July.

Pennsylvania.—The annual meeting of the Pennsylvania State Bar Association will be held at Bedford Springs, June 27, 28 and 29. Ex-Governor A. J. Montague of Virginia is to make the principal address.

Ohio.—The annual meeting of the Ohio State Bar Association will be held at Cedar Point during the week following the Fourth of July. It is hoped that President Taft and Governor Harmon will attend as the principal speakers.

Illinois.—The Illinois State Bar Association will hold a semi-annual meeting at Springfield, on February 16, for the further consideration of Reform of Practice and Procedure. The afternoon will be devoted to the ceremonies attending the unveiling of the portraits of the ex-justices of the Supreme Court in the Supreme Court building. There will be an informal reception and banquet in the evening.

Nebraska.—At the annual meeting of the Nebraska State Bar Association, held at Omaha Dec. 28, the two chief addresses were delivered by George Whitelock of Baltimore, secretary of the American Bar Association, who chose as his subject, "Precedents in Ex-Presidents," and by Lynn Helm of Los Angeles, president of the

California Bar Association, who offered "A Study of the American Union." Myron L. Learned was indorsed for United States Circuit Judge to succeed Judge Van Devanter.

The new officers elected were: president, B. F. Good; vice-presidents, D. O. Dwyer, E. H. Scott and W. H. Thompson; secretary and treasurer, Alfred G. Ellick.

Massachusetts.—The Massachusetts Bar Association held its second annual meeting in Boston Dec. 17. President Richard Olney gave a *résumé* of the past year's work of the association and called special attention to the work of the committees. The principal business of the meeting was the consideration of the extended report of the Committee on Legislation. This report was mainly concerned with the recommendations of the Massachusetts Commission appointed to investigate the causes of delay in the administration of justice in civil actions. The report showed some difference of opinion, as the committee could not concur in all the recommendations. The Association was not prepared to accept all the proposals of the report, favoring sixteen and opposing fourteen, while there was a division as to many others.

The proposal that the jurisdiction of libels for divorce be transferred from the Superior to the Probate Court excited a good deal of debate, Secretary Robert Homans and Lee M. Friedman favoring the change and E. H. Vaughn, George P. Drury, Judge William T. Forbes and W. H. Niles opposing it. This subject, together with some others, was referred back to the committee.

The proposition that sittings of the Supreme Judicial Court be in future held only in Boston was endorsed.

The officers elected include: president, Alfred Hemenway; vice-presidents, William J. Brooks, Charles W. Clifford, James E. Cotter, James R. Dunbar, Samuel K. Hamilton and John C. Hammond; secretary, Robert Homans; treasurer, Charles E. Ware.

California.—At the first annual meeting of the California Bar Association, held at Los Angeles Dec. 6-7, the proposition to call a convention to frame a new state constitution was voted down. The recommendation of the Committee on Criminal Law and Procedure, which advocated a three-fourths verdict in all cases where a life term is not the penalty, was adopted, by a vote in the proportion of three to one. The report of this committee advocated reforms in procedure under the California code substantially identical with those favored by a committee of the San Francisco Bar Association (see 23 *Green Bag* 21). President Curtis H. Lindley in his annual address considered "The Tendencies of Modern Legislation," saying: "I share the conviction of a number of thoughtful and earnest members of our profession, that modern legislation, at least in the English-speaking countries, foreshadows in its tendencies the breaking down of the old system of individualism, and the enforcement of the collective principle. Whether right or wrong, the tendency is direct and insistent, and demands at least serious consideration." Oscar T. Trippet of Los Angeles aroused interest

through his paper on "An Independent Judiciary," in which, as a plan to remove the courts entirely from the sphere of politics, he suggested a constitutional amendment providing for a state court commission which would have the power to select all the judges. Other papers presented were "Admission and Disbarment of Attorneys-at-Law," by Henry J. Stevens; "The Education of a Lawyer," by Prof. Frederic C. Woodward; "The Election of Judges," by William Denman; "Distinctive Character of the Ethical Obligations of the American Lawyer," by Charles S. Wheeler; "Oratory, the Lost Art of Our Profession," by John E. Richards. Officers elected were Lynn Helm of Los Angeles, president; M. K. Harris of Fresno, vice-president for first district; William J. Hunsaker of Los Angeles vice-president for second district; L. D. Hatfield of Sacramento, vice-president for third district; T. W. Robinson of Los Angeles, secretary; H. C. Wyckoff of Watsonville, treasurer.

Death of Senator Elkins

Senator Stephen B. Elkins of West Virginia died at Washington Jan. 1, at the age of sixty-nine, of blood poisoning. This great railroad pioneer as well as statesman, President Harrison's Secretary of War, was born in Perry county, O., on Sept. 26, 1841. His father was a farmer, and moved while he was still a boy to Missouri. He was graduated from the university of that state in 1860 and took up the study of law. Just as he was admitted to the bar the Civil War started, and Mr. Elkins showed his individuality by breaking away from all his home ties to enlist in the Union army. Before the war was over he left the army, and in 1864 struck across the plains to New Mexico, where two-thirds of the population were Spanish. He mastered that language in the course of a year and soon acquired a large law practice. He was elected to the Legislature and also served as territorial Attorney-General. President Johnson made him territorial United States District Attorney. Mr. Elkins first appeared in Washington as the delegate to Congress from the territory of New Mexico in 1873. While he was in Congress he married a daughter of ex-Senator Henry G. Davis of West Virginia. This alliance made him acquainted with great undeveloped resources of that mountainous state. After the expiration of his second Congressional term he severed his connection with New Mexico and lived for two years in Washington. He found that as a Westerner of national repute he could make money by looking after legal business of the great interests growing up in the newly developed states. He declared years afterward that he was making \$50,000 a year by his practice. Moving to New York, he became interested in railroads and turned his attention more and more to the development of his wife's state in co-operation with her father. Together they conceived the West Virginia Central. Owning as he did in West Virginia hundreds of thousands of acres of timberland and thousands of acres of mines, Mr. Elkins became the uncrowned king of the state. He divided his power with his father-in-law, but in all their interests they were united. He came

into politics again with the nomination of James G. Blaine in 1884, and has also been credited with having had much to do with the nomination of Harrison.

Miscellaneous

Jesse Holdom, Esq., after twelve years of service as a judge of the Superior Court of Cook county and a justice of the Appellate Court of Illinois, has resumed practice of law in Chicago.

Assistant U. S. Attorney Walter De C. Douglass has recently been appointed professor of pleading at law, practice and pleading in equity, the law of torts and the law of insurance, in Temple University Law School, Philadelphia. He takes the place of H. Bové Schermerhorn, who resigned.

Judge John C. Sherwin of Mason City, Iowa, became Chief Judge of the Iowa Supreme Court Jan. 1. He is the oldest member of this body in point of service, though one of the youngest in age. He is by birth an Ohioan, was graduated in law at the University of Wisconsin in 1875, and moved to Mason City, Iowa, in 1876.

The law department of Temple University opened its new quarters in the Wilson Building at 16th and Sansom streets, Philadelphia, on Wednesday evening, Jan. 4. Dr. Russell H. Conwell, president of Temple University, spoke of the success which Temple has made. Francis Chapman, dean of the law department, spoke of the work of the school during the nine years during which he has been connected with it. He referred with a great deal of pride to the fact that only one graduate of the law school had failed to pass the examinations of a state board of bar examiners. The law department of Temple has been approved by the state board of bar examiners of New Jersey as well as of Pennsylvania.

Recent confirmations by the Senate include the following: Cornelius D. Murane to be United States Judge for the District of Alaska, division No. 2; Clarence J. Roberts to be Associate Justice of the Supreme Court of New Mexico; Edward R. Wright to be Associate Justice of the Supreme Court of New Mexico; Chandler P. Anderson of New York to be counsel for the Department of State to succeed the late Henry M. Hoyt; J. Reuben Clark, Jr., to be Solicitor for the Department of State; William T. Thompson to be Solicitor of the Treasury; George R. Walker to be United States Attorney for the District of Alaska, division No. 3; E. H. Randolph to be United States Attorney for the western district of Louisiana; Alexander Dunnnett to be United States Attorney for the district of Vermont; Bernard S. Rodey to be United States Attorney for the district of Alaska, Division No. 2; Fred. C. Wetmore to be United States Attorney for the western district of Michigan; Oscar Cain to be United States Attorney for the eastern district of Washington; Frank E. Hinckley to be District Attorney of the United States Court for China.



LAW AND EQUITY

MURAL PAINTING IN APPELLATE COURT ROOM IN NEW SUPREME COURT BUILDING
AT SPRINGFIELD, ILLINOIS, PAINTED BY ALBERT H. KREHBIEL

| See p. 133

The Green Bag

Volume XXIII

March, 1911

Number 3

The Reform of Procedure¹

By ELIHU ROOT

GENTLEMEN of the New York Bar:

The Bench, the Bar, and the public agree that there is undue delay in our judicial proceedings. A considerable number of able and public-spirited lawyers, including several committees of this Association and the local Bar Associations of this state, have addressed themselves to the work of devising amendments of the law which should make our procedure more swift and certain in reaching the ends of justice. They have made many suggestions of great value looking to changes in the code of procedure. Some of these have been adopted, and there are pending some, the adoption of which would be of material advantage.

It is not my purpose in selecting the reform of procedure as the subject for the remarks which seem appropriate on the part of a presiding officer, to discuss these suggestions or to offer others relating to the details of the code. I wish rather to emphasize the general principle which we will all agree ought to control the acts of the state in dealing with this subject. The principle is, that

procedure should be made as simple as possible. The fewer statutory rules there are to create statutory rights intervening between a citizen's demand for relief and the court's judgment upon his demand, the better. The more direct and unhampered by technical requirements the pathway of the suitor from his complaint to his judgment, the better. It seems to me that we have reached a point in our practice where the application of this principle requires very thorough and radical action; that mere improvement of the Code of Procedure in its details will not answer the purpose.

The original Field Code of Procedure of 1848 contained 391 sections and was comprised in 169 of the small, loosely-printed pages of the Session Laws of that time. The last edition of our present Code at which I have looked contains 3,384 sections, a large proportion of them dealing with the most minute details. It is doubtless true that some provisions of substantive law have found their way into this enormous mass of statutory matter, and that some special branches of procedure are covered by the present Code which were not included in the original Code. Nevertheless the comparison between the two statutes reveals plainly the fact that

¹This is the address which Senator Root delivered as President of the New York State Bar Association at the annual meeting of the Association in Syracuse, January 19, 1911.

for many years we have been pursuing the policy of attempting to regulate by specific and minute statutory enactment all the details of the process by which, under a multitude of varying conditions, suitors may get their rights.

Such a policy never ends. The attempt to cover, by express specific enactment, every conceivable contingency, inevitably leads to continual discovery of new contingencies and unanticipated results, requiring continual amendment and supplement. Whatever we do to our Code, so long as the present theory of legislation is followed the Code will continue to grow and the vast mass of specific and technical provisions will continue to increase. I submit to the judgment of the profession that the method is wrong, the theory is wrong, and that the true remedy is to sweep from our statute books the whole mass of detailed provisions and substitute a simple practice act containing only the necessary, fundamental rules of procedure, leaving all the rest to the rules of court. When that has been done the legislature should leave our procedure alone.

We may well aid this simplification of procedure by applying the same principle of simplicity to certain changes in the substantive law with a view to making the practical application of the law simple; and, most important of all, we should observe that principle in determining the standards of conduct at the bar.

The condition in which we find ourselves is that, in varying degrees in different parts of the state, calendars are clogged, courts are overworked, the attainment of justice is delayed until it often amounts to a denial of justice, the honest suitor is discouraged, the dishonest man who seeks to evade his just obligations is encouraged to litigate for

the purpose of postponing them. Such a condition is not sporadic and occasional. It is continually recurrent. It is the result of a natural tendency which appears whenever the conduct of affairs in any branch of the social life of man is entrusted to a particular class of men specially qualified for that special work by learning and skill beyond the great body of their fellows. The conduct of such affairs by such a class becomes an art. The art becomes a mystery. Rules and formulas originally designed as convenient aids to the attainment of ultimate ends become traditions and dogmas, and belief in their importance supersedes the object which they were originally meant to subserve. Special training develops intellectual acuteness and fine and subtle distinctions. The sense of proportion is lost and the broad, simple, direct methods which alone are really useful in helping plain people to attain the substantial objects of practical life, become entangled in a network of form and technical refinement.

This tendency shows itself in some degree in every learned profession. It often affects the organization and control of political methods. It often affects the conduct and administrative regulation of government. History is full of illustrations of its working in religion. The development of the fine arts presents a record of a multitude of revolts against the results of its influence. It affects the development of substantive law. Most of all it characterizes the growth of legal procedure. There more frequently than anywhere else the system takes the place of the object for which the system was created. We need not go back for illustration to the Medes and Persians, or to the Priesthood of Egypt, or ask why Cato wondered that the Roman Augur could keep from

laughing when he looked a Roman Augur in the face; for the development of our own system of common law and equity is familiar to us all.

We are now in about the same condition, as respects a great mass of technical and specific rules obstructing the course of justice, as we were in 1848, when the old law and equity practice of the state was swept away by the adoption of the Field Code — that great enactment which gave form to the procedure of practically every American state following the course of the common law, and which ultimately impressed itself upon the slow-moving but considerate judgment of the English people. We are now in about the same condition in this respect as was England in 1873 when the British Parliament passed the new Judicature Act and yielded to the principle of simplicity in litigation, the allegiance which she has ever since maintained and strengthened. Curiously enough, at about the same time when England adhered to the principles of the reformed procedure, we were taking the first great step towards the abandonment of those principles by making the basis of our further development in procedure the revision of the Code by my old friend, Mr. Montgomery Throop. There is but one way to deal successfully with the condition resulting from such a process, and that is not by palliatives in procedure but by revolution in procedure. The New York enactment of 1848 was revolution. The British enactment of 1873 was revolution. And it is revolution that we need now.

Let me recall some of the effects of such a system as we now have, well known as they are to all of us. The system of attempting to cover every minute detail with legislation appropriate to every conceivable set of circumstances is to create a great number of

statutory rights which the courts are bound to respect because they are the law; which suitors are entitled to demand because the law gives them. In some cases they may contribute to the attainment of justice. In other cases they may obstruct it. The courts cannot apply the rule of justice because they must apply the law. These artificial statutory rights become the subject-matter of special litigation intervening between the demand for redress and the attainment of it.

The energies of attorneys and counsel and clients, their time and labor, are devoted to these statutory proceedings instead of being addressed to the trial of the case. Pending the disposition of the multitude of motions which it is possible to make, and which in number are often in inverse proportion to the merits of the case, the final disposition of the case is postponed. Serious and long-continued delay is the result in many cases. Witnesses die or leave the jurisdiction. Their memories become vague and the establishment of facts becomes more difficult. Suitors become tired and discouraged, or their means are exhausted. Conditions change, and the relief, when attained, is often deprived of much of its value.

The facilities for delay afforded by this system lead to innumerable defenses for the purpose of delay. These encumber the calendars and occupy the time of the courts, and prevent the hearing and decision of honest controversies. The system tends to breed a class of Code lawyers, acute and subtle, practitioners skilful in baffling the efforts of honest men seeking to get their rights and with no conception whatever of the principles of jurisprudence or of the high duty of the advocate to secure substantial justice for his clients. At their hands justice is easily tangled in

a net of form. The public estimate of the profession of the law is lowered. Public confidence in the administration of justice is weakened. The general effect of this great mass of statutory provisions as a whole is not to facilitate, but to impede and hamper the courts in rendering prompt and efficient justice.

All this is wholly unnecessary. Our courts desire to do justice; they are competent to do it; and they will do it if left to themselves under the guidance of a few simple, fundamental rules and unhampered by a multitude of statutory requirements. They are perfectly competent to regulate the procedure before them by their own rules, which they can adapt to the requirements of the cases that arise, so that whatever is necessary in any case to secure the ascertainment of the facts and the application of the law to them shall be done, and so that nothing else shall be required.

I have always thought that Judge Stephen Field's printed but unpublished little book called "Early Days in California," was most instructive to a student of the law. In the early period of the great gold excitement of 1849 some fifteen thousand men, mostly miners, found themselves collected in the mining camp of Marysville. In that hitherto almost unpeopled region there was no government and no administration, there were no officers of the law, and there were no laws of which anyone there knew anything. The need of government was apparent and the miners got together and elected Stephen Field Alcalde of Marysville. Under that title he proceeded to hold court. There was no procedure. There were no laws to describe or define his powers. There were no statutes or precedents establishing the rights of the parties who came before him; but he heard com-

plaints; and with the whole force of the general concurrence of that rude community, he required the persons complained of to answer. He tried and determined the issues. He enforced the judgments. He tried and punished offenders against those rules of right conduct which obtain generally in civilized communities, and he rendered justice to the satisfaction of Marysville and the peace and order of the community. It may be useful sometimes and it is refreshing always to look out from the refinements and subtleties of our sophisticated system for administering the law upon some simple and direct and swift enforcement of the fundamental principles of justice, and to question whether in all our elaborate contrivance of means to attain this end we may not be obscuring and forgetting the end itself.

The real strength of the tendency to make provisions for arbitration of disputes in the rules of business organizations, rests upon a feeling that, if the members of the particular trade or branch of business can get away from lawyers and the law's delays and the cumbrous technical and expensive procedure of our courts, they can have the merits of their disputes determined swiftly, certainly, inexpensively and adequately. I am inclined to think they are generally right.

Consider the recent development of law administration in the Public Service Commissions, and the Interstate Commerce Commission of the United States. They have not yet embarrassed themselves by any code of procedure. They have not had time. Yet they are hearing and determining in a most adequate and satisfactory way questions of fact and law of the most complicated nature and of vast importance.

It would be difficult to conceive of

litigation more important or more complicated than the great controversies between nations which the civilized world is more and more tending to submit to the judgment of arbitral tribunals. Yet the Permanent Court of Arbitration at The Hague has practically no rules of procedure. It can't have them because the forty-four nations who are signatories to the Hague Convention for Pacific Settlement of International Disputes differ so widely in their ideas of procedure that the adoption of any single system would be impossible. Accordingly that great Convention which first gave practical form to the hopes and aspirations that the apostles of peace on earth had been voicing for centuries, contained only a few very simple and fundamental provisions regarding the constitution of the Court and the way to get a decision from it, leaving the field of procedure, in the main, to be determined by the common sense of the parties and of the Court in conformity to the requirements of each case as it arises.

I remember hearing Mr. David Dudley Field, during the argument of a cause many years ago, ask Mr. Charles O'Connor a question as to his position concerning the effect of the pleadings in the case. Mr. O'Connor turned, and, with that intensity which characterized him (especially when dealing with someone he did not like) he answered: "I understand that under your code, Mr. Field, the plaintiff comes into court and tells his story like one old woman and the defendant comes in and tells his story like another old woman." And that was all the satisfaction Mr. Field got. The reply was intended as a condemnation of the rather simple code of that day, but I am not sure that it was a condemnation. The old-woman method doubtless has its disadvantages, but I

am not so sure that they are not to be preferred to the subtleties of the special pleader and the Code lawyer. If we could substitute for Mr. O'Connor's old woman a man of common sense with a reasonable knowledge of substantive law and a trained sense of materiality and relevancy we should have come very near the chief end and object of all legal procedure. I think it is safe to say that if we must choose between too much procedure and too little we better have too little.

I wish to guard here against the misapplication of what I have said lest it have the effect of overstatement. It should not be inferred from what I have said about our procedure that in general, considering by itself each case which does come to a final judgment, the ends of justice are not attained. As a rule, in most cases which reach that point justice is done because we have honest and competent judges and an upright, independent, fearless and loyal bar. Yet it is done in a great proportion of cases, not by the aid of, but in spite of, this vast multitude of statutory restrictions, and with an enormous waste of time and labor and expense and delay. I do not mean to be understood as asserting that a great part of the provisions contained in our Code do not point out quite reasonable and proper methods of procedure to be followed in some cases to which they seem to be applicable, and probably in the cases which the legislature has had in mind in enacting them into law. Yet in a great number of other cases they are burdensome and obstructive; and it is true in general that the more detailed provisions of law are, the more certain they are to be misfits in many cases to which they come to be applied. I do not mean to say or to imply that the members of the bar are subject to just criticism for in-

sisting in each case entrusted to them that their clients shall have the benefit of all the statutory rights which the legislature has provided. Suitors are entitled to the rights the law gives them. They are entitled to have their counsel assert those rights and to have courts award them. I do insist, however, that the law ought to be such that what a suitor is bound to do or to suffer by way of means or preliminaries leading to a final decision on the merits of his case, should be determined, as far as possible, by the common-sense requirements of that particular case, and as little as possible by compliance or failure to comply with detailed and technical statutory requirements designed to cover ten thousand different cases as well as his. I do insist that, notwithstanding the many just decisions rendered by our courts, when we consider the prevalent delay, the unnecessary expenditure of time and effort and money, the hindrance of just rights through long-continued defensive litigation without substantial merit, the litigants who abandon their pursuit of justice through weariness or lack of means, the citizens who abandon their rights rather than incur the annoying and injurious incidents of litigation in the effort to enforce them, the emboldening of the unscrupulous in whose hands delay and difficulty and expense of litigation are weapons with which to force compromise without just grounds — when we consider all these incidents of our present condition we are bound to say that the general interests of the administration of the law require a thorough and radical change.

The situation cannot be met by merely increasing the judicial force. We have often tried that expedient, but always ineffectually. The only real remedy is to be found in reforming the system.

I have said that the most important thing of all toward re-enthroning the principle of simplicity and directness in attaining the ends of justice is that we ourselves shall observe that principle in determining the standards of conduct at the bar. No system will work well unless it is applied in good faith. Even though we may escape in a great measure from the statutory restrictions which now hamper the courts in applying the rule of justice in the particular case to the proceedings in that case, the rule cannot be successfully applied unless the sentiment of the profession — the public opinion of the bar — makes conformity to that rule a requirement of honorable obligation.

What I have in mind may be illustrated by reference to two proposed provisions which have been much favored by our committees and which, it seems to me, should find their place among the simple and fundamental provisions of any system of procedure. One is, the provision that in every case a day shall be given when the parties, through their counsel, may come before a judicial officer informally for a rule regulating the further procedure in the case, covering the whole ground of pleadings, bills of particulars, discovery of documents, deposition of witnesses, mode of trial, etc. — the so-called omnibus summons provision. This would be a most useful substitute for the separate, successive motions under special statutory provisions now permitted, yet I can well see that its effectiveness could be largely destroyed if the bar generally were to attempt to evade it instead of accepting in good faith the opportunities which it would afford.

The other provision is, that no error of ruling upon the admission or rejection of evidence or otherwise in a trial, shall be ground for reversal unless it appears

that a different ruling would have led to a different judgment. Real acquiescence in such a rule by the bar would put an end to the incessant objections and exceptions which now disfigure so many of our trials. We share with England and her colonies a highly artificial and technical body of rules of evidence such as obtain nowhere else in the civilized world. These rules afford most delightful exercise for intellectual acumen, and they have some advantages. They have also great disadvantages, and it is by no means certain that in the long run they produce any better results than the simple and natural methods which obtain in the trial of cases in countries that follow the course of the civil law, and where the method of Mr. O'Connor's hypothetical old woman controls in the giving of testimony as well as in the statement of the case. The fundamental disadvantage of this Anglo-American system of rules is the fact that, when strictly and technically applied, they do not correspond with the instincts or the habits or the ideas of common sense of any plain, sensible layman in this world. Their strict application continually impresses clients with a sense of injustice because they think they are not getting their case before the court, and it impresses witnesses with a sense of being bottled up and prevented from telling the truth. In the strictness and technicality with which we enforce those rules we go far beyond England or, so far as I know, any of her colonies. I think we stand alone among civilized countries in the obstacles that we interpose to the giving of testimony in the most natural way. How common it is to see a witness trying to tell his story, hindered and worried and confused by being stopped here and there again and again by objections as to irrelevancy and immateriality and hear-

say, when what he is trying to say would not do the slightest harm to anyone and would merely help him to state what he knows that is really competent and material. Such a rule as I have now mentioned would take away the faint hope of a technical reversal which underlies such objections; but the legal right to object would continue, and incessant technical objections would probably continue to prolong many trials and impede the speedy ascertainment of the merits of many causes unless the bar in good faith were to accept as a rule of conduct that no objection should be made or point raised not really affecting the merits.

I presume upon your not remembering something that I said at Rochester a year ago to repeat that we are too apt at the American bar to act as if in litigation we are playing a game, with the judge as referee of the game. Only the bar itself can cure that, and realize the highest usefulness of a noble profession by devoting its learning, its skill and its best effort to securing for every suitor, as promptly as possible, a fair and final judgment on the merits of his case.

The complication of our procedure is only one phase of a general tendency affecting the whole field of government and law in the rapidly developing, intricate and interdependent social conditions of our time. In the fundamental act at the polls, when the sovereign people select those who shall make the laws and shall administer them, the voter has placed in his hands a ballot of enormous size, sometimes too large to be spread out fully in the voter's booth, and with such a vast array of names for such a great number of offices to be filled, and with so many questions to be decided in the affirmative or negative, that the best trained and best in-

formed mind must fail to do its whole duty intelligently. The need for simplification here is recognized by the advocates of the Short Ballot, who have my most sincere good wishes.

The mass of our statutes has grown so great that the volumes constitute a library in themselves and require another library of indexes and digests and guides to ascertain what the law is. We are continually trying to simplify this condition by consolidations and revisions and codifications, all of which are useful.

The mass of judicial reports has grown so great that it begins to seem as if before long we shall have to burn our books like the Romans and begin anew. And indeed, where decisions can be found in support of every side of every proposition, authority is in a great measure destroyed and we do begin anew in determining by the light of reason

which authority shall be followed. I wish that our judges could realize officially what so many of them agree to personally — that restating settled law in new forms, however well it is done, complicates rather than simplifies the administration of the law; that the briefest of opinions usually answers the purpose of the particular case; and that the general interests of jurisprudence justify reasoned opinions only when some question of law is determined which has not been determined before by equal authority.

On every side the increasing complication of life calls for vigorous and determined effort to make the working of our governmental system more simple. Our primary concern as lawyers associated to consider the public aspects of our professional work and to promote the usefulness of the profession to the community, is with our own procedure.

Curia Advisari Vult

By MR. JUSTICE DARLING¹

A PARODIST'S success to crown —
 The travesty I wrote,
 When first I wore my wig and gown,
Green Bag can gravely quote —
 Nay, praise it, as a thing apart,
 Where legal genius flames,
 While each full phrase betrays the art
 Of learn'd Lord Justice James.

In sober earnest or in sport,
Green Bag, did you mistake
 For wise pronouncement of the Court
 A jest no Judge could make?

¹See page 162 *infra*.

That Florafountin Murder Case

By A. G. ZIMMERMAN¹

[*Note.* — The following story is founded substantially on fact, although the author has not resisted the temptation to take a few liberties with regard to non-essentials and, as he says, "in supplying more or less probable details otherwise obscured by lapse of time." The author took part in the lost will case with Senator LaFollette many years ago. The state's attorney is at present a leading lawyer and politician of the Northwest. — *Ed.*]

THE sheriff of Hamilton county, located little more than a hundred miles from the western shore of the Mississippi, had passed a convivial and most agreeable afternoon with the judge of the Orphans' Court.

Judge Comradowsk was one of the last of the peculiar judicial tribunes not uncommon in the early days of the West. His characteristics would come under the head of personality rather than that of personage. He had been on the bench for a score of years or more and though an incorruptible and genial old burgher, his sole even pretended other qualification for the position was his ability as a vote-getter to defeat any lawyer who had the temerity to try conclusions with him at the polls. He never had been regularly admitted to practice at any bar except where strong liquid refreshments were dispensed, and he was a past-master at consumption there. He made no claim to any knowledge of the law and had but little acquaintance with the English language.

This judicial representative had reached that stage of his career when, as a result of a too persistently practised life of pandering to the appetite, his gouty, barrel-shaped proportions made it impracticable for him to walk. He could only waddle a few steps at a time. He could not get into a car-

riage or hack. His hands and feet were covered with enormous gouty protuberances that must have been most painfully inconvenient.

To enable him to get about and perform his judicial duties, Judge Comradowsk had for his regular daily use a drayman with a one-horse, low-wheeled flat-topped dray, which was the only vehicle at the county seat that would at the same time accommodate the ample judicial proportions and the accompanying gouty infirmities.

The drayman with his dray would call at the judge's residence in the morning and from the edge of a low horse-block, the judicial entity would seat itself at the side of the flat-topped platform of the dray between the fore and aft wheels, with legs dangling down and the arms encircling a stake at either side. In this manner his honor would be taken down town, usually making a stop at one or two drink emporiums for refreshments before proceeding to the courthouse. The entrance *ex necessitate* was at the rear where there was but one step.

After the conclusion of the usual morning or afternoon judicial duties, the judge would wend his way homeward in the same dignified dray-like way, with customarily the same stops for refreshments — though on the afternoon journey homeward a more extensive and prolonged interlude at a favorite

¹ Judge of Dane County Court, Madison, Wis.

refreshment parlor would usually be made.

It was at a county seat so honored, and on an afternoon when the judicial labors were timed in minutes and the after refreshments and rest in hours, that the sheriff had in the company of his honor found life to be "one grand sweet song," until rudely disturbed by a base and surreptitious meddler — an anonymous letter writer.

The judge had just simultaneously found the bottom of a stein and the conclusion of his story about a protracted lost-will case he had recently tried in court.

In the story there figured an account of his honor's persistent unslaked thirst while listening to very long erudite legal arguments on the question of the admission of vital testimony — the disputatious lawyers being a distinguished senator from abroad, *pro*, and a militant major of home talent, *con*.

"How did you finally decide the point, Judge?" asked the sheriff, as he too reached the bottom of his stein.

"Vell," said the judge smilingly, "I tolt 'em dat I guess ve better let de magher hav his vay, and den adjurned de case quick."

After the laugh which came easily from the surrounding cronies to the tune of the flowing steins, the deputy produced the anonymous note for the sheriff.

Apparently written with a labored and unaccustomed hand it read as follows: —

"Sheriff of Hamilton county —

"Deer Sur: If you will go to the Pete Slidems place a half-mile out from Florafountin, you will find the house empty and nobody there. Nobody knows where Pete and his wife and Bill Sykes who was sweet on her is and nobody had saw any of them for a long

time. You will find things all tore up in the house terribl and a klot of blud on the kitchen floor and it looks like there had been some fowl play — You better look after things there rite away, and go after Pete who was the last of the three saw alive. They say he went west and let out something about medicin hat, maybe thats a place somewhere out west. Yours truly."

There was no signature nor indication of place or date.

As the sheriff laboriously deciphered the scrawl he became gradually more and more mentally alert and when he had reached the end he was almost sober.

"That's a hell of a note," he remarked, blissfully unconscious of any possible pun.

"Vot's in it?" inquired his honor, who had been gravely blinking the little blue eyes imbedded in the fat cheeks and looking on during the perusal.

"In what?" remarked the dazed officer, and then realizing the purport of the enquiry, continued, "Oh, in the letter! Well, there's hell in it, and murder most likely."

Pending the reading, as there appeared no immediate prospect for more drinks, the two upholders of the law had been left alone by the hangers-on.

Without further elucidating, the sheriff proceeded to re-read the note, and as he grasped more and more of its dire contents, he became as sober as a judge — always ought to be.

Then feeling the need of a division of responsibility, he explained the matter to the stolid judge who also became deeply interested, as it was among his multifarious duties to hold preliminary examinations in criminal cases.

The two officials became more and more deeply absorbed as they discussed

the various possibilities. The horror of the situation began to grow upon them.

A third reading of the spooky paper, which was now gingerly handled as though it too was criminal, disclosed the additional fact that there was probably a double murder.

As the 'shady gossip concerning Pete Slidem's lady, and the rumors of quarrels among the trio were recalled, the uncertainties of Pete's violent temper when in liquor made the most unheard of horrors possible.

The responsibility weighed too heavily upon the pair, and they bethought themselves of the state's attorney upon whom to unload. Enquiry, however, developed that the prosecuting officer was hundreds of miles away enjoying a vacation among the delightful and congenial associations of West Carlsbad Springs.

So the immediate responsibility could not be shifted, and it was thought best for the sheriff flanked with a couple of deputies, to go and look over the ground at Florafountin and see what there was "in it," before calling the state's attorney home for a possible wild goose chase. After all it might be a hoax.

It took but a very cursory examination of the locus to convince the sheriff that a horrible crime had been committed, the contents of the mysterious note having been more than verified in every particular.

Josephus Demos, Esq., the brilliant young state's attorney of Hamilton county, was enjoying himself at one of the numerous alleged eighth wonders of the world — the famous rotunda hotel at West Carlsbad. He had come in contact with a bunch of Chicago aldermen who were down recuperating from a strenuous campaign.

The entire party were enjoying their after dinner cigars and telling stories

in the indoor palm garden under the protection of the rim-supported, two-hundred-foot circular atrium.

There was being related a purported new poker story, though it is probable the yarn was well known to General Schenck when, while Ambassador to Great Britain, he summarized the rules of the game for the benefit of the English nobility a generation or so ago.

The story aptly illustrates the dangerous hold with which this distinctly American game grips its devotees, and ran something like this: —

A good and generous citizen whose one weakness was poker, one day finally cashed in all his earthly chips, and the last balance being on the right side, unexpectedly found himself in heaven. After wandering about like a lost sheep for a time, he thought he would like to see the other place and accordingly applied to St. Peter for a pass. His request was at first peremptorily refused as being contrary to all precedent, but in the end he got a pass enabling him to make the investigating trip and return.

He did not get far in the lower regions until he came across a choice collection of his old cronies engaged in his favorite game.

After the conventional greeting he proceeded at once to sit in the game and asked for a stack of chips.

"Got any money?" asked Beelzebub, who was banker.

"No, I haven't," replied the visitor, "but lend me some chips and I'll soon win and have plenty of money."

He was politely but firmly informed that that method did not prevail there and that he must pay in advance to get in the game.

He walked off disgustedly, but soon returned with a roll of asbestos bills as big as his arm, and demanded some chips.

His old friends were astonished at the magnitude of his wealth and wanted to know how in hades he got all that money.

"Huh," he contentedly replied, as he shuffled the cards, "I sold my pass."

Just as this story was finished, a colored messenger handed Josephus Demos a telegram from the sheriff of Hamilton county, which read:—

"Looks like awful murder at Flora-fountin. Better come right away."

"That beats hell," softly remarked the state's attorney to himself, and he wasn't thinking of the poker story just at that particular moment either.

There was no help for it so he "went," and was soon in the midst of an exciting investigation.

It seemed a clear case of murder.

All the indications at the Slidem place were of a desperate struggle and hurried escape. The final deed evidently took place in the kitchen. There was broken furniture, and marks of apparent blood in various places. Near the centre of the room on the floor, where the unfortunate victim, or one of them, evidently finally succumbed, was quite a clot of clearly apparent dried blood.

True, there was no body found as yet, but the murderer evidently cunningly disposed of this evidence of his crime. The body might be buried somewhere in the vicinity, or what appeared altogether probable, from some dragging marks in the soil, the body of the victim was disposed of in the Stone River which flowed peacefully along only some twenty rods away.

Neither of the three people who inhabited the Slidem place had been seen for several weeks. There were no neighbors nearer than half a mile away, and owing to the evil reputation hovering over the ill-omened trio, everybody had long shunned the locality.

No trace could be obtained of Bill Sykes or of Slidem's wife.

Pete Slidem had been last seen alive, but nobody knew where he was. The only clew as to his whereabouts was contained in the mysterious anonymous note.

The origin of the note itself was a profound mystery. The envelope in which it came bore only an indecipherable impression which indicated that it was probably posted in a railway mail car somewhere. But where, was a mystery.

There were two points in sight to work on.

One was to determine definitely, if possible, whether a murder was in fact committed, by having the clot of blood scientifically examined.

So the state's attorney had the piece of board with the apparent blood-clot thereon, sawed out of the kitchen floor and placed in the custody of the expert public chemist at the capital for microscopic examination.

The other clue was to follow out the suggestion of the anonymous note and try to trace Pete Slidem in the Alberta country in Canada in the neighborhood of Medicine Hat.

After some astute and most commendable detective and investigating service that would have done honor to Sherlock Holmes, the resourceful state's attorney located, in the provincial bastille at Medicine Hat, a man under the apparently assumed name of Pierre Slickem, whose description tallied in every particular with that of the missing Pete Slidem.

The similarity of name was also a suspicious circumstance, and, indeed, under the application of the police sweat-box proceedings of the third degree, the prisoner admitted his identity. It appears that he was in jail simply on a minor charge of vagrancy under an inde-

terminate sentence with a six months' limit.

The Canadian authorities readily agreed to release Slidem from jail and hand him over to properly constituted American authority upon presentation of extradition papers.

In this direction progress was highly satisfactory.

The next step was the report as to the blood-clot on the piece of kitchen floor.

The public chemist had delayed his report until he could get an independent verification if possible from a high expert authority of the state medical profession. After elaborate and most thorough tests these distinguished experts practically agreed — one being certain that the blood was either that of a human being or of a hog, and the other so far agreeing with his brother microscopist, but was moreover inclined to think that in this case he could differentiate and say with reasonable certainty that it was the blood of a human being.

It is a well-known, accepted scientific fact that the blood corpuscles of the human and hog are as nearly alike as some other characteristics of the two mammals, and that it is usually considered impossible to distinguish between them.

However, as the hog proposition was out of the question in this case, the tentacles of the law were getting a firm grip upon Mr. Pete Slidem, alias Pierre Slickem, as a murderer who was likely to get his due. It evidently was a cold day for him when he struck Medicine Hat where the Mississippi valley blizzards are supposed to have their origin.

Before the red tape circumlocution between the foreign office authorities at Ottawa and Washington could reach a finality as to extradition, Pete Slidem, apparently convinced as to the futility

of opposition, consented to waive the extradition proceedings and to cross the international boundary line in the joint custody of the Hamilton county sheriff and the Canadian police authorities. The culprit therefore made the long trip with the sheriff and eventually was safely lodged in the Hamilton county jail.

This feat, together with the remarkable and conclusive blood examination affair, brought the state's attorney felicitous congratulations from the entire county.

It was apparent that if the sometimes admirable French criminal system were in vogue, making it practically necessary for an accused affirmatively to prove his innocence, the prisoner would be as good as hanged already.

But there was one most vital element lacking which was privately causing Josephus Demos much anxiety.

In the most plausible and convincing case of murder it is necessary to produce or account for *the body of the victim!*

The most searching investigation failed to cause either the neighborhood or the river to give up a body.

And no victim came forward to fill the hiatus.

Of course Bill Sykes and Pete Slidem's wife had both mysteriously disappeared under most suspicious circumstances, but had they disappeared from the face of the earth?

Who could say that they, or either of them, were dead! If they were, Pete Slidem no doubt had killed them, *but were they dead?*

At this juncture, and within twenty-four hours of his arrival, Pete Slidem himself came to the rescue. He had theretofore refused to talk, but now he had sent for the state's attorney and apparently intended to make a

clean breast of it. He had designedly been kept in ignorance as to the state's anxiety, but appeared to be taking things quite coolly. He of course knew all about it.

But Pete Slidem started his momentous confession of that awful murder by asking embarrassing questions. He wanted to know if the state's attorney had found the bodies of his wife and Bill Sykes.

The wily Josephus parried by suggesting that the prisoner was no doubt well-informed as to where the bodies were.

Pete was thought to be facetious when he then allowed that the bodies were probably somewhere in Iron county in a mountain state where they originally came from.

This seemed preposterous, but the accused murderer was resting comfortably from his long journey, and for the time being refused further information.

On a venture, the authorities of this Iron county were communicated with, and the astonishing information was elicited that the "bodies" of both Mrs. Slidem and Bill Sykes were there, were in fairly good condition, and, moreover — *were alive!*

This of course ended "that awful murder case."

Subsequent investigation of this curious denouement of what from all reasonable deductions of apparent facts pointed to the commission of a horrible crime, developed the probable facts.

It appeared that Pete Slidem, his wife, and Bill Sykes who was a distant connection of madam, had engaged in a protracted, final, recriminating, tongue-lashing quarrel. There had been no serious physical violence, but as a conclusion the three determined to separate permanently without delay. Mrs. Slidem and Bill Sykes took a midnight train for

their old home in Iron county and there was no satisfactory evidence that their relations were or ever had been improper.

A day or two thereafter Pete Slidem had secretly gone to the Alberta county with the view of eventually selling out in Hamilton county and settling in Canada. Arriving at Medicine Hat he had gone on a protracted spree, lost all his money, and been incarcerated in jail as before stated.

The blood found in the kitchen resulted from the *killing of a chicken* which Pete had prepared for his dinner before he went away, the expert microscopic examination to the contrary notwithstanding.

The mysterious note was never satisfactorily explained, but the handwriting was very similar to Pete Slidem's, and it was the state's attorney's theory that Pete had written and caused the note to be mailed to the sheriff for the purpose of getting out of the Canadian jail and free transportation home into the bargain. No more satisfactory explanation was forthcoming.

Pete Slidem was discharged without apologies. There was no statute under which he could be punished for sending the anonymous note, even though the charge could be brought home to him.

After all there did not seem to be any serious misstatements in the note. Even when referring to the blood-clot, and saying "it looked like there had been some *fowl play*," he seemed to keep strictly within the truth though he probably was guiltless of an intentional play on words.

The state's attorney ventured into the county seat's main refreshment emporium and explained the final situation to his fellow guardians of the law.

"That ends the matter, and we are the only victims," he concluded.

"It beats hell," ventured the sheriff as a final effort.

"It vos hell," echoed Judge Comradowsk, as he again emptied a stein.

The lawyer ordered a couple of more steins as a finale, and took a package of cigarettes himself. He presented the strange anomaly of being a total abstainer and an office-holder, in a county where teetotalism was almost a crime.

As a further evidence of the state's attorney's genius, it may be added that he was later rewarded by being made the head of a great political party in his state.

Query: What would the expert testimony have done to Pete Slidem and his story if Bill Sykes and madam had — well, affinitized and lost themselves in Labrador, for instance?

The Battle of the Names

By SIRIUS SINNICUS

"Ginglukenzarn and Puzellipientazco Arraigned for Assault. Gonzarowitcz was the Complainant."— *Heading of News Item.*

VICTOR GINGLUKENZARN with all his force
His name at Andi Gonzarowitcz threw;
And Michal Puzellipientazco, of course,
His own name added too.
With such a weighty mass attacked
The danger sure was great,
And Andi but a little lacked
Of a most dreadful fate.
But nimbly dodging from the path
He missed the impact awful
Of those two names propelled by wrath —
Which certainly was lawful.
Before the magistrate straightway
He haled the men pugnacious.
The court clerk spent an awful day
Upon those names. Good gracious!
The prisoners were hard to keep;
The cells were all too small.
They had to put those names to sleep
Away out in the hall.

What One has to Learn to be a Lawyer

By EDMOND IRVING LA BEAUME

WHEN a boy begins to think about choosing his serious vocation in life he finds very little definite information to help him in making the choice. Most of us waste a lot of time before we hit upon the occupation for which we are best fitted. This is often unavoidable, but in the case of the professional man there is very little time to waste. The purpose of this article is not to draw men into a somewhat crowded profession by extolling the glories of a life at the bar, but to show those who are thinking of becoming lawyers some of the difficulties they will encounter, with hints for overcoming them. And when I say, "those who are thinking of becoming lawyers," I mean lawyers who intend to practise their profession. I have not the space to speak of the law as an asset to the business man or the politician.

First, what are the natural qualifications that a lawyer should possess? Conversation with those who are preparing men for the bar shows that the lay mind is permeated to an absurd extent with the mistaken idea that the argumentative boy is cut out by nature for a jurist. "I receive letters from fond parents almost every day," said the dean of one large law school, "telling me that their sons will make fine lawyers because they are always arguing. There never was a greater mistake. These people think that a lawyer spends his time disputing in a court room. As a matter of fact, even court lawyers, who are a very small part of the legal profession, do about four-fifths of their work outside of court."

Remembering then that the mere fact that you are fond of contradicting

your elders, and that you sustain your contradictions with aggressiveness and skill, does not necessarily signify that you will one day be a member of the Supreme Bench. Let us inquire into some of the things that are really essential to the successful lawyer. The authority just quoted gave as the mental attributes the lawyer should possess, "the power of clear logical thinking, with the intellectual grasp that enables one to take in many sides of a situation readily, and to distinguish between problems which look alike but are not; a keen sense of justice, and enough common sense to know instinctively, at least in a general way, what is right for a man to do and what is wrong."

A writer in a legal periodical says: "The law is an intensely intellectual profession, and the successful study of our jurisprudence requires the mastery and control of one's intellectual processes, and the development of one's reasoning faculties, to a degree that is ordinarily attained only after long disciplinary study." Thus we see that success at the bar rests upon something more solid than an unwillingness to admit oneself in the wrong and an ability to give to the wrong the semblance of the right.

Accepting the idea that the law is a scholarly profession, how shall we prepare for it? There are two roads open. You may prepare for your bar examination either by attending a law school or by "reading" law in an office. The former method is preferable and today about seventy per cent of our lawyers come to the bar by way of the schools. In many cases, however, the latter

method is the only practical one. It is a good one too, under proper conditions, and it will be discussed later.

For those who can do so it is advisable to take a college degree before entering the law school. The Harvard and Columbia schools demand this. Some of the other institutions require two years, others one year of college work, and the rest simply inforce, in a more or less scrupulous fashion, the presentation of some proof of a high school education or its equivalent. The law school course usually covers three years. There are some schools in the South which offer a two years course, but although they have some warm defenders, all that they can be said in favor of the short course seems to be greatly offset by the fact that there is much talk among the larger schools of lengthening the course to four years.

A quotation or two from the writings of legal educators will explain why a college degree is preferable. We find this in the article just quoted: "The law teacher realizes, more keenly probably than any one else, because his attention is constantly challenged to the fact, that, as a rule, the strongest students in law are those who had an extended and systematic preparatory training." Another writer says: "We take it to be conceded at least among our brethren, that there is no profession or calling which requires a broader, deeper, fundamental knowledge than the profession of the lawyer. The various and diverse phases of life with which it deals necessarily require this for the successful practitioner, so that today there is a universal demand and a general trend among the law schools of our country requiring a broader fundamental knowledge, and a higher mental training on the part of

the student who desires to pursue the law course."

The belief has been expressed that it does not make any difference what the boy who intends to enter the law school studies in college, as long as he gets the mental training that comes from following any systematic course of study. It seems to be the more general opinion, however, that a knowledge of certain definite subjects aids materially in the study of law. Most of these would almost surely be included in any well-rounded college course, so that the boy who goes through college before entering the law school gets his mental training and his useful knowledge together. But for the boy who has only the time and money to go through high school or at most to spend a year or two in college, all the knowledge he can acquire which bears either directly or indirectly on the study of law, becomes doubly important.

To understand the law one must know something of its historical development. The law is not a set of rules written out in statute books which can be learned and applied like mathematical formulæ. It is a living thing that is subject to change like all living things. In order to understand it one must be familiar with the processes of change and development through which it has passed in arriving at the point where it is today. A lawyer who knows simply the law of the community in which he practises is like an engineer who knows his formulæ by rote but knows nothing of the mathematical principles involved in their derivation. But just as it is impossible for an engineer to carry all the necessary formulæ in his head, it is impossible for the lawyer to carry in his head the whole body of law that he is called upon to use. Both have their books to fall

back upon and both are helpless without them, while the lawyer who understands the principals upon which his formulæ have been built up, can construct the law or the formulæ in an emergency. At best the man who knows only rules can approach the likeness of a machine which is useless if one of its parts is lost. The man who knows principals can learn the rules with less effort, and if he lose one of them he is no whit dismayed for his mind is stored with resources for meeting such a contingency. To be successful a lawyer must be resourceful. The law is not an exact science like mathematics; it is more subject to change, and for this reason it is all the more important that you who intend to use it should understand its principles so that you will not gape stupidly if a rule is wiped away and even your books do not give you the new one.

And as we have said, these principles can only be understood in the light of their historical development. In an address made as president of the Association of American Law Schools, Prof. W. P. Rogers said: "The development of civilization and the advance of civil government are so interwound with the growth and development of the law, that in pursuing either, one cannot avoid the other, and the student who has completed a course in history is delighted and charmed later with his legal studies, when he discovers himself frequently crossing and traversing familiar paths." You who wish to be a lawyer cannot acquaint yourself too thoroughly with history—particularly social and constitutional history.

The so-called "common law" which is the law of all but one of the states of the Union, is based upon the common law of England, which in turn goes back to Roman law for its inception.

Thus we may narrow down the most important part of our program of historical study to that which deals with Rome, England and the United States, as far as it is possible to study the history of one of these without reference to that of neighboring civilizations.

Probably the subjects of next importance in leading up to the study of law, are economics and social and political science. At least an introduction to these studies is found among the courses provided for the freshman or sophomore year in most colleges, but they are seldom taught with anything like adequacy in the high school. It is for the student who must combat the disadvantage of not having a college education, to gain by private study as thorough an insight into them as possible.

Attention to the art of written and oral expression cannot be too strongly urged. The former is necessary to all lawyers. The latter is necessary to some, and is a useful accomplishment to all. To quote Professor Rogers once more: "We should all agree that one cannot take too much of what is generally designated as the course in English, for the lawyer who can use with fluency and accuracy the words of the English, language is well equipped for the law though he may be ignorant of other languages." Of oral expression he says: "And to every young man who contemplates a life at the bar, I would say, miss no opportunity to cultivate this art. Take advantage of every occasion which gives you a chance to think and talk in public."

As accuracy is one of the pre-eminent requirements of the legal practitioner, mathematics, and other studies which induce it, are of great importance as mental training. When you present a case or draw up a brief the watchful adversary will take advantage of any

inaccuracy on your part, and you should begin early to cultivate that sureness in your work that will come at first only with conscious, methodical painstaking, but which in time will become a habit of incalculable value to you.

There have been so many good lawyers in this country who never saw the inside of a law school, that it is impossible to ignore the law office as a place to prepare for the bar examinations. But never think that because you do not have to present a certificate to enter an office that you can afford to neglect the preparatory study that the certificate stands for. On the contrary, the boy who has let his mind run wild and undisciplined will stand a better chance in the law school where his work will be systematized for him, and where he will be under the guidance of instructors, than in an office where he will have to rely on his own resources to a far greater degree. Such a boy has no business to study law anywhere, but least of all in an office.

If you are sure that you are mature enough to keep up a strict course of study more or less by yourself, the first thing is to find a lawyer who will take enough interest in you to direct your work. It is too much to suppose that you will find one who can spare the time from his practice to give you the same attention that you would receive from the professors in a law school, but your road will be a hard one indeed if you fall upon a man who takes you in simply to secure your services free. For in these services lies the pit-fall most to be dreaded. From the first day you enter the office you will be able to make yourself useful in some way,

if only by finding a book on the shelves. And as time goes on you will become accustomed to common procedure and will be intrusted with more and more important work. You will soon know more of practice than the average law school man ever knows on graduation, but the great danger is that you will be lead to neglect your text books for the practical work. If you do you are lost. You may be admitted to the bar, but as has been said, you can never be anything but a wooden, resourceless, machine-like lawyer, if you are ignorant of the theoretical side of your profession.

Do not decide to be a lawyer unless you can make the sacrifice necessary to be a good one. If you have an independent means of support that will enable you to pursue your studies tranquilly, and will carry you over the first years at the bar which usually bring in a rather meagre recompense, your case is not such a difficult one. But if you must earn your living as you go along, the necessary sacrifice will be great, and you should face it squarely before you start out.

It is from this generation of young lawyers that the judges of the next generation will be chosen. In any community a corrupt bar will produce corrupt judges, and an ignorant bar will produce ignorant judges. The quality of the law depends ultimately on the competence and integrity of the practising lawyers, and whether you are destined to preside over the highest court, or to be a humble practitioner in the lowest, you should feel that the responsibility for meting out justice to your fellowmen rests upon your shoulders.

The Thirty-fourth Annual Meeting of the New York State Bar Association

THE reform of procedure was the principal topic considered at the thirty-fourth annual meeting of the New York State Bar Association at Syracuse, Jan. 19-20. The keynote of the meeting was struck by President Elihu Root's notable annual address, which broadly dealt with the subject, "Reform in Procedure." Almost every speaker, whatever the subject of his remarks, recognized a general criticism of the courts.

The convention opened on Thursday morning at ten o'clock, Senator Elihu Root presiding. A good share of the morning session was taken up with the reports of committees.

INCOMPETENT JUDGES

Frank criticism of the Supreme Court Justices of the state was made by Adelbert Moot of Buffalo, a former president of the Association, at the afternoon session. In the course of a paper on the topic, "How can We Improve Our Courts?" he produced tables of figures showing the days upon which the Justices held court, and said that the only judicial district from which there had been no complaint was the fifth district, in which Syracuse is situated.

"The trouble with the New York Justices," said Mr. Moot, "is that they work too short hours, too few days and are altogether too incompetent when they do work."

He regarded it as a failure of duty when Judges work from eleven in the morning until four in the afternoon.

The New York City members were most heartily in favor of the proposed bill relating to body executions. Several up-state lawyers were opposed and

on the final vote there were twenty-nine against accepting the committee's report, and fifty-two in favor, and the committee will go again to the Legislature to secure, if possible, the change which Justice Hughes was so anxious to bring about.

Cases were cited in New York where men had been practically imprisoned for life on failure to pay judgment in civil actions. It was the sense of the report that all cases where there is actual fraud or conversion should be treated under the criminal laws. "Where there is no conviction," they said, "there should be no imprisonment."

The Committee on Bankruptcy reported in favor of the introduction of the Shirley bill, which fixes compensation for receivers, and the report was adopted.

THE CRIMINAL INSANE

The report of the special committee on the commitment and discharge of the criminal insane aroused considerable discussion. The committee referred to the scandal of sham pleas of insanity and as a remedy offered the following proposed enactment:—

If, upon the trial of any person accused of any offense, it appears to the jury upon the evidence that such person did the act charged, but was at the time insane, so as not to be responsible for his actions, the jury shall return a special verdict, "guilty, but insane," and thereupon the court shall sentence such person to confinement in a state asylum for the criminal insane for such term as he would have had to serve in prison but for the finding of insanity; and if, upon the expiration of such term, it shall appear to the court that such person is still insane, his confinement in such asylum shall continue during insanity, and further, when such a verdict of "guilty, but insane," is returned in a case where the penalty for the verdict of guilty against

a sane person is death, such sentence for the insane person thus found guilty shall be for life; but in all cases the Governor shall have the power of pardon, after such inquiry as he may see fit to institute upon the question whether it will be safe to the public to allow such a person to go at large.

The committee did not feel warranted in asking the Legislature to pass such a law just now, but asked that its report be submitted to all the officers of institutions for the insane and others who are interested in the question so that the bar may get a fuller knowledge on the subject.

The Association adopted resolutions asking the Court of Appeals to amend the rules as to the admission of candidates to the bar so as to raise the standard of education and character, "that the profession may be placed upon the high plane to which it justly belongs."

John Brooks Leavitt, in discussing the report on abuses of the contingent fee, said that the committee had met with incredulity, apathy and hostility, and stated that the profession generally was not awake to the need of regulation.

SALARIES OF JUDGES

As a result of the action of the Association endorsing the Moon bill, the following letter was sent to the White House:—

Syracuse, N. Y., Jan. 19, 1911.

The President, Washington:—

The New York State Bar Association, in annual convention in the city of Syracuse, earnestly and pursuant to unanimous resolution, petitions and urges that the salaries of the judges of the federal courts may be increased to the just and reasonable amounts proposed by Mr. Moon of Pennsylvania. The present salaries are both inadequate for the suitable support of those exercising the judicial office, which excludes the propriety of other gainful occupations, and insufficient compensation for the service to which they devote their lives and sacrifice their professional opportunities.

Elihu Root, President.

Frederick E. Wadhams, Secretary.

Attorney-General Wickersham took as the subject of his address delivered on Thursday evening, "Concerning Certain Essentials of Republican Government." The banquet afterward given to Mr. Wickersham and the State Bar Association by the Onondaga County Bar, on the same evening, was a brilliant affair.

CRIMINAL PROCEDURE

Adolph J. Rodenbeck of Rochester, Judge of the Court of Claims and chairman of the Board of Statutory Consolidation, made an address on Friday afternoon, on "The Reform of Procedure in the Courts of the State of New York." The evils of the present criminal procedure were gone into fully by Judge Rodenbeck, who said that the same treatment which has been recommended for the civil practice might be applied to the criminal branch. It could be classified, consolidated and revised to great advantage.

The speaker repeated the ten recommendations offered by the committee of the American Institute of Criminal Law and Criminology (see 23 *Green Bag* 92, under "Criminal Procedure"). When the classification, consolidation and revision of the practice acts have been accomplished, some check upon the too frequent and ill-advised amendments should be provided, said Judge Rodenbeck. If no statutory board can be secured by appropriate legislation a strong committee of the Association should be able to preserve the integrity and symmetry of the practice.

Following the reading of Judge Rodenbeck's paper, the executive and law reform committees met to discuss the extent to which the practice of the courts should be revised.

The Association endorsed a project for the reform of medical expert testimony,

approving a bill providing for the appointment by the different Appellate divisions of the state, of not less than ten nor more than one hundred and twenty physicians for each district who are to be the only experts who may be sworn. They would be paid by the counties.

The report of the committee on the Torrens system of land registration, showing how the law still requires strengthening by amendment, was adopted by the Association.

Senator Root was the toastmaster at the annual banquet, held at the Onondaga Friday evening, and the speakers included Attorney-General Wickersham; former Chief Judge of the Court of Appeals, Charles Andrews of Syracuse; Mr. Justice William Renwick Riddell of the King's Bench, Toronto; Judges Irving G. Vann, Frank H. Hiscock and William E. Werner of the New York Court of Appeals; former Governor Horace White; H. T. Kelley, who represented the Toronto bar; M. L. Garneau, who represented the Montreal bar; Chan-

cellor James R. Day of Syracuse University; J. Newton Fiero, dean of the Albany Law School; James A. Lawson of Albany, and Rev. Dr. E. A. Burnham.

Mr. Justice Riddell spoke in favor of arbitration for the settlement of disputes between nations. He advocated immediate and extensive expansion of the courts of international arbitration. He expressed the belief that the recent speech of President Taft, in which the President declared that all international disputes should be referred to a court of arbitration, regardless of the nature of the quarrel, marked a new epoch in world history.

The following officers were elected: President, Senator Elihu Root, (re-elected); secretary, Frederick E. Wadhams of Albany; treasurer, Albert Hessberg of Albany; vice-presidents, first judicial district, William G. Choate; second, Edward M. Shepard; third, Lewis E. Carr; fourth, Thomas Spratt; fifth, Jerome L. Cheney; sixth, Israel T. Deyo; seventh, Edward Harris; eighth, Franklin D. Locke; ninth, John F. Brennan.

The National Civic Federation

PRESIDENT Seth Low called the eleventh annual meeting of the National Civic Federation to order January 12 at the Hotel Astor, New York. Mr. Low said that as the result of the efforts of the Federation and the American Bar Association, it was likely that within the next few years uniform laws would be enacted by all of the states covering the regulation of corporations, workmen's compensation and compulsory arbitration. There had been organized, Mr. Low said, state councils in twenty-three states and the District of Columbia, and as the result of this action

these councils and the executive committee of the Federation were working to push through the uniform laws already decided on without delay.

Gilbert H. Montague, William Dudley Foulke, Samuel Untermeyer and others who have been active participants in the enactment of the anti-trust legislation by Congress in the several states, outlined their views on the subject.

In place of the Sherman law, Mr. Untermeyer, in common with Prof. J. W. Jenks of Cornell, Edgar A. Bancroft, counsel for the International Harvester Company, and others, advocated federal

license or incorporation of trusts and their regulation by a commission, with such powers as that established by the Canadian combines act of May, 1910.

On the second day, Hon. Alton B. Parker being in the chair, the entire morning was given up to a symposium on the need of legislation. Banking, taxation, insurance, pure drugs and foods, regulation of railways and regulation of corporations were among the matters discussed.

"We are one great family of states," said Judge Parker, in his opening remarks, "and there is no need why New York State should take advantage of the citizens of California, Minnesota or any other state. There is no reason why there should not be a uniform corporation law. If there were, no one state, for the purpose of adding money, could then set loose corporations with charters so broad that many states would not think of granting them for a minute."

The first subject discussed was good roads building by John A. Stewart, chairman of the National Board of that name. The building of good roads he declared was a matter of economy and had no relation to politics. He said that he hoped that the Cocks bill would be passed, which would make the building of roads a national matter.

Amasa M. Eaton of Providence, R. I., followed with an address on the need of national uniformity of laws in commercial bills.

REFORM OF PROCEDURE

One of the most important subjects brought before the morning session was the report of the committee on reform in legal procedure, read by its chairman, Ralph W. Breckenridge of Nebraska.

The committee in its report said that the committee and the committee of the

American Bar Association to suggest remedies and formulate proposed laws to prevent delays and unnecessary cost in litigation, held a joint meeting in New York. After quoting the general principles of practice reform adopted by the committee at the last annual session of the American Bar Association, which are substantially those proposed by the American Bar Association, the report said:—

"Some of those suggested principles may in certain jurisdictions require constitutional amendments, but whatever is necessary will in some way be accomplished. The proportions of the task which your committee has undertaken can scarcely be underestimated. There is no conservatism so forceful as that which insists upon leaving things as they are; and many lawyers are loath to express themselves freely on this subject because they fear that criticisms of the system under which the laws are administered, may be construed as criticisms of the courts working under the system.

"It is not intended by those who seek to achieve procedural reform to provide expressions of disrespect concerning the judiciary of America. The idea is to magnify the law, and to do away with those things which hinder and embarrass its administration and which themselves provoke much of the current popular dissatisfaction with the administration of justice in the United States.

"This great organization can accomplish no greater good than to promote simplicity in the administration of law without undue expense and unnecessary delay.

"When a procedural system shall be in operation under which technicalities of practice and procedure and useless appeals shall be done away with, the

people will remember with wonder and disgust the chains which they wore so long under the present system."

WORKMEN'S COMPENSATION

The afternoon was devoted to a discussion of workmen's compensation acts. "Nine-tenths of the strikes are mainly the result of employers' systems and do not arise through differences in money matters," said Andrew Carnegie, who advocated the passage of a workmen's compensation act.

Scotland has outstripped the United States in its protection for workingmen, he said. He thought, however, that the Workmen's Compensation Act was a step in the right direction. "I believe that here on this earth," said Mr. Carnegie, tapping the stand beside him to emphasize his remark, "people will live who have attained perfection." Col. Theodore Roosevelt said that he believed in a square deal for both the employer and employee. He said he had come to realize that it was now necessary to increase the collective against the individual action in the control of corporations. He gave credit to Dr. Eliot, President Emeritus of Harvard, for expressing this idea more concisely than himself. He declared that this country had lagged behind every other civilized industrial country in this matter of workmen's compensation.

Other speakers were P. Tecumseh Sherman, chairman of the committee which has been at work on the proposed uniform workmen's compensation act, Alton B. Parker, R. W. Breckenridge of Nebraska, Amasa M. Eaton, Providence, R. I., Robert Lynn Cox, William J. Schieffelin, Martin S. Decker, and Thomas W. Shelton of Virginia.

On the third and closing day, resolutions were adopted advocating the ex-

tension of the Erdman act to include all interstate public utilities, especially telegraph and telephone companies, and advocating extended powers to all state departments of labor so that compulsory arbitration might be brought about.

Seth Low was re-elected president and all the other officers were re-elected, with the exception of Mrs. Horace Brock, who was succeeded as chairman of the woman's department by Mrs. John Hays Hammond.

COMPULSORY ARBITRATION

President Low advocated an amendment to the New York state labor law, suitable for all states, providing for the appointment of an arbitration committee by the Governor in case of labor troubles. James Duncan of Quincy, Mass., attacked the idea on the ground that such summary power in the hands of Governors gave them too great an opportunity of appointing mediation boards of their own selection. The resolution was practically lost by being sent to the executive council for future action.

The closing session was devoted entirely to consideration of practical methods for the prevention of strikes, especially in public utilities, and a majority of the speakers agreed the Canadian law on this subject might be advantageously copied. The principal address on the subject was delivered by Marcus M. Marks.

Mr. Marks thought the application of the Erdman act, which had worked well, would be somewhat difficult in the case of such occupations as do not involve the convenience of a large section of the public. Compulsory arbitration he held to be very distasteful to the American spirit if the principle were generally applied. The speaker was more inclined to favor features of the Canadian, or Lemieux, act, which re-

quires a notice of thirty days before a strike, as well as a board of mediation and arbitration.

At the annual dinner, Mr. Low, the toastmaster, introduced Senator A. B. Cummins of Iowa, who said that America is now standing on the middle ground between co-operation and competition, and that under existing conditions the great majority of workers are not enjoying a fair proportion of the products of their labor. The United States Government must meet squarely the most important question that now confronts it, namely, whether to get back that part of competition in the business and industrial world that has already been absorbed by great monopolies that are not entitled to it and prepare to safeguard what measure of free competition we still have, or whether to accept complete co-operation, preparing to make this altruistic and including all men.

August Belmont, chairman of the department of the National Civic Federation that has the matter of workmen's compensation in hand, spoke on

the proposed uniform act dealing with this subject.

Samuel Gompers, introduced as one of the vice-presidents of the Federation, declared that the Civic Federation had many enemies among both employees and employers of labor. He criticized Senator Cummins' observation that the organizations of labor will never secure for the working people adequate wages. The fact of the matter is, he said, that so long as there shall be a divergence of interests between employers and employees there will never be such a thing as adequate wages.

George W. Perkins compared the present labor and capital, monopoly and competition agitation with that which preceded the Civil War. It was no less grave, he said, and the agitation could not long continue without some solution. He added that there were but three possible outcomes — business co-operation under control of the government, government ownership, or socialism. He thought it would come to regulated co-operation.

Mr. Krehbiel's Paintings in the New Illinois Court House

THE symbolical painting of "Law and Equity," which furnishes the frontispiece of this number, is part of the decorative work of the Appellate Court room in the new Supreme Court Building, which the state of Illinois has erected at Springfield.

An interesting competition for this and the decorative paintings in the Supreme Court room was held, and many meritorious designs were submitted by some of the best of our American artists. The Jury of Awards was unani-

mous in awarding the work to Mr. Albert H. Krehbiel of Chicago. Mr. W. Carby Zimmerman, the architect of the building, considers the work done by Mr. Krehbiel an example of the best mural painting work ever executed in the West. The panels are not only paintings of the highest order, but are painted in such a manner as to form an unquestionable and an essential part of the general decorative scheme.

The panel which has been chosen for reproduction is one of thirteen mur a

paintings executed by Mr. Krehbiel in addition to two ceiling decorations. It is an end panel of the Appellate Court room frieze. The ceiling of the Appellate Court room represents "The Light of the Law." From the centre of the composition, which measures twenty-six by sixteen feet, radiates the light. Around it float graceful female figures bearing torches to the four groups of figures arranged on the opposite sides of the border and symbolizing the various divisions of law entering into American jurisprudence. To the Common Law is borne the light of reason; to Mosaic Law the light of revelation; to Civil Law the light of order, and to Canon Law the light of inspiration. The Common Law group shows its chief exponent in the character of Alfred the Great, supported by figures in whose keeping are the reports, digests and commentaries of that law. Mosaic Law is personified by the figure of Moses, with attendants holding the two tables of the Commandments. Civil Law is typified by Justinian, and grouped about him are three figures bearing the pandects, institutes and codes. In the Canon Law group is Gregory IX, attended by figures supporting the two important decrees of that pontiff.

The ceiling of the Supreme Court room, measuring twenty-one by sixteen feet, represents symbolically the principle of Law in the governing of all things. In the midst of storm clouds, light and darkness, and other phases of nature, are four groups of figures symbo-

lizing the fundamental laws of human life. As the theme as a whole sets forth the harmony of the universe, the design is entitled, "The Supremacy of the Law." The spirits of good and of evil are in the centre. Good is shown as free and triumphant, Evil as veiled and sinister. A cycle of four laws revolves around this centre. The law of love appears in the form of the union of man and woman, the man leading his mate to establish a home; and of maternal love, in which the mother ministers to the child; the law of self-preservation, in which the chief figure wards off a threatening danger; the law of evolution, typified by two aerial figures that rise out of darkness towards the light; the law of life and death, in which the spirit of death pursues life, which soars unmindful of its swift approach.

The charm of the panel "Law and Equity" comes largely from the natural attitudes of the figures, the composition being free from stiffness and arranged with grace and dignity. The truthful portrayal of familiar types gives the picture the character of distinctive American art. The painter has limned his figures with a truly affectionate gentleness, and the symbolism of the picture is the more effective because of its interpretation of the spirit of the law as one pre-eminently of peace substituted for discord. The treatment of the children, and prominent places given to father and mother, widow and orphan, make a homely, intimate appeal which is unusual in a work of this kind.

Index to Periodicals

Articles on Topics of Legal Science and Related Subjects

Administration of Justice. "Coddling the Criminal." By Charles C. Nott, Jr. *Atlantic*, v. 107, p. 164 (Feb.).

"The appalling amount of crime in the United States, as compared with many other civilized countries, is due to the fact that it is known generally that the punishment for crime is uncertain and far from severe. The uncertainty of punishment is largely due to the extension in our criminal jurisprudence of two principles of the common law which were originally just and reasonable, but the present application of which is both unjust and unreasonable. This change is due to the fact that under the common law an accused was deprived of many rights which he now possesses, and was subjected to many burdens and risks of which he is now relieved. But, although the reason and necessity for the two principles referred to have long since ceased to exist, the principles are not only retained, but have been stretched and expanded to the infinite impairment of the efficiency and justice of our criminal law. The two principles are: That no man shall be twice put in jeopardy of life or limb for the same offense; and: That no man shall be compelled to give evidence against himself."

"The Growing Disrespect for the Law." By E. M. Grossman. 45 *American Law Review* 25 (Jan.-Feb.).

A study of some recent cases bearing on freedom of contract is made the basis of the charge that "defects in the substantive law are due largely to the tardiness of courts and judges to respond to the popular will." But "the doctrine of police power now comes to the rescue of the substantive law and renders it again national and popular, and an institution for service to the community as a whole."

The writer also gives much attention to the reasons for popular distrust of the criminal law.

"Probably the most vicious of all the shields placed in the hands of an accused against the attempts of society to vindicate its rights to peace and security is the perversion of the wholesome constitutional provision that no person shall be compelled to testify against himself in a criminal case. . . . It was never intended as an absolute bar or even as an impediment to the detection and punishment of crime. And yet that is exactly what it has become today. Instead of being a wholesome provision for the protection of the innocent, it has become the means of escape for the guilty."

"Too Much Expected of a Criminal Judge." By Levi Turner. 59 *Univ. of Pa. Law Review* 215 (Jan.).

"I think I have said quite enough to suggest the imperative necessity of having for our county attorneys not politicians nor callow striplings in the law, but sober, honorable, conscientious and skilful lawyers. The community can infinitely well afford to pay for such talent. The executive officers also should be men of character, capability and zeal."

Administrators and Executors. "Power of Personal Representative to Continue Decedent's Business." By Theodore F. C. Demarest. 24 *Bench and Bar* 15 (Jan.).

Continued from 23 *Bench and Bar* 96 (23 *Green Bag* 91).

See Survival of Actions.

Adoption. "Adoption Without Consent of Natural Parents." By Almond G. Shepard. 17 *Case and Comment* 391 (Jan.).

"Adoption statutes are humane provisions intended primarily for the protection and well-being of helpless and homeless children. To effectuate this laudable object, the provisions should be liberally construed, and the parties thereto and their privies should be denied the right to collaterally assail the proceeding."

Bill of Rights. See Cruel and Unusual Punishment, Race Distinctions.

Codification. "*Festina Lente.*" By John W. Patton. 59 *Univ. of Pa. Law Review* 203 (Jan.).

"The suggestions of this article are not, cannot be, and are not intended to be exhaustive; nor do they lead to the conclusion that the legal maxim '*Omnis innovatio plus novitate perturbat quam utilitate prodest*' is to be literally and slavishly observed. For example, it may be hoped that there will be great benefit from the enactment of uniform state laws applying to social and industrial questions that affect the welfare of people in all parts of our country. Legislative action, however, should be based upon demonstrated need, careful study of the proposed remedy in substance, of its constitutionality, of the meaning of every word used in a proposed act, with a careful examination of existing decisions as well as statutes. Knowledge of law as well as of the English language is required and the pen of one who thinks he

has a facility for legislative expression should indeed 'make haste slowly.'"

See International Peace.

Comparative Jurisprudence. See Mohammedan Law, Workman's Compensation.

Conspiracy. See Monopolies.

Contracts. "*Reeve v. Jennings.*" By A. E. Randall. *27 Law Quarterly Review* 80 (Jan.).

Criticizing the decision of the Divisional Court (1910, 2 K. B. 522, 79 L. J. B. 1137) to the effect that a contract not performed within one year is within the Statute of Frauds, even though capable of being executed within the year.

Corporations. "Legal Personality." By Prof. W. M. Geldart. *27 Law Quarterly Review* 90 (Jan.).

Beginning with Gierke's theory of the *genossenschaft* as expounded by Maitland, the writer attempts in an admirably perspicacious article to disprove the fiction and the concession theories, in their bearings on modern English law.

"The Courts and the Corporations." By Henry Wollman of the New York bar. *New York Times Annual Financial Review*, Jan. 8.

"Regardless of how substantial the legal yield of all this litigation under the Sherman law will be there can be no doubt that the moral gain resulting to the people, from the anti-corporation agitation and legislation, is beyond estimation. Because of it most of the corporations have cleaned and are cleaning house. The reckless disregard by many corporation managers of statutory enactment and moral precept is gradually being superseded by rules of conduct that recognize not only an observance of the laws of the land but also that competitors and the public have rights which should be respected. This change may be due to reformed consciences, but probably is attributable to fear of prosecution."

See Rate Regulation, Taxation.

Criminal Law. See Administration of Justice, Penology.

Criminology. See Juvenile Delinquency.

Cruel and Unusual Punishment. "Cruel and Unusual Punishment." By Prof. Henry Schofield, Northwestern University. *5 Illinois Law Review* 321 (Jan.).

"White, J., says [in *Weems v. U. S.*, 217 U. S. 349] he does not think the fine and imprisonment part of the sections of the Spanish Penal Code in question, including the chain at the ankle hanging from the wrists, so far disproportionate to the offense of falsifying a public document by a public official to steal money from the public treasury, as to justify a judicial declaration of unconstitutionality, when the accessories are eliminated as a separate punishment, even assuming that the prohibition of cruel and unusual punishments means, when applied to restrain Congress, that Congress must authorize the infliction of punishments which

the Supreme Court is likely to consider 'graduated and proportioned to offense' . . .

"The majority opinion employs the sounding and swelling vocabulary — *i.e.* 'men of action,' 'obsolete,' 'progressive,' 'humane justice,' 'public opinion,' — of the so-called 'progressive jurisprudence,' to convert a power to declare the law of the Constitution into a power to make it, thus disclosing the cloven hoof of the 'progressive' system so far as it touches the courts. But, as stated, the opinion delivered by McKenna, J., as the opinion of the Supreme Court is the opinion of only four Justices. Not until five Justices subscribe to it can the eighth amendment be revised so as to read like the Illinois constitutions of 1818 and 1848: —

"All penalties shall be proportional to the nature of the offense; the true design of all punishment being to reform, not to exterminate mankind."

Declaration of London. See Maritime Law.

Direct Legislation. "The Initiative-Referendum in the United States." By Frank Foxcroft. *Contemporary Review*, v. 99, p. 11 (Jan.).

"Under this system the conservatives are always at a disadvantage. The dice are loaded against them. The various radical groups, the socialists, the single-taxers, the woman suffragists and the rest will sign each other's petitions and get their different propositions before the people. When the campaign opens the radicals are already organized. They know what they want, and they will co-operate energetically to secure it. But the conservatives are handicapped. It is always harder to organize the negative than the affirmative. And if the conservatives defeat destructive changes in the fundamental law at one election, they cannot rest upon their arms. They must be continually upon guard, for at the very next election the same battle may have to be fought over again."

"A Great Democratic Reform." By Harold Cox. *Nineteenth Century*, v. 60, p. 21 (Jan.).

An earnest plea for the referendum in British politics, not altogether free from partisan bias. The party system is even more rigidly organized in the United States than in England, yet "American politics are a by-word for corruption." By such arguments as these Mr. Cox supports his contention that the referendum alone can purify a democratic government.

Evidence. See Witnesses.

Executive Powers. See Government (New York).

Federal and State Powers. "Decisions of the Federal Courts on Questions of State Law." By William M. Meigs. *45 American Law Review* 47 (Jan.-Feb.).

An extended discussion of the bearings of the decision in *Kuhn v. Fairmont Coal Co.* (1909) 215 U. S. 349, in which the Supreme Court by a vote of four to three overruled the doctrine of a West Virginia court that in a deed conveying

all the coal underneath a certain tract there is no implied reservation of the right to support.

"It involved a question of land law, and land-law cases are the very ones in which the court has been especially slow to decide otherwise than does the state tribunal. If the majority of the court, however, will not today proceed thus to limit the effect of their unfortunate decisions, if they will still adhere to the rules which have let in this chaos, is not the only course open to the opponents of these decisions to keep on dissenting and protesting in the hope that new blood on the bench may yet some day see that the true course is to follow the state courts and thus at once largely rid our system of the horrid and disgraceful confusion which has grown up?"

Federal Incorporation. "Federal Incorporation and Control." By Frank B. Kellogg. 20 *Yale Law Journal* 177 (Jan.).

"What is an instrumentality of commerce? It is not merely the cars and engines used for transportation, or the roadbed and tracks on which they run. The *corporation* by which the commerce is conducted, as was decided in the *Northern Securities* case, is in itself an instrumentality, and Congress may regulate all the machinery of such a corporation, whenever it enters into interstate commerce. . . .

"In *Gibbons v. Ogden*, Chief Justice Marshall settled for all time the supremacy of the federal power over interstate commerce. He held that the power was plenary and exclusive of state control or interference; that when necessary to effectuate the regulations adopted by Congress, the exercise of the power does not stop at state lines, nor yield to the power of the state, even though exercised in the regulation of its purely internal affairs; that, while conceding to the states exclusive jurisdiction over their internal affairs—such as municipal control, taxation, the control of purely internal commerce—yet, whenever state laws or regulations come into conflict with the exercise of the power committed to Congress, necessary to the control of interstate commerce, the state regulations must yield.

"It cannot at this day be disputed that Congress may create federal corporations for the purpose of carrying out any of the powers specifically conferred by the Constitution of the United States."

See Interstate Commerce, Public Service Corporations.

Government. "The Gerrymander." By Henry F. Griffin. *Outlook*, v. 97, p. 186 (Jan. 28).

An animated and also highly informing account of the nature and history of this curious animal.

Canada. "Canadians and the Privy Council." By W. S. Deacon. 31 *Canadian Law Times* 6 (Jan.).

Following up his recent criticism of *Gordon v. Horne*, the author thinks it a shame that the Supreme Court of Canada should be a supreme court in name only.

India. "The Native States of India — A Re-

joinder." By Sir William Lee-Warner. 27 *Law Quarterly Review* 83 (Jan.).

A reply to Professor Westlake's review of Sir William's book (22 *Green Bag* 702). The controversy over the point whether the relations of the native states are governed by international law is thus summed up by Sir Frederick Pollock: —

"The residual fact seems to be that the relations of the Government of India and the Native States are governed by a body of convention and usage not quite like anything else in the world, but such that in cases of doubtful interpretation the analogy of international law may often be found useful and persuasive."

Mexico. "Federal Control in Mexico." By Norman D. Harris. 20 *Yale Law Journal* 202 (Jan.).

"Altogether the federal government of Mexico has made an enviable record — worthy of any nation — but this is only a beginning. Mexico is a nation in the making. She is still in that immature stage between childhood and manhood."

New York State. "Power of the Governor to Remove Local Elective Officials." Editorial. 24 *Bench and Bar* 1 (Jan.).

Written from the point of view of New York law.

See Direct Legislation, Federal and State Powers, Interstate Commerce, Supreme Court.

International Arbitration. "A World Treaty of Arbitration." By James L. Tryon. 20 *Yale Law Journal* 163 (Jan.).

The first of a series of seven articles by this author on subjects of international law.

"A world treaty of arbitration is what the world wants and what the world will have. It only remains for the friends of peace to keep up an earnest agitation in behalf of the treaty from now on to the Third Hague Conference. This agitation should be carried on in all the states from Greece to Japan that abstained from voting for or that voted against the treaty. But Germany should be labored with most of all, as her influence against the treaty was paramount in 1907, particularly with her Italian and Austria-Hungarian allies, which may again be inclined to hold together with Germany against the measure."

"Arbitration Tribunals Still Useful." By Francis W. Hirst, editor of *London Economist*. *Advocate of Peace*, v. 73, p. 8 (Jan.).

Address delivered at the Conference of the Society for the Judicial Settlement of International Disputes, Dec. 16.

"Some Considerations as to International Arbitral Courts." By Jackson H. Ralston. *Advocate of Peace*, v. 73, p. 11 (Jan.).

Address delivered at the Conference of the Society for the Judicial Settlement of International Disputes, Dec. 16, 1910.

"Interstate Controversies in the Supreme

Court of the United States." By Justice Brown of the Supreme Court of the United States (retired). *Advocate of Peace*, v. 73, p. 19 (Jan.).

Address delivered at the Conference of the Society for the Judicial Settlement of International Disputes, Dec. 16, 1910.

See International Peace.

International Law. See Government (India), Panama Canal Fortification.

International Peace. "The Carnegie Peace Fund." By Professor Paul S. Reinsch, University of Wisconsin. *North American Review*, v. 193, p. 180 (Feb.).

An able discussion of the best means of using the Carnegie endowment for the purposes for which it is designed. Several possible fields for useful research supported by the Foundation are indicated. For example:—

"A great service would be performed by a scientific study of all the ramified causes of war by mapping out, as it were, the etiology of war. War is not a compact entity, but a resultant from many complex phases of human life and experience. Certain causes which formerly produced war, such as dynastic interest, are no longer operative. The growing democracy of nations has not, as was originally expected, reduced the danger of war, but has added other impulses which may provoke hostility. It would appear that some of these causes could be studied with considerable scientific exactness. . .

"Detailed scientific investigation ought to determine the actual effects of military life and action upon the physical and intellectual development of the race. In this connection complete and accurate data should also be secured as to the loss in human material inflicted upon civilization by periodical blood-letting on a vast scale—a subject of investigation already suggested by a prominent biologist. These considerations are allied to others which include in their scope the various phases of human character and intellect, and which would ascertain with exactness whether the special fitness cultivated by military training and the sacrifice made in actual war are compatible with the development of those types of efficiency which the standards of modern life require. In a word, the question concerns the relation of war-like activities to personal and social efficiency from the point of view of the most essential demands made by modern civilization."

Professor Reinsch also directs his attention to considerations which should govern the proposed codification of international law:—

"In order to be adequate, a codification should rest upon a comprehensive, detailed and scientific study of precedent in diplomacy and arbitration, as well as of the legal doctrines elaborated by the authorities. It should be based on a thorough knowledge of existing practice in all the branches of international relations; but it should also suggest and develop principles in which account is taken of the new forces that have come into the life of the world in our own era. A combination of patient inquiry, of scientific exactness and of constructive

ability is called for in order to assure an adequate result. One sentence or clause in the completed code may be the outcome of years of investigation and thought; only after accurate scholarship has thoroughly collected and digested all precedents, after constructive minds have made a synthesis of all these results, will statesman-like action have at hand the materials for making a code that will command the respect of the world."

Interstate Commerce. "Nature and Scope of the Power of Congress to Regulate Commerce." By Frederick H. Cooke. 11 *Columbia Law Review* 51 (Jan.).

"Now it seems established that Congress has what is, to a large extent at least, concurrent power with the states in this respect, this being a concession to Congress, we submit, of a clumsy usurpation of powers reserved to the states by the Tenth Amendment. This usurpation was first conspicuously sanctioned in sustaining Congressional legislation prohibiting the transportation of lottery tickets from state to state. . . .

"Regulation by Congress of the agency of transportation ordinarily takes the form of regulation of the conduct and liability of carriers. . . .

"Such regulation for the benefit of interstate travelers and shippers is within the power conferred upon Congress by the Commerce Clause, conspicuous instances of the exercise of such power being the Interstate Commerce Act and the Safety Appliance Act. But the states have, generally speaking, concurrent power with Congress in this respect.

"The concession to Congress of the power, not merely to regulate the conduct and liability of those engaged in transportation, but to itself furnish the means of transportation, thus by way of improvement of waterways, is an abuse of the power conferred by the Commerce Clause."

See Federal Incorporation, Rate Regulation.

Juvenile Delinquency. "Control of Children by the State." By Hon. Ben B. Lindsey. 17 *Case and Comment* 383 (Jan.).

"Ignorance of the law cannot be pleaded as an excuse by man; but how is a child to know until he is taught, and why condemn thoughtlessness and ignorance in the same terms which we bestow upon hardened vice? We shall deal more justly with erring youth, and more wisely with the great problem of zigzag human nature if we look upon the cardinal virtues as an achievement, rather than a heritage lost early in life."

"Juvenile Offenders and Their Treatment." By Burdett A. Rich. 17 *Case and Comment* 387 (Jan.).

"The question whether a children's court should be regarded as a criminal court or a court of chancery has not been entirely free from uncertainty. . . . The system which treats the children as wards of the state, to be protected, rather than as criminals, and saves them from the stigma of a conviction for crime, is unquestionably in advance of a system that treats them

as criminals and deals with them, however leniently, as convicts."

See Penology.

Labor Law. "Women Laundry Workers in New York." By Sue Ainslie Clark and Edith Wyatt. *McClure's*, v. 36, p. 401 (Feb.).

These facts gathered at first hand about the conditions under which women work nowadays in laundries are of special timeliness in connection with the tendency of current legislation to regulate the hours of labor of women in the interest of their health and welfare.

"Capital and Labor." By John S. Whalen. *Editorial Review*, v. 4, p. 58 (Jan.).

A plea for co-operation between the employing class and the employed as the best means of solving the problems of capital and labor.

Legal History. "Selden as Legal Historian." By Harold D. Hazeltine, University of Cambridge. *24 Harvard Law Review* 205 (Jan.).

The concluding installment of an essay noticed in *23 Green Bag* 94.

"Selden's defective literary style is perhaps the chief reason why his learned tomes are now little read except for reference and why his fame in literature rests fundamentally upon his *Table Talk* and upon that alone. . . .

"Selden's style is ordinarily quite solemn and grim enough for the most solemn and grim of his readers; but at times this grey sky is lighted up by quaint and striking verses culled from many an out-of-the-way place, by vivid and picturesque descriptions, and by flashes of humor and sarcasm."

"Burgage Tenure in Mediaeval England, III." By M. de W. Hemmeon. *27 Law Quarterly Review* 43 (Jan.).

We have already commended this scholarly treatment of a forgotten phase of feudal tenures. (*22 Green Bag* 538, 704.)

See Monopoly.

Literature. See Legal History.

Maritime Law. "The Doctrine of Continuous Voyage." By Charles Noble Gregory. *24 Harvard Law Review* 167 (Jan.).

"In 1899 the Supreme Court of the United States decided in *The Adula* (176 U. S. 361), a case arising from the blockade of the Cuban coast, that it would not modify its doctrine that a ship sailing to break blockade was liable to capture and condemnation as soon as she left the territorial water of her initial port, and that this view would be in no way changed on account of the opinions of foreign writers. From this it may be argued that the important consensus of foreign writers and learned authorities expressed by the International Conference [resulting in the Declaration of London of 1909] against the doctrine of continuous voyage cannot be received to modify the rule of that court, and so of the nation whose chief tribunal it is, until Congress sees fit to make such modification by statute, or until the treaty-making power, namely, the President and Senate, by proper negotiations and ratification alter the rule. . . .

"My honored and learned friend, Professor Westlake, has very ably opposed the German doctrine that the laws of war are liable to be overridden by necessity, answering the arguments of Lueder that the commanders will act on the dictates of necessity whatever may be laid down, and will not submit to defeat or ruin in order not to violate formal law. Dr. Westlake says, 'This ground reduces law from a controlling to a registering agency.' Admitting the force and dignity of this conception, yet in the grim struggle for existence between two nations, where human life is as nothing, a formal rule as to property which represents a fiction, a pretense or a device will be apt to be disregarded."

"The Declaration of London." By Rt. Hon. Arthur Cohen, K. C. *27 Law Quarterly Review* 9 (Jan.).

Read last August at the conference of the International Law Association. See *22 Green Bag* 598. Some additions, however, have since been made. This eminent jurist concludes:—

"The Declaration of London is defective in the points I have above specified; it is also incomplete, because it has failed to determine three of the important matters it was intended to decide. The real question to be settled by Parliament is, whether these defects and this incompleteness are not greatly counterbalanced by the advantage of having two excellent codes of the law of contraband and of blockade together with valuable provisions relating to the right of search and the right to compensation, and by the establishment of an International Prize Court instead of the Prize Court of a belligerent power for determining the rights and obligations of neutral governments and neutral subjects; or whether it should be reserved for negotiations between the Naval Powers or for another Hague Conference to remove the defects of the Declaration and to solve the questions it has left unanswered."

"Sea-Made Law in Germany." By H. W. Wilson. *National Review*, v. 56, p. 740 (Jan.).

Mr. Gibson Bowles in a recent book has opposed the ratification of the Declaration of London as a blow at the power of the British navy. The writer reviews this work, and says: "The Declaration of London and its surrenders must go. It must never be ratified unless this country is prepared to accept without a struggle the passing of its sea-power to Germany."

"The New Federal Statute Relating to Liens on Vessels." By Fitz-Henry Smith, Jr. *24 Harvard Law Review* 182 (Jan.).

"It is unfortunate that Congress cannot legislate to supersede the provisions of the state statutes conferring liens for the construction of a vessel, but so long as the Supreme Court maintains the view that a contract to build a ship is not maritime, which view it has recently reiterated (*The Winnebago*, 205 U. S. 354), the constitutional power to make the change does not appear to exist. There are, however, some remaining features of the state laws relating to liens on vessels which might well be eradicated, for not a few of the state statutes have under-

taken to provide liens, not only for necessities, but for many other claims known to the maritime law. In so far as these statutes attempt to confer a lien when one is already given by the general maritime law, they are, strictly speaking, of no effect. And when they attempt to extend the jurisdiction of the maritime law beyond the limits fixed by the Supreme Court they are unconstitutional under the decision in *The Roanoke* (189 U. S. 185)."

Master and Servant. "Liability of Master for Wilful or Malicious Acts of Servants, II." By Floyd R. Mechem. 9 *Michigan Law Review* 181 (Jan.).

Concluding installment of an able article on the doctrine of the non-liability of the master (see 23 *Green Bag* 95).

Mining. "What Questions of Mining Law have been Decided in the Litigation Over the Drum Lummon Lode or Vein." By John B. Klayberg. 20 *Yale Law Journal* 191 (Jan.).

Treating of the questions determined by the Supreme Court of the United States and by the federal Circuit Court of Appeals, in this litigation.

Mohammedan Law. "A Historical Study of Mohammedan Law, I." By Syed H. R. Abdul Majid. 27 *Law Quarterly Review* 28 (Jan.).

A very lucid, readable and intelligent historical sketch.

Monopolies. "The Law of Combined Action or Possession." By Frederic J. Stimson. 45 *American Law Review* 1 (Jan.-Feb.).

A scholarly review of the common law of combinations, as embraced in the old law of monopoly and of conspiracy. Prof. Stimson concludes:—

"We should think long and carefully before we abandon this great principle of our English law preventing the oppression of the individual by the multitude, and, in the law of combination, going directly to the ethical motive of the combine. It has been a commonplace of laymen critics that the law is not moral—that it does not go into the higher issues—that it is easy to keep within the letter of the law while morally guilty to one's neighbor or to the state. This is *not* true of our law of combination. Let us, therefore, not carelessly give up this one great domain of the law of private right, which, based both on our English history and the profoundest laws of economy at the same time, rises to the highest standard of duty to one's neighbor and to the state; the one great body of the common law based squarely on the Golden Rule."

"Nationalism and Special Privilege." By Theodore Roosevelt. *Outlook*, v. 97, p. 145 (Jan. 28).

The third of Mr. Roosevelt's editorials on the general subject of "Nationalism and Progress." He here suggests that the problem of regulation of monopoly is solved by the method illustrated by the German law recently enacted, to restrict the over-production of potash.

"German and British Experience with Trusts." By Gilbert Holland Montague. *Atlantic*, v. 107, p. 155 (Feb.).

"The British attitude toward trusts has never been hostile. The Industrial Commission of the United States found that, aside from the universal phenomenon of hostility among a few radicals against every kind of wealth, no antipathy existed against trusts, and that 'the strong feeling on the subject, which has been manifested for some years in the United States, seems to have found only a very faint echo in England.' Trusts have never been a political issue in Great Britain. On the whole, the British view their trust development with complacency and satisfaction. The secret of this peace and contentment—so contrasted with the political and industrial turmoil in which the anti-trust crusade has plunged our own country—is not hard to find. While Congress and the various state legislatures were enacting the most stringent legislation to repress the trust movement, the English were recognizing and accepting the economic necessity of combination."

"The Great Express Monopoly." By Albert W. Atwood. *American Magazine*, v. 71, p. 427 (Feb.).

The small capital and large profits of the express companies, and situation in their affairs which government investigations have disclosed, form the subject of this article, which is to be followed by one on the relations between these companies and the railways.

See Corporations.

Newfoundland Fisheries Arbitration. "The North Atlantic Fisheries Arbitration." By Edwin M. Borchardt. 11 *Columbia Law Review* 1 (Jan.).

A summary of the circumstances giving rise to the dispute and of the grounds on which the principal points were determined.

Panama Canal Fortification. "The Fortification of the Panama Canal." By H. A. Austin. *Forum*, v. 45, p. 129 (Feb.).

A lucid summing up of the arguments for and against, by a writer well qualified to discuss the question both from the standpoint of public policy and of military expediency. He says:—

"It is believed that, despite assertions to the contrary, there is no limitation upon the power and right of this Government to erect fortifications on the waterway should it see fit to do so. The public press of Great Britain admits that that Government has tacitly consented to such action by the United States, although censuring the Administration for its weakness in abrogating the Clayton-Bulwer treaty. While the Republic of Panama may now take the view that no right to fortify the canal in time of peace was granted to the United States under the Hay-Bunau-Varilla treaty, it is not conceivable that this country must wait until the actual necessity—war—exists before taking steps to secure its defence and protection. With no other country than these two has the United States any treaty affecting the Panama Canal; there is no

unwritten law against erecting fortifications there, and at no time has this country ever given any pledge or even intimation, since the abrogation of the Clayton-Bulwer treaty, that it would abstain from treating the canal as a part of our territory or as a factor in our military equipment. The United States has, in its assertion of the Monroe Doctrine, as well as in the exertion of its good offices in the domestic affairs of the Central and South American republics, demonstrated to the world its policy of extending a protecting hand over its sister republics on this Hemisphere, and as a factor in the carrying out of this policy, the Panama Canal is of great importance. Considering all these things, it is believed that we have a just and equitable right to protect the canal by the erection of permanent fortifications, or by any other legitimate means we may see fit to adopt.

"As regards the guarantee of neutrality, rather than prohibiting fortifications on the canal, such a guarantee carries with it, by inference if not by letter, the right to adopt such measures as may be necessary to insure that guarantee being fulfilled. In only two ways can that object be obtained; that is, in order to enforce the dictates of the guarantor, the power must either be present at the canal in the form of permanent fortifications, or by the presence of our navy in waters contiguous to the canal, at least until we secured absolute control of the sea on both sides, and, as stated above, to compel the navy alone to defend the canal would be to deprive it of its principal function of acting in the offensive."

Patents. "The Progress of Japanese Patent Law." By John Gadsby. *27 Law Quarterly Review* 60 (Jan.).

Tracing the legislation from 1871.

Penology. "The Correction and Prevention of Crime." By Edward T. Devine. *Survey*, v. 25, p. 653 (Jan. 21).

"Crime in the last analysis is not to be overcome after arrest, but before. Schools, churches, playgrounds, settlements, trade-unions and charitable societies — agencies of social progress and of social reform, public and private — are the handmaidens of the new penology. We shall transform police, courts and prisons when we have further transformed society."

"The Professional Training of Prison Officials." By Prof. R. Vambery, Buda-Pesth. *Survey*, v. 25, p. 660 (Jan. 21).

"The Home Secretary and Prison Reform." By Major Sir Edward Clayton, C. B. *Nineteenth Century*, v. 69, p. 58 (Jan.).

This writer, formerly inspector of prisons, avers that Mr. Churchill's scheme "bristles with difficulties."

Penology. See Administration of Justice, Cruel and Unusual Punishment, Juvenile Delinquency.

Pleading. See Procedure.

Practice of Law. "The Acquisition and Re-

tention of Clients." By Frank J. Loesch. *31 Canadian Law Times* 17 (Jan.).

Full of good practical advice, for example: — "I would have no hesitation about beginning as clerk in an office. In addition to an immediate compensation that will suffice to support you modestly, you get experience. You get experience from the things you have to do and from your observation of how the older lawyers do the work. You may be in your own office ten years and not see how certain things are done."

See Professional Ethics.

Principal and Agent. "The Application of Money Wrongfully Procured, by a Defaulting Agent or Trustee, to the Payment of the Debts of the Principal's Business or the Trust Estate." By Ralph J. Baker. *59 Univ. of Pa. Law Review* 225 (Jan.).

"To summarize briefly, we find that upon but one theory and in but one class of case, can the plaintiff recover, that is, where his action is against a principal whose debts the fraudulent agent has paid with the money or proceeds of the property wrongfully procured from the plaintiff. In such case he may succeed in an action arising in *quasi-contract* in some jurisdictions; in others only by bill in equity. He becomes a general creditor of the principal but no more. But where the fraudulent person is a trustee, and he is himself in arrears to the trust estate, the plaintiff is without relief upon any theory, save his unprofitable right against the trustee personally."

Procedure. "Revision of Court Procedure in Illinois — A Symposium of Judges." *5 Illinois Law Review* 350 (Jan.).

Interesting, brief opinions on the best method of carrying out needed reforms of civil procedure in Illinois. A strong sentiment in favor of code pleading is shown. One writer says that a general statute leaving details to be governed by rules of court would be unconstitutional.

"Illinois Conference on Procedural Reform: A Bill for an Act Concerning Pleadings." By Clarke B. Whittier. *5 Illinois Law Review* 364 (Jan.).

This bill regulating pleading in civil actions is in thirty-four sections, leaving details to be governed by rules of court which may be revised annually.

"A Proposed Judicature Act for Cook County." By Albert M. Kales. *5 Illinois Law Review* 336 (Jan.).

The conclusion of a paper noticed in *23 Green Bag* 95.

"The 'Notice of Objection' in Revision Courts." By P. Tindal-Robertson. *27 Law Quarterly Review* 75 (Jan.).

Professional Ethics. "The Ethics of Advocacy in an Unjust Cause." By Edwin S. Oakes. *17 Case and Comment* 433 (Feb.).

"The whole matter may be summarized by saying that the ethical obligation of an advo-

cate in an unjust cause is neither more nor less than rests upon him in the advocacy of any cause. 'There is,' said Sir James Hannen, 'an honorable way of defending the worst of cases.' In so doing the advocate should remember the advice of Lord Eldon, that in cases of doubt and difficulty, *Quod dubitas ne feceris* is a good rule of conduct. The lawyer's greatest danger arises from his bias in favor of the cause which he represents. He should guard against excess of zeal, and in the glow of partisanship should not forget that he owes other duties than that to his client. He must make no distinction between his personal and his professional conscience; and in following its dictates should take care not to incur the charge, which an eminent man of letters is reported to have made against a famous English statesman, that the conscience which should have been his monitor had become his accomplice."

"Can the Lawyer Advertise?" By L. B. Elliott. 17 *Case and Comment* 439 (Feb.).

Written from the standpoint of a professional advertising man:—

"It would seem to me that there is no more reason why an attorney should not advertise in the newspapers or other public prints, in a dignified and truthful manner, than there is reason why a banking institution, an artist and advertising writer, an architect, a consulting engineer, a chemist, assayer, or other technical or professional man who has only his service to give in return for money, should advertise."

Property and Contract. See Monopolies, Rate Regulation.

Public Service Corporations. "Public Regulation of Capitalization." By Milo R. Maltbie. *New York Times Annual Financial Review*, Jan. 8.

"It is essential that the supervising authority should know how the funds are actually expended and that the amounts paid are reasonable, that the property is needed, and that the cost should be charged to capital and not to operation. . . . This phase of the problem presents the principal difficulty which any scheme for federal regulation must meet. A local body, such as a state board, is constantly in touch with the corporations. Investigations can be easily made, and an audit of accounts and an examination of property can be readily checked with reported expenditures. With the federal Government such work would require a large expenditure and a large staff of engineers and accountants."

See Federal Incorporation, Rate Regulation.

"Electric Railway Transportation." Being v. 37, no. 1, of *Annals of American Academy of Political and Social Science* (Jan.).

This issue contains the following articles on Public Regulation of Electric Railways: "Valuation of Intangible Street Railway Property," by Frank R. Ford; "The Indeterminate Permit as a Satisfactory Franchise," by William Osgood Morgan; "State Supervision of Electric Railways in Wisconsin," by Hon. B. H. Meyer; "The

Fruits of Public Regulation in New York," by Hon. Milo R. Maltbie; "Supervising Engineers and Street Railway Service," by George Weston.

Race Distinctions. "The Constitutionality of Race Distinctions and the Baltimore Negro Segregation Ordinance." By Warren B. Hunting. 11 *Columbia Law Review* 24 (Jan.).

The Supreme Court of the United States, in *Plessy v. Ferguson* (1896), 163 U. S. 537, upheld the constitutionality of "Jim Crow" laws. The writer dissents from Professor Ernest Freund's view that this case decides that transportation companies may be required to enforce separate accommodations for the races in the interest of public convenience and comfort. That argument, he says, merely begs the question; if it is a sound one state separation would be upheld by the same reasoning, even though the rights of individuals are interfered with. His point is that the individual citizen has the right to live where he wishes, but such individual rights may be regulated by the police power, and reasonable regulations are likely to be sustained by the courts. The Baltimore ordinance appears fair on its face, seemingly restraining the liberties of colored citizens no more than of whites.

Railways. "German Railway Policy." By Elmer Roberts. *Scribner's*, v. 49, p. 245 (Feb.).

"While the Imperial government is not itself a large railroad-owner, it has unified the policies and the charges upon the state and privately owned lines of the empire so that so far as the shipper perceives he is dealing with one transportation system. . . . The control of the rates is centralized under the Bundesrat, the Senate as it were, consisting of members appointed by the governments of the twenty-five individual monarchies and republics of the empire. The Bundesrat from time to time calls a 'general conference' for regulating railway rates. . . . Business for the general conference is prepared by a Permanent Rate Commission with representatives from fourteen railway boards. A subdivision of membership called the Trader's Committee is made up of five representatives of agriculture elected by the combined agricultural chambers of the empire, five representing the manufacturing interests and five the distributing commercial interests. The two latter classes are elected by the chambers of commerce of the country acting together. These fifteen and a member appointed by the Bavarian government recommended to the Permanent Commission authoritatively, especially in adjusting rates equitably among zones of traffic into which the empire is apportioned so that a shipper in one part of the country shall not be at a disadvantage in internal trade through his geographical location."

See Rate Regulation.

Rate Regulation. "Passenger Rates and Regulative Commissions." By William L. Ransom. *Editorial Review*, v. 4, p. 44 (Jan.).

"Personally, I find much in many of the more recent decisions of the present Commission, which, if analogies are carried to their logical sequences, point the way to the establishment

of a secure legal basis for such an adjustment of passenger tariffs as will continue and fortify the various forms of 'special' fares as vital factors in industrial and commercial life and growth."

"Charter Contracts and the Regulation of Rates." By Charles G. Fenwick. 9 *Michigan Law Review* 225 (Jan.).

"1. It is within the power of the legislature, provided there be no restriction in the state constitution, to make binding contracts with public service corporations, by which it can renounce its general power of regulating the rates for their services. This power of making binding contracts the legislature may delegate to municipalities, whose ordinances therefore are only binding within the limits of the authority conferred.

"2. Such contracts of a legislature or municipality with public service corporations are construed strictly against the corporation in favor of the state or municipality. But as between the state and a municipality exercising delegated power, the existence of the delegated power is construed against the municipality.

"3. The right of ultimate decision as to the reasonableness of rates, whether by the legislature or by the company, resides in the courts.

"4. The reservation, either in the charter or in the constitution of a state or in a general law, to which the charter does not form a clear exception, of the power of alteration and repeal gives to the state the right to reject any agreements it may make concerning the rates to be charged."

"A Discussion of the Rate Question." *New York Times Annual Financial Review*, Jan. 8.

Contains the following articles: "Why the Railroads want Increased Rates," by Walker D. Hines, General Counsel of the Atchison; "Railroad Capital and Real Value," by Darius Miller, President of the Burlington & Quincy; "The Relation Between Capitalization and Rates," by W. H. Williams, Vice-President Delaware & Hudson; "The Shippers' Point of View," by E. G. McVann, Commercial Club of Omaha; "This Demand Only a Beginning," by David O. Ives, Chairman Seaboard Shippers; "Saving by Scientific Management," by Harrington Emerson.

See Federal Incorporation, Interstate Commerce, Public Service Corporations, Railways.

Real Property. See Federal and State Powers.

Supreme Court. "The Supreme Court Justices." By Elbert F. Baldwin. *Outlook*, v. 97, p. 156 (Jan. 28).

The most readable, personal and vivid sketch of the interesting men who compose our highest court which we have yet seen.

See International Arbitration.

Survival of Actions. "Construction of 'Survival Act' and 'Death Act' in Michigan." By T. A. Bogle. 9 *Michigan Law Review* 205 (Jan.).

Discussing a question solely of Michigan law. **Taxation (Federal Corporation Tax).** "Con-

stitutionality of Federal Corporation Tax Law." By Israel Freeman. 72 *Central Law Journal* 59 (Jan. 27).

"A conclusion may be reached that the present Corporation Tax Law, which requires every profit-making corporation to pay a special *excise tax*, with respect to the carrying on or doing business by such corporation equivalent to one per centum upon the entire net income, etc., may be taken for what it says, and not a direct tax subject to apportionment."

Wage Assignment. "The Validity of Laws Regulating Wage Assignment." By Guy M. Blake. 5 *Illinois Law Review* 343 (Jan.).

In *Massie v. Cessna*, 239 Ill. 352, the court held unconstitutional, as interfering with freedom of contract, a statute designed to surround the process of attachment of wages with certain safeguards in the interest of the wage-earner. The author thinks that this decision leaves the borrower at the mercy of the money-lender and that it stands "without a parallel or precedent in any other state."

Witnesses. "Psychology for the Witness Stand." By Dorr Kuizema. 73 *Central Law Journal* 41 (Jan. 20).

The writer discusses from a purely psychological standpoint the laws of suggestion and association, our knowledge of which may be practically applied in the examination of witnesses.

Women. "Women and Wealth." By Prof. J. Laurence Laughlin. *Scribner's*, v. 49, p. 199 (Feb.).

This writer considers that there has been a radical change in the character of the American woman which has resulted from altered economic conditions. The multiplication of riches has created a large class of idle, unintelligent women who are hungry for social position, and even the less well-to-do have been contaminated by the contagion of false standards of conduct, so that the American woman of today is strongly attracted into living an idle, selfish, inane life, which unfits her for the duties of a helpmeet and mother.

Professor Laughlin has endeavored to offer an unprejudiced, sincere estimate of the American woman, but we fear that he has pressed his generalization too far. Undoubtedly economic conditions have altered the ideals and habits of women, but we cannot accept his conclusion that feminine extravagance and selfishness are already menacing the soundness of our American civilization. The fact that wealth tends, in the long run, to beget a special sense of public duty cannot be ignored. Moreover, simply because women are not equal to men in economic capacity, it does not follow that their function is wholly unproductive and that they are debarred from that co-operation with their husbands which we constantly see them exercising in all walks of life. Ethical standards, moreover, undergo continuous re-adjustment to economic conditions, and through them the race

is ever seeking new means for the prevention of its own disintegration.

Workmen's Compensation. "Workmen's Compensation and the Theory of Professional Risk." By F. P. Walton. 11 *Columbia Law Review* 36 (Jan.).

Valuable not simply as a lucid treatment of an important problem of contemporary legislation, but also as a contribution to the science of comparative law, as the workmen's compensation systems of France, England and Canada are considered at length.

Miscellaneous Articles of Interest to the Legal Profession

Biography. *Brandeis.* "Brandeis." By Ernest Poole. *American Magazine*, v. 71, p. 481 (Feb.).

A most interesting sketch of the able Boston lawyer who has so liberally given of his time and talents in the service of the public good.

Lincoln. "The Career of a Country Lawyer." By Charles W. Moores. 45 *American Law Review* 78 (Jan.-Feb.).

Continued from the preceding number of the same review.

Morgan. "The Life Story of J. Pierpont Morgan." By Carl Hovey. *Metropolitan*, v. 33, p. 593 (Feb.).

"Morgan's primary interest in affairs, the moral axis upon which his career turns as a whole, is a natural passion for sound, well-founded business." This instalment treats of extensive operations in the field of railway reorganization.

Morley. "The Only Living Briton who is at the Head of Two Professions." *Current Literature*, v. 50, p. 153 (Feb.).

A most readable biographical sketch of a man who has won highest eminence in two professions, those of statecraft and letters. "Morley may be no lawyer in the American sense, but he is a barrister who took up two other professions and made himself leader in each."

Reed. "Thomas Brackett Reed: The Statesman, the Wit and the Man." By Senator Henry Cabot Lodge. *Century*, v. 81, p. 613 (Feb.).

"One of his retorts, so well known that it is a household word, illustrates his quickness as well as any other. Mr. Springer of Illinois was declaring with large and loud solemnity that, in the words of Henry Clay, 'he had rather be right than be President.' 'The gentleman need not be disturbed,' interjected Mr. Reed; 'he will never be either.' Hardly a day passed that a repartee of this kind did not fall from his lips, and they belonged to that small class of witty retorts which cannot in the nature of things have been prepared and which fly out on the spur of the moment like the sparks from an anvil."

Congress. "Impressions of Congress." By

Sydney Brooks. *Fortnightly Review*, v. 89, p. 90 (Jan.).

Some readers may think that this English journalist views the manners, dress and deportment of our Congressmen in too unfavorable a light. But in his comparisons between our Congress and the House of Commons he shows his appreciation of our strong points.

Detection of Crime. "Great Cases of Detective Burns." By Dana Gatlin. *McClure's*, v. 36, p. 386 (Feb.).

The first of these stories tells of the confession of Abe Ruef, the San Francisco boss, Detective Burns relating Ruef's continual evasions and subterfuges up to the time of his trial. An absorbing detective story founded on fact rather than fiction.

Dual Personality. "Real Dr. Jekylls and Mr. Hydes." By H. Addington Bruce. *Cosmopolitan*, v. 50, p. 337 (Feb.).

The author, who has devoted considerable study to unexplained psychical phenomena, states some of the most remarkable recorded instances of dual personality which fairly parallel the theme of Stevenson's famous story.

Foreign Affairs. "What does the Secretary of State Mean?" By Frederick McCormick. *North American Review*, v. 193, p. 206 (Feb.).

The policy of Secretary Knox has been to preserve diplomatic silence regarding his intentions. Yet the foreign policy of the Government unmistakably tends to involve this country in steadily increasing responsibilities in the Far East. The President has said that Peking is our most important diplomatic post. The policy of the "open door," pursued by Secretary Knox and his two predecessors, has made the United States already an important factor in the international politics of China and Japan.

Foreign Trade. "How America Got Into Manchuria." By Frederick McCormick. *Century*, v. 81, p. 622 (Feb.).

Being "the inside history of America's diplomatic fight for the open door and equality of trade."

India. "The Gateway to India." By Price Collier. *Scribner's*, v. 49, p. 142 (Feb.).

"Of these divisions [the nine provinces] I visited seven, and in each I was impressed by the enormous amount of work being done, by the conscientious — often I thought too conscientious — way in which it was done, and by the dignity and fearlessness of the men who were doing it. If it were not for the interferences from the India Office, and the criticism from ignorant politicians, who shamelessly play India off for votes at home, it would be the most ideally managed, as it is the most successfully administered, dependency in the world."

Invention. "The Wonderful New World Ahead of Us." By Allan L. Benson. *Cosmopolitan*, v. 50, p. 294 (Feb.).

An interesting character sketch of Edison,

greatest of living Americans, and of his views regarding the marvelous things the future holds in store for mankind.

Labor Unions. "San Francisco of the Closed Shop." By Frederick Palmer. *Hampton's*, v. 26, p. 217 (Feb.).

Unfolding the career of P. H. McCarthy, mayor of the city, and organizer of union labor into a political power.

Mormonism. "The Mormon Revival of Polygamy." By Burton J. Hendrick. *McClure's* v. 36, p. 449 (Feb.).

The official attitude of the Mormon Church, at nearly every stage, has been one of deception, says Mr. Hendrick, with regard to its attitude toward polygamy; it does not excommunicate the offenders, as a rule, countenancing the plural marriages of the important people whose violation is open and continuous.

Party Policies. "The Democratic Opportunity." By Thomas Nelson Page. *North American Review*, v. 193, p. 193 (Feb.).

The extravagance of the Republican party in its appropriations, its wastefulness in the pension role, its alliance with privileged interests through the tariff, and the tendency to usurp powers not granted by the Constitution, are conditions giving birth to the Democratic opportunity. The "old" Nationalism is good enough for Mr. Page, who desires a conservative government of laws, not of men, fully recognizing the supremacy of popular rights.

"An Appeal to President Taft." By Wayne MacVeigh. *North American Review*, v. 193, p. 161 (Feb.).

The writer thinks that there is much more opportunity for useful public service of the states than of the nation, and that the state legislator can do far more than the Congressman to solve the problems of equalizing the opportunities of the rich and the poor along the lines of the social reforms which have been taken up by eminent foreign statesmen. He decries the wastefulness of Congress in its pension and log rolling appropriations, and its readiness to be the tool of special interests in legislating on the tariff. The article closes with an earnest appeal to the President to throw his influence into the cause of federal taxation of inheritances.

"American Affairs." By A. Maurice Low. *National Review*, v. 56, p. 822 (Jan.).

"Last month the country repudiated the Republicans, yet the Democrats, who are now in a majority in the country, are in a minority in the House of Representatives; the party that has forfeited the confidence of the country is still in control of the machinery of government, and it will be thirteen months after election before the Democrats can attempt to put their policies into effect. It is an arrangement, as every one must admit, both unjust and ridiculous, but it

is the Constitution and therefore not to be changed."

"What Will the Democrats Do?" By Judson C. Welliver and Louis Brownlow. *Hampton's*, v. 26, p. 196 (Feb.).

"The wise course would be for Champ Clark and his fellows," we are told, to recognize the principles of Republican Insurgency; "we shall then have both brands of Progressives, Democratic and Republican, arrayed in line of battle against both kinds of Tories, Republican and Democratic."

"Theodore Roosevelt, Please Answer, II." By M. E. Stone, Jr. *Metropolitan Magazine*, v. 33, p. 543 (Feb.).

Concerned with Col. Roosevelt's relations with political leaders while he was Governor of New York, and his record in that office.

"The End of the Old Constitution." By Sidney Low. *Fortnightly Review*, v. 89, p. 114 (Jan.).

"There is nothing novel in the claim, whether or not it be justified, that the Peers are the guardians of popular rights against an encroaching House of Commons. 'The House of Lords,' said Lord Salisbury in 1895, 'is a body which exists for the purpose of preventing the House of Commons doing mischief behind the backs of the people.' That, of course, is precisely the point of view of Lord Lansdowne in the present crisis. And when he and Mr. Balfour declare for the Referendum, they are on the old Tory ground of setting the nation as a whole against a privileged governing section."

Pensions. "The Pension Carnival; V, The Growing National Scandal of the Private Pension Act." By William Bayard Hale. *World's Work*, v. 21, p. 13967 (Feb.).

By presenting the facts of particular cases, the author reveals the wrong of hasty, ill-considered special acts.

Post-Office. "The Post-Office: An Obstructive Monopoly." By Don C. Seitz. *World's Work*, v. 21, p. 13978 (Feb.).

This article is taken up with a criticism of the out-of-date business methods.

Pure Food Laws. "Cassidy and the Food Poisoners." By Cleveland Moffett. *Hampton's*, v. 26, p. 139 (Feb.).

The story of what Henry P. Cassidy, food inspector in Philadelphia, has done to give that city pure food. *Hampton's* has retracted the libel of the Standard Oil Company herein contained.

Taxation. "The Things that are Cæsar's, III." By Albert Jay Nock. *American Magazine*, v. 71, p. 450 (Feb.).

A third article on the inequalities and absurdities of the personal property tax in other states, following two articles on New York City taxation.

Reviews of Books

KORKUNOV'S THEORY OF LAW

General Theory of Law. By N. M. Korkunov, late Professor of Law, University of St. Petersburg. English translation by W. G. Hastings, Dean of the Law Faculty, University of Nebraska. Boston Book Co., Boston. Pp. xiv, 524 (index). (\$3.50.)

THIS treatise by the late Professor Korkunov of the University of St. Petersburg, in its English translation, is one of the few Continental works of permanent importance which have been made accessible to American readers. Written in 1887, at the beginning of the sociological movement in juristic science, it is very largely concerned with a review and criticism of earlier Continental jurists, chiefly German and French, and the author is also familiar with English legal thought. These criticisms are marked by rare discrimination and sanity, and the author presents his own views with an ability which compels admiration. We have here a Continental point of view, but the metaphysical method is not employed in too idealistic a manner for Anglo-Saxon readers. Moreover, the author is a broad-minded man of cosmopolitan culture whose political opinions convey no suggestion of bureaucratic Russia.

The publication of this work in America is an important event if it foreshadows, as we hope it does, the reproduction of standard European treatises by jurists of highest repute, in a form accessible to American readers. A large debt of gratitude is due to Dean Hastings on this score, for his alertness in being one of the first of our legal scholars to discover this "Science of Law," and for so pleasantly introducing its author to the American public.

Professor Korkunov's argument regarding the distinction between law and

morals cannot here be presented and criticized in detail. He connects morals with the evaluation of interests and law with their limitation. It is, however, difficult to accept any view which treats the evaluation and the limitation of interests as separable. By "limitation" it is plain to be seen that he does not mean physical limitation or constraint, but a moral limitation, for if not physical, what can it be but moral? It is hard to see, therefore, how the field of morality and of law can be differentiated in this manner. We prefer to Korkunov's view a different theory, analogous to Jhering's, which would treat morals as concerned with the evaluation of interests and law with their protection. Or, to express this attitude differently, morals are concerned with an ideal limitation of interests, in the sphere of reflection, and law with an actual limitation, in the sphere of conduct.

This work, marked by notable vigor of analysis and lucidity of treatment, is least satisfactory in its criticisms of Jhering. Korkunov believes, and labors to prove, that "constraint is neither a fundamental, nor even a general, attribute of juridical phenomena" (p. 96). The explanation of his readiness to adopt such a position is found partly in the broad sense in which he uses the term "law." If "law" is to mean something more than positive law, if it is, in fact, to instruct men with regard to their duties to one another and to society, it is hardly distinguishable from morality, so the concept of constraint is easily eliminated. But in the Anglo-Saxon philosophy "law" and positive law are practically synonymous, and the definition being narrower, it is futile to

argue that there can be any law in the absence of constraint. A man, we will suppose, is under a certain obligation; if he is constrained by the state to fulfill the obligation it is a legal obligation, if he is not so constrained it can be no more than a moral obligation. Kor-kunov argues that his fulfillment of the legal obligation may be voluntary, hence constraint cannot be essential. Such a voluntary attitude, however, does not imply that a man's so acting precludes the existence of constraint, for he may perceive it to exist and choose not to resist it. It does not cease to be a constrained obligation simply because it is discharged voluntarily. Constraint exists none the less, whether met with consent or with resistance. Moreover, the constraint which is fundamental to law need not be actually exercised; it is sufficiently real because there is the possibility of its exercise and it may be brought into play at any time by resorting to the proper agencies of compulsion.

Having abolished constraint, Kor-kunov is aware that he needs some notion to take its place, to differentiate law from morality, so he adopts the sublimated conception of a command (p. 169). This really involves a latent inconsistency, for obviously where there is no power to constrain there can be no power to command. By denying that there is any constraint we are destroying the authority and the sanction of law — it can no longer be a command.

GRAY'S NATURE AND SOURCES OF THE LAW

The Nature and Sources of the Law. By John Chipman Gray, LL.D., Royall Professor of Law in Harvard University. Columbia University Press, New York. Pp. xii, 292 + appendices and index 40. (\$1.50 net.)

THIS book, made up of the Carpentier lectures given at Columbia University in 1908, discusses fundamental

questions of legal theory, the views of Austin and of the late James C. Carter coming in for a large share of the author's attention, and those of numerous other juristic writers being criticized from a point of view which suggests specialization in the law as a particular science and profession rather than broad philosophical study, and everywhere bears evidence of the hard-headed assimilation of facts by a mind of ripe legal scholarship.

The author relies largely on illustrations for the presentation of his points, and the profusion of his examples drawn from a large fund of juristic learning gives the book a concreteness and vigor all its own. This quality may have its defect, for the attention of one employing such a method may easily be distracted from delicate abstract analysis to the clumsier practical means of testing refinements of speculation. Prof. Gray, we say with due deference, could hardly claim to have employed throughout an analytical rather than an empirical method. The value of his contribution is most conspicuous when he is examining the theories of Austin or Carter in the light of actual facts drawn from a study of historical and current conditions. Its value is also in evidence when he is discussing such a question as that whether our courts make the law or merely interpret and declare it. In the higher realms of speculation, however, as for example where he is considering the nature of rights and duties in the abstract, Professor Gray's skill in elucidating a subject by means of concrete illustrations is of little aid, and we may be pardoned for saying that he seems too readily to fall into the danger of confusing substantive with remedial rights.

While the book perhaps devotes disproportionate attention to the metaphy-

sical theories of the past—for Korkunov has assigned Kant and Hegel, for instance, their proper place in the history of juristic thought — still, it is up-to-date in spirit, and recognizes the trend of modern legal science by its sympathy with recent juristic developments in Germany, where the *nicht positivisches recht* is rightly being eliminated from the definition of law. Prof. Gray's general definition of law is carefully framed, moreover, so as not to invade the special province of morality.

It is impossible to do full justice to this learned writer in a short review, and we commend his discussion of the nature of rights and duties, his definition of the state, his treatment of the various sources of the law, his observations on custom, and his study of the fiction of the artificial legal person, to all students of theoretical jurisprudence as meriting attentive study.

ALEXANDER HAMILTON

The Intimate Life of Alexander Hamilton; based chiefly upon original family letters and other documents, many of which have never been published. By Allan McLane Hamilton. With illustrations and facsimiles. Charles Scribner's Sons, New York. Pp. xii + 431 + 44 (appendices) + 7 (index). (\$3.50 net.)

IN THIS biography, as the title should suggest, we have a sketch, not of Hamilton's public career, or of the opinions and policies of the chief author of the *Federalist*, but of his private life, and it reveals a character of attractive and fine qualities, permitting us to see, in place of Hamilton the statesman to whom we have been accustomed, Hamilton the accomplished orator, the vivacious gentleman of cultivated tastes and charming manners, the affectionate husband and generous friend. His high-spirited devotion to the public weal, and his resolute, unselfish nature,

animated by the moral earnestness of a man who set a high value on his personal honor, excite great admiration. The book is truthful in exhibiting some of the defects of Hamilton's impulsive temperament. His zeal to expose falsehood and corruption, for example, was sometimes so great as to prevent him from doing justice to the motives of his adversaries, and as an orator he sometimes went too far in the support of a good cause. But these weaknesses can easily be condoned, in view of the intrinsic worth and nobility of his nature and his uncompromising fidelity to his own notions of right.

Dr. Hamilton has done his work so well as to provide a most readable book. The private letters are so well fitted into the text as to swell an unbroken current of fascinating narrative, and it is not often that a biography of such rare human interest is set before a book-ridden American public. The reason for this happy result is found, doubtless, largely in the skill of the biographer, but it is due in no small part to the engaging qualities of his subject, for it would be hard to find a personality of the eighteenth century more attractive and more richly endowed than that of Alexander Hamilton.

TOPHAM'S COMPANY LAW

Principles of Company Law. By Alfred F. Topham, LL.M., of Lincoln's Inn, Barrister-at-Law, Reader in the Law of Real Property and Conveyancing to the Council of Legal Education. 3d edition. 272 pages. Butterworth & Co., London. Pp. xxxiv, 251 + 20 (appendix and questions). 43 (index). (6s.)

TOPHAM'S Company Law is a short treatise designed primarily for English students of law, setting forth leading principles in good-sized type with abundant illustrative material less prominently displayed. The third edi-

tion was necessary to embrace the changes made by the Companies Consolidation Act of 1908. The references have been recast, and some parts of the work formerly treated historically have been entirely remodeled. The concluding chapter, on the subject of reorganizations, has had to be rewritten.

A WORLD CORPORATION

World Corporation. By King C. Gillette, Discoverer of the Principles and Inventor of the System of "World Corporation." New England News Co., Boston. Pp. 240. (\$1.)

IT SEVERELY taxes the imagination to credit the successful business man who has proposed this fantastic and preposterous scheme with sincerity, but we wish to be magnanimous. The "world corporation" seems to be nothing more nor less than a socialistic state, controlling all the labor and production of the world, every citizen being a shareholder. The Arizona charter and the by-laws, even, are set forth. The corporation law of Arizona must be amazingly progressive.

We have received a copy of the able argument of C. A. DeWitt of the Manila bar on "The Power of the Governor-General of the Philippine Islands to Deport or Expel Aliens," issued in a pamphlet of a hundred or more pages. It contains a vigorous and logical plea for the protection of the constitutional rights of aliens against invasion by arbitrary power.

The old established law publishing business of Banks & Co., which was recently sold, is not to be removed from Albany. With the purchasing interests are associated men from other successful law publishing firms, and the following officers have been elected: President, David Banks, Jr.; vice-president, Matthew Bender, Jr.; treasurer, Lemen K. Strouse; secretary, John T. Bender.

Those who may be interested in the famous naval battle between the *Kearsarge* and the *Alabama* will find some interesting details about

the construction of these ships and the conduct of the fight in the address delivered by Congressman John W. Weeks, delivered at the dedication of the statue of Admiral Winslow which now adorns the State House of Massachusetts. Admiral Winslow commanded the *Kearsarge*. The proceedings at this dedication have recently been printed.

The fourth edition of Robert L. Dugdale's "The Jukes," with an introduction, especially prepared for this edition, by Franklin H. Giddings, Professor of Sociology in Columbia University, has been issued by G. P. Putnam's Sons, New York. This little volume, which is a painstaking study of the persistence and the modifications of heredity through several generations, as revealed in statistics of the crimes, pauperism, and diseases of a family of degenerates, whose real identity the author has disguised under the name Jukes, is a unique chapter in sociological investigation and has proved, and should prove, invaluable to students of criminology and to those interested in eugenics.

BOOKS RECEIVED

RECEIPT of the following new books is acknowledged:—

Report of the Thirty-third Annual Meeting of the American Bar Association, held at Chattanooga, Tenn., Aug. 30 and 31 and Sept. 1, 1910. V. 35. Lord Baltimore Press, Baltimore. Pp. 1197. (Cloth, \$1.25, paper, \$1.)

David Ricardo: A Centenary Estimate. By Jacob H. Hollander, Ph.D., Professor of Political Economy in the Johns Hopkins University. Johns Hopkins University Studies in Historical and Political Science, series 28, no. 4. Johns Hopkins Press, Baltimore. Pp. 137 (index). (Cloth, \$1.50, paper, \$1.)

A Treatise on the Law of Pawnbroking, as governed by the principles of the common law, and as modified by the statutes of the different states of the United States, and the ordinances of the municipalities regulating pawnbroking; and a Review of Pawnbroking. By Samuel W. Levine, of the New York bar. S. W. Levine, New York. Pp. 111 + 13 (index).

The Law and Practice in Bankruptcy, under the National Bankruptcy Act of 1898. By William Miller Collier. 8th edition, with amendments of 1903, 1906 and 1910, and with decisions to date, by Frank B. Gilbert of the Albany bar, editor of Street Railway Reports, Annotated; joint author of Commercial Paper, etc. Matthew Bender & Co., Albany. Pp. lxxxi, 854 + 244 (General Orders and Forms) + 157 (Rules and Statutes) + 51 (General Index). (\$7.50.)

Modern Theories of Criminality. By C. Bernaldo de Quirós, of Madrid. Translated from the second Spanish edition by Alfonso de Salvio, Ph.D., Assistant Professor in Romance Languages in Northwestern University. With an American Preface by the Author, and an Introduction by W. W. Smithers, Esq., of Philadelphia, Secretary of the Comparative Law Bureau of the American Bar Association. Modern Criminal Science Series, v. 1. Little, Brown & Co., Boston. Pp. xxvii, 249 (index). (\$4 net.)

Criminal Psychology: A Manual for Judges, Practitioners and Students. By Hans Gross,

J. U. D., Professor of Criminal Law at the University of Graz, Austria, formerly Magistrate of the Criminal Court at Czernovitz, Austria, Editor of the "Archives of Criminal Anthropology and Criminalistics." Translated from the fourth German edition by Horace M. Kallen, Ph.D., Assistant and Lecturer in Philosophy in Harvard University. With an American preface by the author, and an introduction by Joseph Jastrow, Ph.D., Professor of Psychology in the University of Wisconsin. Modern Criminal Science Series, v. 2. Little, Brown & Co., Boston. Pp. xx, 492 + 22 (appendices and index). (\$5 net.)

Latest Important Cases

Banking. Guaranty of Bank Deposits — Statutes of Oklahoma, Nebraska and Kansas Constitutional — Police Power. U. S.

The constitutionality of the Oklahoma bank deposit guaranty law was upheld by the United States Supreme Court Jan. 3, in *Noble State Bank v. Haskell*, 219 U. S. —, 31 Sup. Ct. 186. The court decided that contract obligations arising from a state bank's charter subject to alteration or repeal are not impaired by the state's levying assessments to create a guaranty fund, unless the bank is deprived of liberty or property without due process of law, that such assessments, on the contrary, are a valid exercise of the police power, and such power extends to the regulation of the banking business.

Mr. Justice Holmes said in the opinion of the Court, which was unanimous: —

"It may be said in a general way that the police power extends to all the great public needs. *Camfield v. U. S.*, 167 U. S. 518, 42 L. ed. 260, 17 Sup. Ct. 864. . . . It is asked whether the state could require all corporations or all grocers to help to guarantee each other's solvency, and where we are going to draw the line. But the last is a futile question, and we will answer the others when they arise. With regard to the police power, as elsewhere in the law, lines are pricked out by the gradual approach and contact of decisions on the opposing sides. *Hudson County Water Co. v. McCarter*, 209 U. S. 349, 355, 52 L. ed. 828, 831, 28 Sup. Ct. 529, 14 A. & E. Ann. Cas. 560. It will serve as a *datum* on this side, that, in our opinion, the statute before us is well within the state's constitutional power, while the use of the public credit on a large scale to help individuals in business has been held to be beyond the line. *Citizens' L. Asso. v.*

Topeka, 20 Wall. 655, 22 L. ed. 455; *Lowell v. Boston*, 111 Mass. 454, 15 Am. Rep. 39."

In *Shallenberger v. First State Bank*, tried at the same time, the Supreme Court held valid the Nebraska guaranty law, on the same grounds as those stated in the Oklahoma case.

In *Assaria State Bank v. Dolley*, involving the Kansas bank deposit guaranty law, the difference in the circumstances of the case lay in the fact that under the Kansas statute, unlike that of Oklahoma, contribution to the fund and participation in its advantages is optional rather than compulsory. Mr. Justice Holmes held that the law could not for this reason be viewed as not justified under the police power. Neither was there any unconstitutional discrimination in favor of depositors, or in favor of a certain class of banks.

Customs Duties. Foreign Residence — Incoming Passengers Presumably Truthful. U. S.

In deciding the case of Bradley Martin, Jr., of New York, who resisted payment of duty on his personal belongings on the ground that he was a citizen of England, the United States Court of Customs Appeals on Jan. 5 defined the status of one class of American citizens who live abroad a number of years. Mr. Martin arrived in New York on the *Kaiserin Auguste Victoria* on Oct. 9, 1909. His household effects and other foreign purchases were held dutiable on the ground that he was not a foreign resident. Two months after he landed Mr. Martin determined to remain in the United States and went into the banking business in New York City.

Judge Hunt wrote the decision, saying in part: —

"We are of the opinion that he has sustained the burden of proving that when he arrived in

the United States he was not a resident of this country. He had been abroad practically all his life, and maintained a household, claimed a residence there, had paid income taxes in England, never claimed the right to vote in the United States, and appears to have had no intention of remaining here when he arrived in New York in October, 1909.

"We do not overlook the importance and necessity for customs officers to search for external facts by which they may gather the intent of those who claim to be non-residents, entitled to exemption, for it is only by extreme vigilance that fraud may be prevented. On the other hand, a witness is presumably truthful, and if, on the uncontradicted external facts, themselves not irreconcilable or incompatible with strict honesty of conduct, the only deduction which is inconsistent with such presumption is in favor of the person arriving, it becomes the duty of the courts to sustain his statement, rather than to discredit it."

Due Process of Law. *No Federal Question Involved in Municipal Ordinance without Force of Sovereign State Law — Rate and Franchise Cases Must be Tried in State Courts.* U. S.

An important decision was rendered Feb. 6 by the United States Court of Appeals for the ninth circuit, at San Francisco, the effect of which was to make it impossible for public service corporations to seek relief from municipal ordinances relating to rates and franchises by appealing to the federal courts. *Seattle Electric Co. v. Seattle, Renton & Southern Ry. Co.*, San Francisco Recorder, Feb. 14.

The appellee took its street railway franchise under a declaration that the franchise should "not be deemed exclusive" and under a reservation by the city of Seattle of the right to grant a similar franchise to any other corporation. The city subsequently granted a second franchise to the appellant corporation, providing by ordinance that the original holder be entitled to compensation for any damages suffered. The appellee in this action, complainant in the court below, thereupon attached the second franchise as depriving it of its property "without due process of law," and the United States Circuit Court for the Western District of Washington issued an injunction restraining the second company from constructing its road, from which injunction the second company appealed.

The Court of Appeals decided that the Circuit Court exceeded its jurisdiction in issuing the injunction, basing its holding on two grounds.

First, to quote the opinion, "manifestly the

ordinance is not in conflict with the Constitution of the United States. Instead of taking complainant's property without due process of law, it expressly provides that it shall not be so taken. There is no right claimed under it by the defendant contravening any rights secured to the complainant under the Constitution of the United States. This proposition requires no discussion. It appears plainly and distinctly upon the face of the ordinances."

Secondly, "there is a further and, as we believe, a conclusive objection to the claim of right on the part of the complainant to invoke the jurisdiction of the circuit court on constitutional grounds. . . . If it should be conceded that in some view of the ordinance and defendant's action under color of its provisions there would be a taking of complainant's property without due process of law, still it would not follow that the circuit court had jurisdiction of the case unless the ordinance in that aspect would be the supreme law of the state. The supreme law of the state is the constitution of the state; and that document provides in Article 1, Section 3, as does the Fourteenth Amendment to the Constitution of the United States, that: 'No persons shall be deprived of life, liberty or property without due process of law.'

"Under this provision of the state constitution the ordinance would be as invalid as under the federal Constitution. . . .

"This was substantially the question before the Supreme Court of the United States in *Hamilton Gas Light Co. v. Hamilton City*, 146 U. S. 258, where the court said: —

"The jurisdiction of that court [Circuit Court of the United States] can be sustained only upon the theory that the suit is one arising under the Constitution of the United States. But the suit would not be of that character, if regarded as one in which the plaintiff sought protection against the violation of the alleged contract by an ordinance to which the state has not, in any form, given or attempted to give the force of law. A municipal ordinance, not passed under supposed legislative authority, cannot be regarded as a law of the state within the meaning of the constitutional prohibition against state laws impairing the obligations of contracts."

"See also *Barney v. City of New York*, 193 U. S. 430."

Judge W. W. Morrow wrote the opinion, with which Judges W. B. Gilbert and Erskine M. Ross concurred.

Husband and Wife. Wife's Right of Action for Husband's Assault — Common Law Rule not Modified by District of Columbia Statute. D. C.

The question in *Thompson v. Thompson* (218 U. S. 611, 54 L. ed. 1180), decided by the United States Supreme Court Dec. 12, was whether, under the statutes governing the District of Columbia, a wife may bring an action to recover damages for an assault and battery committed by her husband. A provision of the District of Columbia Code, sec. 1155, authorizes married women "to sue separately for the recovery, security, or protection of their property, and for torts committed against them, as fully and freely as if they were unmarried." The court held that this provision did not so far modify the common law relation between husband and wife as to give the wife a right of action for assault. Mr. Justice Day, who wrote the opinion, said: "We can but regard this case as another of many attempts which have failed, to obtain by construction radical and far-reaching changes in the policy of the common law, not declared in the terms of the legislation under consideration."

Mr. Justice Harlan dissented, Mr. Justice Holmes and Mr. Justice Hughes concurring in this dissent.

Interstate Commerce. Liability of Initial Carrier — Carmack Amendment Constitutional — Fifth Amendment — Principal and Agent. U. S.

The so-called Carmack amendment to the Hepburn rate law, making the initial carrier liable for loss of interstate shipments during transportation not only on its lines, but also on those of connecting lines, was declared to be constitutional on Jan. 3 by the Supreme Court of the United States. *Atlantic Coast Line R. R. Co. v. Riverside Mills*, 31 Sup. Ct. 164.

It was contended that the act, by imposing the liability on the initial carrier, in disregard of the condition in the bill of lading, denied such carrier the liberty of contract secured by the Fifth Amendment of the Constitution. This contention the court answered by saying that under the decisions of the Supreme Court there is no such thing as absolute freedom of contract; the power of government extends to the denial of liberty of contract to the extent of forbidding or regulating every contract which is reasonably calculated to affect injuriously the public interests.

It was also contended that the act violates the Fifth Amendment by taking the property of the initial carrier to pay the debt of the independent connecting carrier whose negligence may

have been the sole cause of the loss. This contention the court held resulted from a superficial reading of the act. To quote Mr. Justice Lurton: "The receiving carrier is, as principal, liable not only for its own negligence, but for that of any agency it may use, although, as between themselves, the company actually causing the loss may be primarily liable." (Discussed in 72 *Central Law Journal* 129, Feb. 24.)

Interstate Commerce. Not Burdened by State Excise Tax on Company Whose Place of Business within the State is not Used in Interstate Commerce. Mass.

The plaintiff in an action brought to have a state excise tax abated as in violation of the federal Constitution, argued that chapter 490 of the Acts of 1909 of Massachusetts, imposing an excise tax on foreign corporations, was invalid as putting a burden upon interstate commerce. *Baltic Mining Co. v. Stevens*.

The Massachusetts Supreme Judicial Court, in deciding against the plaintiff on Jan. 5, said: —

"The plaintiff's regular place of business in Boston is not used in interstate commerce, as are the passenger stations and freight houses of railroad companies. It is used as a home in Massachusetts for this foreign corporation, for the financial management and direction of the company's affairs, where the president and treasurer have their offices, and the meetings of the board of directors are held. It could be given up or removed to any other state without affecting in any way the plaintiff's income from interstate commerce.

"If there were an arbitrary exclusion of the plaintiff from the commonwealth, except so far as it conducted the business of interstate commerce within the state it would put no burden upon its commerce, either in Massachusetts or elsewhere. Whatever view be taken of this imposition of an excise tax, it is difficult to see how it has any direct relation to the petitioner's income from interstate commerce. The required payment is strictly of an excise tax, and not of a tax upon property."

Master and Servant. Repeal of Fellow Servant Rule — Constitutionality of Mississippi Statutes — Equal Protection of Laws. U. S.

The United States Supreme Court affirmed the judgment of the Supreme Court of Mississippi Dec. 19, in a case involving the constitutionality of the Mississippi statute abrogating the "fellow servant" rule. *Mobile, Jackson & Kansas City R. R. Co. v. Turnipseed*. The action, which was one of tort, had been brought for the wrongful killing of a foreman of a section crew

charged with keeping the track in repair. The Court, Mr. Justice Lurton delivering the opinion, held (1) that the statute was not repugnant to that clause of the Fourteenth Amendment which guarantees to every person the equal protection of the laws, and (2) another statute of Mississippi, making proof of injury inflicted by the running of locomotives or cars *prima facie* evidence of negligence, does not deny the equal protection of the laws nor due process of law.

Patents. *Selden Patent on Gasoline Automobiles — Forced Construction of the Patent Cannot be Adopted.* U. S.

The United States Circuit Court of Appeals handed down a decision Jan. 10 reversing a decision returned by United States Judge Hough on Sept. 15, 1909 (21 *Green Bag* 534), and overthrowing the suit brought by the holders of the famous Selden automobile patent against C. A. Duerr & Co., the Ford Motor Company, the O. J. Gude Company, Panhard & Levasseur, the Société Anonyme des Anciens, Andrew Masserbal, John Wanamaker and others concerned in the automobile industry which sought to enforce a claim of infringement against all the defendants. The patent was obtained on Nov. 5, 1895, by George B. Selden, for an improved road engine.

The opinion of the Court, written by Judge Noyes, said in part:—

"While the conclusion of non-infringement which we have reached leaves the patentee empty-handed with respect to the patent for the short time it has to run, it cannot be regarded as depriving him through any technicality of the just reward of his labors. He undoubtedly appreciated the possibilities of the motor vehicle at a time when his ideas were regarded as chimerical. Had he been able to see far enough he might have taken out a patent as far reaching as the circuit court held this one was.

"The Brayton engine was the leading engine at the time, and his attention was naturally drawn to its supposed advantages. He chose that type. In the light of events, we can see that had he appreciated the superiority of the Otto engine and adapted that type for his combination his patent would cover the modern automobile. He did not do so. He made the wrong choice, and we cannot, by placing any forced construction upon the patent or by straining the doctrine of equivalents, make another choice for him at the expense of these defendants, who neither legally nor morally owe him anything."

Taxation. See Interstate Commerce.

Torrens System. *Validity of California Statute Providing for Quieting of Titles — State has Power to Legislate Regarding Registered Titles — Fourteenth Amendment.* U. S.

After the San Francisco earthquake, the California legislature enacted a statute designed to afford relief from the possible injustice arising from the destruction of public records by the conflagration. This statute (c. 59 of 1906) provided for the quieting of titles by means of a special form of action brought in the Superior Court of the county in which the property is situate. One Zeiss brought such an action, obtaining a judgment of the Superior Court removing the cloud on his title. The defendant company appealed. On certificate from the United States Circuit Court of Appeals two questions came before the Supreme Court of the United States, namely (1) whether the state had authority to deal with the subject embraced in the statute, (2) whether the act was repugnant to the Fourteenth Amendment. Both questions were answered in the negative in *American Land Co. v. Zeiss*, decided Jan. 3.

On the former question Mr. Justice White, who delivered the unanimous opinion of the Court, said: "As it is indisputable that the general welfare of society is involved in the security of the titles to real estate and in the public registry of such titles, it is obvious that the power to legislate as to such subjects inheres in the very nature of government. This being true, it follows that government possesses the power to remedy the confusion and uncertainty as to registered titles arising from a disaster like that described by the court below."

The Court thought the foregoing proposition self-evident, but as the question of the power of the court is intimately interwoven with that of the sufficiency of the procedure adopted, reviewed a number of leading cases which show conclusively that such power can unquestionably be legally exercised under such circumstances as those of the case in hand.

On the second point, also, the statute was upheld, the Court saying: "To argue that the provisions of the statute are repugnant to the due process clause because a case may be conceived where rights in and to property would be adversely affected without notice being actually conveyed by the proceedings is in effect to deny the power of the state to deal with the subject. The criterion is not the possibility of conceivable injury, but the just and reasonable character of the requirements, having reference to the subject with which the statute deals."

The Editor's Bag

PROCEDURAL REFORM — THE NEED OF CO-ORDINATION

THE subject of the reform of procedure, civil and criminal alike, has occupied an especially conspicuous place in the discussions of legal bodies and in the pages of legal publications during the past two or three years, if not for longer. At the present time it is safe to say that no legal question is more frequently or more earnestly discussed. While the press of the country have long been hammering at the legal profession to take steps to improve the intolerable conditions from which litigation in this country as a whole suffers, certainly the bench and bar cannot be accused of any failure to realize to the full the need of this great reform. If the administration of justice in this country is "a reproach to civilization," no one is more aware of that fact than the lawyer himself. His caution in seeking the proper remedies — remedies which will prove truly effective because thought out with due deliberation — must not be mistaken for indifference. The legal profession, as any one may see for himself, is alive to the fact that upon it solely rests the duty of taking the initiative in the reform. Indeed, it is already acting, and we are slowly moving toward better things.

While the fact that we are making progress is not to be denied, this progress is not as rapid or as definite in results

as one might desire. Much of the energy bestowed on the discussion of procedural questions is spent largely in vain, because it is not systematized and co-ordinated. The ablest legal minds in the country are formulating projects of procedural reform, and somewhere in the limbo of legal thought there exists a model system of pleading and practice which will some day assume tangible shape. It is by no means certain, however, that its materialization will not be due more to chance than to concerted effort.

The *Engineering News* is of the opinion that —

Mr. Brandeis ought not to stop his reform proposals with the railways. He has succeeded in focussing the attention of the nation on efficiency in industrial operation. Now let him grasp a magnificent opportunity and appeal to the court of public opinion for the application of efficiency methods in the business of his own profession — the Law.

That the machinery of the law, its rules of procedure, calls for the application of "efficiency engineering" is a proposition which should find ready endorsement. We are disposed to think, however, that there is now a more important problem confronting the legal efficiency engineer than that of improvement of our legal machinery. It is the problem of co-ordinating the agencies which are working to bring about this reform. The machinery by which this discussion is carried on needs to be perfected. Spasmodic, desultory efforts need

to be organized, and results to be collated from all sources, passed upon by some competent authority which speaks for the whole legal profession, and urged upon legislative bodies by some appropriate agency which voices the sentiment of a united bar. It is difficult to see how such an organization can be perfected, and here, truly, is a problem worthy of the ability of the most masterful efficiency engineer.

In England this reform, like other legal reforms, has been brought about readily because there is only one jurisdiction, and there has been full opportunity for concentration and unification of effort. In the United States, we have a multitude of jurisdictions, and we are hampered by countless differences in constitutions, statutes and usage. But co-operation, both of the states with one another and of the states with the nation, is possible, and should not only be invited but insisted upon.

We regret the non-existence of any official publication in this country devoted exclusively to the procedural reform movement. Such an organ would focus discussion and provide a suitable forum for debate. If the American Bar Association were to create a permanent procedural reform bureau, which intelligently supervised such discussion by means of a regular organ, its influence in bringing about definite accomplishment might become much greater.

The Commissioners on Uniform State Laws have not formulated a model uniform practice act, yet such an act is needed, and there is no subject entitled to receive more attention from this important and useful body. To what higher authority shall the various state bar associations submit their results to be passed upon, if not to the American Bar Association or the Commissioners on Uniform State Laws?

THE BUTLER OF THE MIDDLE TEMPLE

H. W. DARLING, chief butler of the Middle Temple, who has been presented by the Benchers with a check and rosebowl on the completion of fifty years' service, has described some of the duties of his picturesque office. For the past twenty-five years, since he was promoted to the chief butlership, he alone of all the servants has had the privilege of remaining in the Benchers' dining hall at speech-time. "It is very necessary that the utmost privacy should prevail."

Robing the Benchers is another of Mr. Darling's duties, and he himself wears a black gown at dinner. "When King Edward was made a Bencher in 1861 I robed him," he said. "Sir William Alexander, who was standing at his side, asked him if I might do so, and the prince nodded smilingly. Many years afterwards I robed his eldest son, the Duke of Clarence. King Edward was present on that occasion, too. Among those who have passed through these halls in my time were Lord Chief Justice Cockburn, Lord Westbury, Mr. Montague Smith, Sir Henry Hawkins and Sir Lawrence Peel, who once was Chief Justice of India."

Another of Mr. Darling's duties is to see that the barristers and students dining in the outer hall are served with the exact quantity of wine (port and claret) the laws of the Temple allow. "It would be a terrible breach," he said, "if any one should have even half a bottle more than the allowance. For two shillings they can have as much as they like to eat and as much beer as they choose to drink, but the wine is limited to one bottle of the best or two bottles of light. On 'grand nights' the allowance is more liberal."

LINES ON COLD STORAGE

"The representative of several egg concerns expressed the opinion that eggs were even more nutritious after being in cold storage a year than the first day after they were laid."—*Newspaper report of hearing on cold storage bill at Albany.*

THIS bill is bad and will deprive
The people of their rights.
On fresh-laid eggs we do not thrive;
Give us, for pure delights,
The egg which has a year been stored
Till it is rich in flavor.
For such our pennies we will hoard
And reckon it a favor.

But lest too long we have to wait
For our supply of hen fruit,
Why not, by order of the state,
In storage the old hen put?
Then we can have nutritious food,
Rich, strong and certified.
With such laws for the people's good
All should be satisfied.

SIRIUS SINNICUS.

THE LONGEST SUIT

WITH our strong national tendency to "get it over with" and to "end it one way or another," law suits, like other matters, are generally disposed of with a speed that strikes the average European, even the Englishman, as headlong. In England, a suit is not worthy of mention as an old one before it has been in the courts at least twenty years, and in a number of instances it has taken a half century for the mills to grind out the grist of justice.

The longest suit on record, however, is one which existed between the heirs of Sir Thomas Talbot, Viscount Lisle, and the heirs of a Lord Berkeley, respecting some property in the county of Gloucester. This suit began at the end of the reign of Edward IV, and was depending until the beginning of the reign of James I, when it was finally

compounded, one hundred and twenty years having elapsed.

MORE IOWA STORIES

C. B. KEELER in his lifetime was a brainy lawyer, and in a law suit very nervous, to such an extent that his hair would stand up nearly straight. One day as he was walking back and forth in front of the bench engaged in deep meditation, ready for another encounter, the opposing counsel said, "Keeler, if you would only put a feather in your hair you would make an ideal Mephistopheles without any further make-up."

One of the old judges in practice and on the bench in Iowa for many years was an ideal as well as an odd character. Once in a suit involving the price of certain fanning mills which were said to be of no value, the judge replied after a heated argument that he instruct the jury in favor of the defendants; "Well, I have always found, in my long career at the bar and on the farm, that the fanning mill never worked so well after the chickens had roosted on it all winter."

The story is told of an old lawyer, that he had a case of a person concerning some outlawed account, and when the jury was selected it was made up of those who would rather not pay a claim if they could help it. The client said, "See here, just talk to them this way, that this dead beat business has got to stop somewhere or other." He did so, and won the case.

Another lawyer happened to come into the room, and left the door of the dingy court room wide open, when the Judge called out to the bailiff, "Close that door, man, for this case will certainly slip out that opening if nothing is done to prevent it."

The referee in bankruptcy was asked one day who had most of the clients, and he replied, Mr. H—. An attorney who stood by replied, "I always knew that old H— had many of the dead beats, but I did not know before that he had all the dead beats in our town."

THE JUDGE WAS EDIFIED

IT IS a well-known fact that many very sedate and learned men greatly enjoy stepping aside now and then from the weighty matters connected with their profession, and indulging in affairs of less absorbing demand. The late Judge John T. Redd of the Tenth Judicial Circuit of Missouri recreated his energies by reading light literature of the "Deadwood Dick" type. When going about from court to court he generally carried a supply of ten-cent novels along with his briefs and law papers. This practice of the Judge's was the subject of some good-natured banter by the lawyers, all of which his Honor took in good part.

One day some wags of the Hannibal bar put up a job on the Court. They fixed up a package of blood and thunder books, marked "important papers," and had them delivered by express. Court was in session when the bundle arrived, the expressman deeming it of such a nature as to warrant the interruption of proceedings while Judge Redd signed acknowledgment of the receipt. He looked thoughtfully at the package, and then placed it in a drawer near his bench. Then he resumed the trial.

It was several days before the lawyers in the conspiracy heard how the Judge took the matter, and they began to fear he had been mortally offended. Certainly he had been unusually grave. That was a bad sign. There were serious grounds for thinking he might regard it as an act deserving a fine for

contempt of court — perhaps disbarment. The judge's smooth face was a mask; there was no telling what he would do.

Finally a day came when a big trial was on at Hannibal. Lawyers from Chicago and St. Louis were there, as well as every member of the local bar. Unusual solemnity reigned in court. Judge Redd, dignified and austere, entered the court room and ascended to his bench. Everybody supposed his first business would be to call the docket. Instead he opened a drawer, fished out some papers and laid them on the desk before him. Then he rapped his gavel with unusual emphasis. There was an immediate hush.

"Gentlemen of the Hannibal bar," said the Judge in the tones of a keeper of a cemetery, "a few days ago I was the favored recipient of your bounty in the form of some literature. I call it literature because it is customary to so refer to written or printed words. The man who gets up a horse bill or a notice of an auction sale is to some extent a literary person, and I'll denominate your gift as literature.

"For not having referred to your thoughtfulness sooner, gentlemen of the bar, I crave your pardon. The delay was occasioned by press of other duties, which made it impossible for me to appreciate the extent of your interest in me. I desired to be able to properly appraise the present before I undertook to thank you. I am now in a position to express myself understandingly.

"In the still small hours of the night I enjoyed an exquisitely thrilling sensation as I read how 'Volcano Victor' shot ten revenue officers with a six-chambered revolver, and slew a buffalo for breakfast with the remaining loads. I tremblingly followed the author through the twilight shades of the 'disappearing

canyon' far enough to learn of a new road to Hades, and my belief that he has landed there by now amounts almost to a conviction. I have been taught by 'Moon-faced Adams,' the peg-legged guide and broncho buster, that oxen can climb trees when necessary, and that a mule can be so trained that its bray sounds like a sweet whisper of love. Since reading this — er — book, I have learned that I have hitherto been an unlettered and unlearned citizen.

"There is no limit to the expensive ideas compressed between the richly illuminated lids of your handsome donation to the Court, and in order, gentlemen, that you may gather some ideas of my humble appreciation, I will say that by a careful perusal of these pages I have gained richer information than has been vouchsafed me during all the years of my contact with the Hannibal bar. Gentlemen, the Court thanks you. Mr. Clerk, call the jury."

GREATER AMBITIONS

A JUDGE in the municipal courts in New York has a son of whose brightness he and the boy's mother are extremely proud.

Recently the family received a visit from a maiden aunt who is quite wealthy and intensely puritanical.

Bobby was brought into the library to meet his august relative, and for some time comported himself with great dignity, and Auntie was evidently favorably impressed. As she was chatting with him, she said: "Now you are such a bright little man, that when you grow up I suppose you will be a great judge and sit on the bench like your father."

"Not much," said Bobby emphatically — "I'm going to run a pool room!"

THE LAW IN MAN

FORMERLY, the Isle of Man had many unique laws, most of them being the outgrowth of peculiar conditions upon the island, and which, while perfectly reasonable there, would have been absurd elsewhere.

For instance, to take away a horse or an ox was not a felony, but a trespass, but to steal a pig or a fowl was a capital crime. The reason for this was found in the fact that, owing to the smallness of the island, it was impossible to permanently conceal or make use of, much less sell a horse or ox, so that it would hardly have been reasonable to regard as a theft the taking away of such animals, when their recovery by the owner was only a matter of a few hours, or days at the outside. On the other hand, pigs and fowls could be readily converted to the thief's use, either as food for himself, or as a readily salable commodity, thoroughly disguised by the process of dressing. The death penalty seemed none too severe to the stern and upright natives.

THE SCALES OF JUSTICE

WE ARE used to representing the figure of Justice holding out scales, yet our system of punishment for crime hardly carries out the idea suggested, the balancing of good and ill.

The ancient Persians went upon this very charitable theory: that to be good, it was not necessary never to do amiss, but to do for the most part that which was right. Therefore, when a person was accused of any breach of the laws, and even clearly proved to be guilty, he was not immediately condemned to punishment, but a careful inquiry was made concerning the whole course of his life, in order to determine whether the good or the evil actions in it had

predominated. If the good actions were in the majority, he was acquitted — or, more properly, forgiven — if the ill or criminal actions outweighed the good, he was condemned.

PREDETERMINED

IN the local courts out West there is generally a friendly, sociable, talkative atmosphere to be found among judge, jury, lawyers and client. In one

of these county courts a lawyer was arguing, and after he had exhausted his eloquence in behalf of his client on trial for stealing, he wound up with: —

"Gentlemen of the jury, after what this man has offered in evidence and what I have stated to you, is this man guilty? Can he be guilty? Is he guilty?"

Imagine his chagrin when the foreman of the jury replied: "You just wait a little while ole hoss 'n' we'll tell you."

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, factia, and anecdotes.

USELESS BUT ENTERTAINING

"You are charged with stealing nine of Colonel Henry's hens last night. Have you any witnesses?" asked the justice sternly.

"Nussah!" said Brother Jones humbly. "I 'specks I 'se sawtuh peculiar dat-uh-way, but it ain't never been mah custom to take witness along when I goes out chicken-stealin', suh."

—*Central Law Journal.*

Sir Henry Hawkins was once presiding over a long, tedious and uninteresting trial, and was listening apparently with great attention to a very long-winded speech from a learned counsel. After a while he made a pencil memorandum, folded it, and sent it by the master to the queen's counsel in question, who, unfolding the paper, found these words: "Patience competition. Gold medal, Sir Henry Hawkins. Honorable mention, Job."

—*Argument.*

The late Chief Justice Chase was noted for his gallantry. While on a visit to the South, shortly after the war, he was introduced to a very beautiful woman who prided herself upon her devotion to the "lost cause." Anxious that the Chief Justice should know her sentiments, she remarked, as she gave him her hand, "Mr. Chase, you see before you a rebel who has not been reconstructed."

"Madame," he replied with a profound bow, "reconstruction in your case would be blasphemous."

—*Everybody's.*

Up in Minnesota Mr. Olsen had a cow killed by a railroad train. In due season the claim agent for the railroad called.

"We understand, of course, that the deceased was a very docile and valuable animal," said the claim agent in his most persuasive claim-agent-

manly manner, "and we sympathize with you and your family in your loss. But, Mr. Olsen, you must remember this: Your cow had no business being upon our tracks. Those tracks are our private property and when she invaded them she became a trespasser. Technically speaking you, as her owner, became a trespasser, also. But we have no desire to carry the issue into court and possibly give you trouble. Now then, what would you regard as a fair settlement between you and the railroad company?"

"Vall," said Mr. Olsen slowly, "Ay bane poor Swede farmer, but Ay shall give you two dollars."

—*Everybody's.*

One of the officials of our Embassy at London tells of an incident that occurred in a train proceeding through the north of Scotland. There was another passenger in the compartment at the time the American entered.

At the next station three Scots came in. They were all big, burly men and completely filled up the seat on the side of the compartment where the first mentioned passenger was seated. At the next station the carriage door opened to admit a tall, cadaverous individual, whose girth was about that of a lamp-post.

He tried to wedge himself in between two of the passengers already there, and said to one of them:—

"Here, you must move up a bit. Each seat is intended to accommodate five persons, and according to act of Parliament you are entitled only to eighteen inches of space."

"Aye, aye, my friend," replied one of the Scots; "that's a' very guid for you that's been built that way; but ye canna blame me if I ha' na' been construckit according to act of Parliament."

—*Lippincott's.*

Correspondence

MR. JUSTICE DARLING'S BOOK CONTAINS PARODIES, NOT QUOTATIONS

To the Editor of the Green Bag:—

Sir: In the amusing notice of myself in the *Green Bag* of December last — which you were kind enough to send me — there is an injustice done to several deceased judges, and I should be sorry if it were not removed.

Unless I am entirely mistaken, the writer of the article is under the impression that the judgments of Lord Coleridge, C. J., of James, L. J., and the others which he says I *quote* in my little "Scintillæ Juris" are genuine

judgments delivered by them. But as a matter of fact they are merely parodies of the style of those judges — and not even travesties of actual judgments of theirs. The parodies are however sufficiently close for me to have been assured by each Judge in turn that the judgments attributed to his brethren were most characteristic.

Believe me

Yours faithfully,

CHARLES DARLING.

*Lady Cross Lodge,
Brockenhurst, Hants,
January 9, 1911.*

The Legal World

The United States Supreme Court

The time of the United States Supreme Court in January was taken up chiefly with hearing the re-arguments in the *Standard Oil, American Tobacco Company* and *Corporation Tax* cases, practically a week being given both to the first and second and three consecutive days to the third, before the Court adjourned to give extended deliberation to these three great suits till Feb. 20.

It was thought that Mr. Justice Van Devanter might not sit in the *Standard Oil* case, as he had participated in the judgment of the Circuit Court, but he was in his seat to hear all the arguments of counsel.

The rehearing of the *American Tobacco Company* case began on Jan. 5. One brief was filed in the court by John G. Johnson of Philadelphia, Judge William J. Wallace, W. W. Fuller, Delancey Nicoll and Junius Parker, all of New York, who carried the brunt of the battle for these corporations in the first argument of their dissolution suit a year ago. Another brief was filed by William M. Ivins of New York.

When oral arguments were begun on Jan. 6, J. C. McReynolds, special assistant to the Attorney-

General, made the opening address. He said that his view was that the law intended to prevent interference with the free flow of competition in commerce between the states and that any combination that was sufficient to interfere with the free flow was within the Sherman anti-trust law. He explained that he had in mind a material and direct obstruction of commerce.

Delancey Nicoll opened for the defendants on the 9th. He was followed by John G. Johnson and W. B. Hornblower, the latter speaking on behalf of the Imperial Tobacco Company, referred to as the "British Tobacco Trust." Mr. Johnson said that the best minds of the country had failed to convince the court that the word "unreasonable" should be inserted before "restraint," and he prophesied that the Government's present attempt would result in failure. Consequently, Mr. Johnson argued that the Government's whole theory fell to the ground. He also argued that the *Knight* case controlled the present suit.

In the final arguments on the 11th, Junius Parker, speaking for John G. Johnson, said that bigness of an organization or mere power possessed by it was not a criterion of a monopoly.

It was argued that there must be an exclusion or attempt to exclude others from interstate trade by means at least tortuous under the common law or under statutes other than the Sherman law. Attorney-General Wickersham objected to this interpretation, and said that decisions of the court had demonstrated that "monopolizing" was brought about by acts of individuals in endeavoring to engross to themselves all of a given commodity and that it had become a question of intent.

When the hearings in the *Standard Oil* case were begun, Mr. Milburn, in taking up his defense, explained the decree of dissolution issued by the Circuit Court. He especially urged the disaster and difficulty which would follow its affirmation. A history of the great combination followed. Acquisitions never had been made, Mr. Milburn told the court, with an intent to restrain or to monopolize interstate trade. Most of the purchases were made, he said, before 1879. His speech on the 12th took up three hours.

On the 13th, Frank B. Kellogg, special assistant to the Attorney-General, began an address to the court in an effort to show that the Standard Oil Company of New Jersey should be dissolved. "I have listened with admiration," said he, "to the charming story of growth and centralization of this benevolent institution. It was told as only a great advocate could tell it. But I mean to tell to the Court the cold facts. And I say on my oath as a member of this bar, and I regard that highly, that the equal of this record in oppression is not to be found in the commercial history of this country."

D. T. Watson of Pittsburgh contended on the 16th that the properties conveyed were non-competitive before 1899 and remained exactly as they had been after that year. The reason he advanced for the Circuit Court holding that the conveyance was illegal was that it believed it had to follow the decision of the Supreme Court in the *Northern Securities* case. But the *Standard Oil* case, he argued, differed from that suit. A second point that Mr. Watson made was that the decree practically confiscated property, because it did not allow the subsidiary companies to pay dividends to the Standard Oil Company of New Jersey, and that the stock of the company became practically worthless.

Attorney-General Wickersham began his closing remarks for the Government as soon as court convened on the 17th. Mr. Wickersham said Congress framed the Sherman anti-trust law to strike at just such monopolies as the Standard Oil Company had built up. The effect of the

conveyance, he said, "was to rivet the control of one hand over the twenty companies, a control that neither death, taxes nor financial ruin could rend. Before, the separation of the stock of one of the certificate holders would have disintegrated the control. By this reorganization a perpetual immortal element was accorded to the control."

Frank B. Kellogg, special counsel for the Government, resumed the argument he had begun on Friday and devoted nearly two hours to a recital of the alleged unfair practices of the corporation. Mr. Kellogg was reviewing the action of the different states that had ousted the Standard Oil Company, when Chief Justice White asked what there was in the absence of affirmation of the decree in this case to prevent the states from continuing the work of ousting the alleged monopoly. On its face the question appeared to suggest the capacity of the states to deal with the alleged trust problem without the necessity of the intervention of the federal Government. To this Mr. Kellogg replied that the action of the various state governments had the effect simply of excluding the Standard Oil from intrastate commerce, leaving it free to continue in interstate commerce.

John G. Johnson, leading counsel for the Standard Oil organization, concluded on the 18th in a brilliant oratorical effort the long oral argument. The acquisition, in the course of conducting business, of competitors was not in restraint of trade nor tending toward monopoly, Mr. Johnson argued. Monopolizing is the exclusion of others illegally from their business, he declared.

The final assault on the constitutionality of the corporation tax provisions of the Payne-Aldrich tariff act began on Jan. 17. Maxwell Evarts and Julian T. Davies, both of New York, argued that the tax was unconstitutional. On the following day Solicitor-General Lehmann defended the law in an argument which took up nearly three hours. He declared that the tax was not upon an instrumentality of a state, a franchise to a corporation, but was upon the exercise of the right procured by the corporation. The hearing was continued on the 19th, when Moorfield Storey and Burton E. Eames contended the Massachusetts real estate "trust," so-called, was not within the scope of the act.

One of the most spectacular legal battles ever waged between capital and organized labor reached its final stages Jan. 27 when the Supreme Court of the United States took up for oral argument the famous litigation by the Bucks Stove &

Range Company of St. Louis, Mo., against the American Federation of Labor. Early in the arguments on the appeal from the decision of the Court of Appeals of the District of Columbia, the Court ascertained that the Federation was no longer boycotting the Bucks Stove Company, and therefore that it was not necessary to determine whether the courts of the District of Columbia were right in issuing injunctions. But though peace had come to the principals there was no evidence that opposing counsel were not in earnest in arguing the "contempt" case. They took the position that in order to decide the contempt case, it was necessary for the court to decide whether the "boycott" should have been enjoined. Fighting for the American Federation of Labor and its officials were Alton B. Parker, former Democratic presidential candidate; Jackson H. Ralston, Frederick L. Siddons, William E. Richardson and John T. Walker. Opposed to them as the representatives of the Bucks Stove & Range Company were Daniel Davenport and J. J. Darlington. Arguments were made by Judge Alton B. Parker and Jackson H. Ralston for the accused, and by J. J. Darlington and Daniel Davenport against them. What Attorney Ralston and Darlington had to say was strictly in regard to the law in the case. Judge Parker digressed to praise these leaders of American organized labor, while Mr. Davenport made a vigorous attack upon the American Federation of Labor. The Court took the case under advisement.

Personal

Hon. Ralph Oregon Dunbar, recently elected Chief Justice of the Washington Supreme Court, was born in Illinois in 1845, but when he was only one year old his parents migrated to Oregon. After attending Willamette University, he moved in 1867 to Olympia, where he studied law in the office of Elwood Evans. Excepting for a brief time when he practised law at The Dalles, his life since 1867 has been spent in Washington. He was editor for six years of the *Goldendale Sentinel*. For more than forty years he has been in close touch with the life of the state and has a long record of honorable public service.

Van Vechten Veeder of Staten Island, N. Y., has been made United States Judge for the new Eastern District of New York. Mr. Veeder is a son of John W. Veeder of Schenectady and is forty-two years old. He is a graduate of Columbia University and was admitted to the bar in Chicago in 1891 and practised in that city for

ten years. He went to New York about ten years ago.

Hon. Reuben R. Gaines resigned as Chief Justice of the Supreme Court of Texas early in January, after a stroke of paralysis. For nearly a quarter of a century he had been a member of this court, and for nearly sixteen years Chief Justice. He maintained the highest standards of his calling, and his decisions in nearly every instance received the judicial approval of the United States Supreme Court, when subjected to review by that tribunal.

Bar Associations

Arizona. — The Arizona Bar Association elected these officers at its annual meeting held at Phoenix, Ariz., Jan. 10-11: Frederick S. Nave of Globe, president; H. B. Wilkinson of Phoenix, vice-president; Paul Burks of Prescott (re-elected), secretary; J. H. Kibbey of Phoenix (re-elected), treasurer. At the annual banquet the following speeches were made: "Are the Initiative and Referendum Theoretically Practicable?" Judge F. S. Nave and George Purdy Bullard; "L'Homme Criminel," Attorney-General John B. Wright; "The Lawless Science of the Law," John Mason Ross; "Judicial Psychology," Chief Justice Edward Kent; "The Process of Amending a Constitution," Judge Kibbey and W. B. Cleary; "The Recall of the Judiciary and the Salary of the Judges," John S. Williams and Col. H. L. Pickett.

Kansas. — The twenty-eighth annual meeting of the Kansas State Bar Association was held at Topeka, Jan. 11-12. Among the papers read were "The Maladministration of Justice in Homicide Cases," by Burr W. Jones of Madison, Wis., and "The Moral Duty to Aid Others as a Basis of Both Civil and Criminal Liability," by A. D. Andrew of Kansas University Law School.

Maine. — The annual meeting of the Maine State Bar Association was held in Augusta Jan. 11. Hon. Luere B. Deasy, of Bar Harbor, presided and the meeting was attended by between sixty and seventy of the members. The annual address was delivered by Hon. Frank S. Streeter of Concord, N. H., who took for his subject, "The World Moves," and discussed the initiative and referendum and compensation for industrial accidents.

The introduction of the resolutions of the Knox County Bar Association favoring a new law court for the state of Maine, independent

of the *visi prius* terms, provoked a lively discussion, the subject being referred to a special committee which was to report at an adjourned meeting.

The election of officers resulted as follows: O. F. Fellows of Bucksport, president; George C. Wing of Auburn, F. H. Appleton of Bangor and C. F. Johnson of Waterville, vice-presidents; Norman L. Bassett of Augusta, secretary and treasurer.

At the banquet the following toasts were responded to: "The Bar," Hon. Charles F. Libbey; "The New Hampshire Bar," Hon. Frank S. Streeter; "The Bench," Justice Savage; "The Legislature," Hon. Frank A. Morey; "The Young Lawyer," Raymond Fellows, Esq.; "The Expert," Hon. Herbert M. Heath.

Montana. — The following officers were elected at the twenty-sixth annual meeting of the Montana State Bar Association, held at Helena, Jan. 10: J. N. Kirk of Butte, president (re-elected); C. F. Word of Helena, secretary (re-elected); A. J. Horsky of Helena, treasurer.

New York City. — The Association of the Bar of the City of New York elected officers Jan. 10 for the ensuing year as follows: President, Francis Lynde Stetson; vice-presidents, Charles C. Burlingham, William D. Guthrie, Payson Merrill, Henry W. Taft and George Zabriskie; recording secretary, Silas B. Brownell; corresponding secretary, Henry Melville; treasurer, S. Sidney Smith; members of the executive committee, Francis W. M. Cutcheon, Francis C. Huntington, William Travers Jerome, L. C. Krauthoff and Charles W. Pierson; members of the committee on admissions, Eldon Bisbee, Alfred A. Cook, Winthrop E. Dwight, Harmon S. Graves, Montgomery Hare, Albert C. Millbank and Charles Albert Perkins.

North Carolina. — The North Carolina Bar Association has selected June 28-30 as the dates for the annual meeting, the place of which has not yet been decided upon.

Oklahoma. — The Oklahoma State Bar Association held its annual meeting at Oklahoma City Dec. 28-29. T. J. Womack delivered the president's address, and the annual address was given by Judge Doster, one of the ablest lawyers in the Southwest, whose subject was, "The Constitution and the Courts." J. C. Monnett, dean of the Oklahoma University Law School, read an interesting paper on "Legal Education and Admission to the Bar." Attorney-General Charles

West of Guthrie delivered an address on "Limitations of the Powers of the Corporation Commission." S. T. Bledsoe of Guthrie read a paper on "Regulation of Public Service Corporations by the State Commission." D. I. Johnston of Oklahoma City read a paper on commercial law. Judge Stilwell H. Russell of Ardmore delivered an interesting address on "Harmless Error." Judge J. T. Dickerson of Edmond read a paper on "Juvenile Courts and Their Influence." A resolution was passed providing for the appointment of a committee of three, to urge upon the legislature the enactment of a law increasing the number of justices of the state Supreme Court from five to seven in order that the docket might be cleared of more than 1,100 cases. Judge John H. Buford of Guthrie was elected president, Clinton O. Bunn of Oklahoma City, secretary, and C. H. Ennis of Shawnee, treasurer.

South Dakota. — At the twelfth annual meeting of the South Dakota Bar Association, held at Pierre, S. D., Jan. 11-12, the president's address was delivered by C. G. Sherwood of Clark, and the principal address was made by Judge Charles S. Whiting, a member of the state Supreme Court, whose topic was "The Lawyer as a Citizen."

Uniformity of Laws

Uniformity of legislation was the subject dealt with by several speakers at one of the Saturday luncheons of the Republican Club of New York City, Jan. 14. Walter George Smith of Philadelphia sketched the history of the movement which has resulted in a number of model uniform acts, and said that the uniform divorce law had been accepted by three states and is practically the law of a fourth. It would not prevent divorce, he said, but it would reduce frauds to the minimum and obviate the scandal of a marriage being good in one state and void in another and children legitimate in one jurisdiction and illegitimate in another. Thomas W. Shelton of Norfolk, Va., dealt with the difficulties arising from diverse judicial interpretations of the same law. As a remedy he pointed out that in the highest court of the land — the United States Supreme Court — the individuality of its members is merged in the court, and he suggested that uniformity in judicial interpretation might be gained by conferences of the state Courts of Appeals, or at least of their presiding Justices. Ralph W. Breckenridge of Omaha, chairman of the joint committee of the

Nebraska Bar Association and the National Civic Federation on Reform in Legal Procedure, complained that the system in use in the federal and state courts is one hundred years behind the age. Amasa M. Eaton of Providence, R. I., spoke briefly, urging that the final courts in each state should take judicial cognizance of the work of the Uniform Laws Conference, and Seth Low summed up.

"If we can't solve the problems of our common life," he said, "by the co-operation of the states it means a tremendous transfer of power to the federal Government. There is not an extreme Republican who wants to weaken the fundamental principles of our Government. It will be the work of years, but the atmosphere is now friendly to the recognition of uniformity in the common interests by the common action of the independent states."

Miscellaneous

It is reported that an international university of international law will be established at The Hague, more or less in connection with the international arbitration court. The cost of the institution is estimated at about £10,000,000, which will be subscribed by capitalists interested in furthering the world's peace. It is understood that the plans will soon be finished.

A comprehensive study of the causes of crime and of the lives of persons after their release from prison has just been completed by the Prison Association of New York, and a full report will soon be made to the Sage Foundation, which furnished the funds for the work. Seven hundred prisoners and ex-prisoners from Elmira Reformatory were studied by the Prison Association's specialists, and a complete history of each subject has been made and tabulated. The deductions from this compilation will be used in mapping out recommendations for the prevention of crime.

Obituary

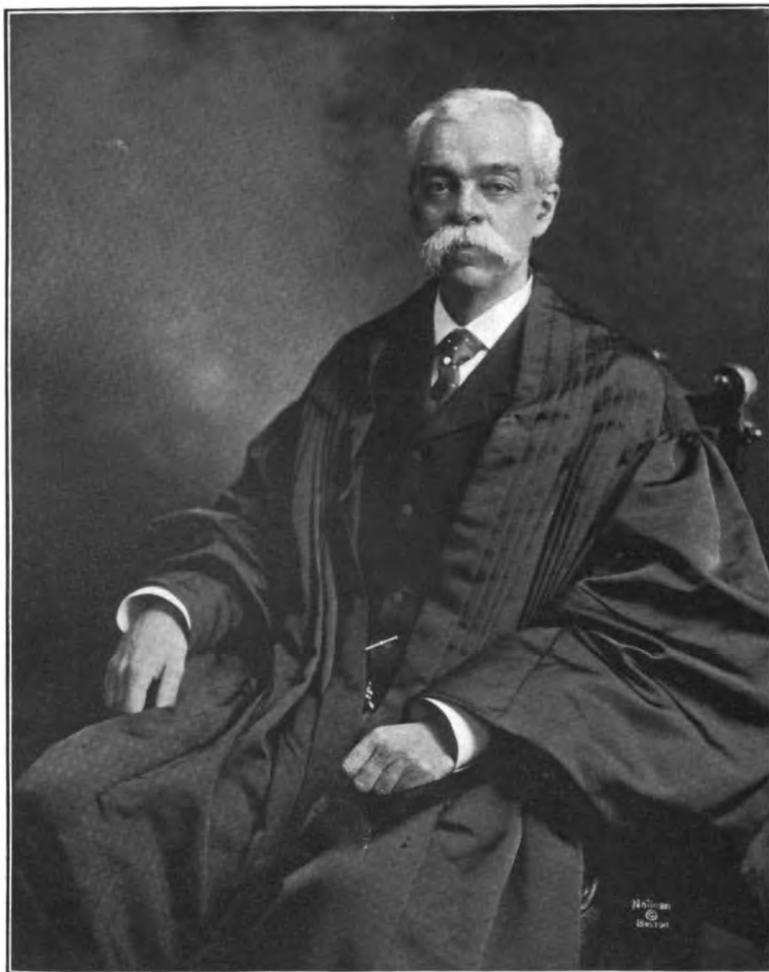
Charles J. Hughes. — United States Senator Charles J. Hughes, junior Senator from Colorado, died at Denver, Jan. 11, after a long illness. He was born in Kingston, Caldwell county, Mo., Feb. 16, 1853, and was graduated from Richmond (Mo.) College in 1871. He was a law student at the University of Missouri from 1872 to 1873,

and received the degree of LL.D. both from the University of Missouri and the University of Denver. From the beginning of his practice in Colorado, Senator Hughes gave special attention to mining and irrigation litigation. He delivered lectures upon mining and irrigation law at Harvard Law School and was for many years professor of mining law at the University of Denver.

Daniel W. Bond. — Judge Daniel White Bond, since 1890 a Justice of the Superior Court of Massachusetts, died at his home in Waltham, Mass., Jan. 22, within a few weeks after he had presided over the trial of Hattie Le Blanc, in the famous Glover murder case. He was born in Canterbury, Conn., on April 29, 1838. He spent his boyhood in his native town, working for farmers out of school terms and attending the public schools in the winter season. In 1862 he received the degree of LL.B. from the Law School of Columbia University. For a time he practised in Providence, R. I., and then he removed to Florence, Mass. He then opened an office in Northampton. From 1877 to 1889 he served as district attorney for the North-western Judicial District of Massachusetts. In October, 1890, he was appointed by Governor Brackett a Justice of the Superior Court.

Edward B. Whitney. — Judge Edward Baldwin Whitney of the Supreme Court bench of New York, died at his country residence at Cornwall, Ct., on Jan. 5, of pneumonia. Judge Whitney was one of the most prominent lawyers at the New York bar prior to his assuming a judgeship on the Supreme Court bench. A descendant of one of the earliest families of New England, he was born in New Haven Aug. 16, 1857. At Yale University he was a member of the famous class of 1878. After a year in the Yale Law School he finished his course at Columbia Law School and was admitted to the New York bar.

In 1893 he was appointed assistant Attorney-General of the United States by President Cleveland and served for about four years. He had been a lecturer at the New York Law School since 1890. He was a contributor to legal and economic publications, and was heartily welcomed and in much demand as a speaker at Yale alumni gatherings and before economic bodies. In this latter respect his prominence in civic reform movement attracted attention throughout the country.



FRANCIS CABOT LOWELL
1855-1911

LATE JUDGE OF THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FIRST CIRCUIT

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The Green Bag

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Number 4

Francis Cabot Lowell

THE death of Judge Francis Cabot Lowell, at an age when men are usually in their prime, is deeply regrettable as depriving the federal bench of one of its best equipped members as regards character and ability.

Judge Lowell was an admirable type of the painstaking, learned and upright judge. The ailment which hastened his death was undoubtedly due in large measure to the earnestness with which he applied himself to his judicial labors. A man of books, plentifully endowed with the traits of one of the most gifted families of Massachusetts, he willingly took upon himself burdens of the kind almost certain to break men of sensitive organization, though they may rest more lightly on rougher and brawnier shoulders. As Major Henry L. Higginson has said, "The Lowells always cared more to serve than to earn," and it was Judge Lowell's keen sense of public duty which exacted a heavier toll than he could bear and prematurely exhausted his powers.

Zealous in protecting the rights of the less favored litigant, unflinching in courtesy, and of a fine impartiality of mind, he won the universal respect of the bar for his fairness in dispensing even-handed justice. Judge Lowell's activities were mainly confined to the legal sphere. He had, however, contributed articles to the *Atlantic Monthly*

and other magazines, and had written a valuable life of Joan of Arc, in which he was the first to analyze her trial from a lawyer's point of view. He was also deeply interested in his *alma mater*, serving first as an Overseer and subsequently as a Fellow of Harvard University. He was also interested in the American School of Classical Studies at Athens, of which he was president of the Board of Trustees. He had also made notable contributions to the literature of Unitarianism. The traces of this breadth of sympathy are seen in all his judicial work. As his friend Mr. Roosevelt said, "He was a judge with great legal learning and ability, who never for one moment permitted learning and technique of the law to dim his clear understanding of the fact that a judge must be much more than a lawyer." The quality of his work, in fact, was such as to verify Bagehot's contention that a thorough soundness of judgment cannot exist in the absence of a wide range of delicately cultivated sensibilities.

His decision holding Armenians proper subjects for naturalization, within the "free white persons" clause, was characteristic of a Lowell.¹ There was nothing remarkable about the ruling, for Armenians, Syrians and Turks had

¹See 22 *Green Bag* 135.

been freely naturalized in his court for years. But the significant point is that the opinion was written from the depths of moral conviction, and was handed down on Christmas Eve. It expressed the breadth of his humanity, and his freedom from narrow Puritanical prejudices. It showed that a Bostonian who is also a Lowell can attain the highest level of statesmanlike impartiality.

Judge Lowell was the son of George Gardner Lowell and Mary Ellen (Parker) Lowell, and was born in Boston on Jan. 7, 1855. His father was a son of Francis C. Lowell, the manufacturer, nephew of John Lowell, Jr., founder of the Lowell Institute, and cousin of federal Judge John Lowell, who died in May, 1897.

The son was educated in private schools in which he was fitted for Harvard College. He was graduated in 1876, and immediately after entered the Harvard Law School, where he remained until 1879. From May, 1880, to February, 1882, he served as private secretary to Chief Justice Horace Gray, afterward Justice of the United States Supreme Court. Later he practised with the legal firm of Lowell, Stimson & Lowell, the other members being Frederick J. Stimson and A. Lawrence Lowell. He married in 1882 Cornelia Prime Baylies, daughter of the late Edmund Lincoln Baylies of New York and Taunton.

As a Republican he was elected to the Boston Common Council in 1889, serving for three years, and in 1895 he was chosen a member of the lower house of the legislature and served three or four terms, holding the chairmanship of important committees like Ways and Means and Taxation. He would doubtless have been Speaker had he chosen to remain in the legislature instead of accepting

a place on the bench. On Jan. 10, 1898, President McKinley appointed him District Judge. He was promoted to the Circuit Court on Feb. 23, 1905.

With his cousin, A. Lawrence Lowell, Judge Lowell was the author of a work on "The Transfer of Stock in Private Corporations," published in 1884. He was honored by Williams College at its last commencement with the degree of LL.D., the degree simultaneously conferred upon Governor Charles Evans Hughes of New York and Francis E. Leupp, former United States Commissioner of Indian Affairs.

The Lowells are a family of lawyers, Even his kinsman, James Russell Lowell, attended Harvard Law School and was admitted to the bar. Two John Lowells have been federal judges, one being appointed by Washington, the other by Lincoln. The second John Lowell was considered the highest authority in the country on bankruptcy, and the Lowell bill, introduced in Congress in 1882, was an important predecessor of the present bankruptcy statute. Judge Francis C. Lowell was appointed to the federal bench when the present bankruptcy law was undergoing its first tests, and he had a great deal to do with its administration and interpretation.

President Eliot, at the banquet given Judge Lowell in Boston on his retirement in 1884, remarked that the Lowell family illustrated "the power of a dynasty of character." A rich heritage came to Francis Cabot Lowell, a heritage of talent and character as well as of refinement transmitted by generations of affluence, and he made the most of it, adding new lustre to the fame of a family which, according to the tests by which real distinction is measured, doubtless ranks as the first family of his native state.

Nunc Pro Tunc

By HENRY A. MELVIN

ASSOCIATE JUSTICE OF THE SUPREME COURT OF CALIFORNIA.

[*Note.*—The learned reader may know all there is to know about the meaning of the phrase *nunc pro tunc*, but we venture to ask his attention to the views of an eminent jurist on this expression, the more readily because this authority treats the subject in a new light, and like certain sculptors in old fairy tales, moulds his handiwork with such extraordinary success that it actually lives and speaks under his magic touch. The disquisition was delivered at the quarterly dinner of the San Francisco Bar Association last December, in the presence of a gathering so versed in moribund legal lore that they could not fail to be dazzled by the retroactive splendor of Mr. Justice Melvin's vivid translation of the words of a dead language into the heart-throbs of the living. In fact, there is only one phrase which can fitly describe the distinctive note of modernity which reverberates throughout this treatment of a musty subject, and that is the expressive term for which no synonym exists in the English language, *nunc pro tunc*. —*Ed.*]

MAY it please the Court, Gentlemen of the Jury:—

I have experienced the first thrill of joy this evening in learning that I have been even indirectly the means of getting my dear friend Judge Hunt¹ into a law library. Judging by my early experiences at the bar of Department Five, and my later more painful duties of stern appellate inspection of some of the proceedings in that Court, I should say that the visit possessed all the charm of novelty.

The Judge once confided to me the fact that he hated puns and therefore never resorted to a library to *hunt* authorities.

Be not deceived by the ease with which he cites Mrs. Partington and Bumble. These references are all to be found in those two useful text-books, which he owns, "Whitewash on Character" and "Shortridge on Silence."²

With respect to the opinions of litigants coming on appeal from Depart-

ment Five, it may be said that when they come as grist from that mill they are satisfied with any fate.

At the outset I am embarrassed about the pronunciation of my subject. Mr. Justice Henshaw, who was more or less remotely acquainted with the professors at the University of California before the days of the Continental pronunciation, says that the expression should be "*nunc pro tunc*," with the "u" hard as in "horehound" and "hospital," not soft as in "McEnerney."³

Mr. Justice Shaw, who in his youth associated with the Indiana poets, maintains that the vowel should have a cooing sound as in "Murasky"⁴ and "Mogan."⁵

Mr. Justice Sloss, a Harvard man, thinks the "u" should be even more unctuous, as in "Hooray" and "Hula hula."

Mr. Justice Lorigan is sure it should be spoken as the "u" in "Cruiskeen Lawn" and "Erin go Bragh."

¹Mr. McEnerney is one of the most eminent members of the California bar, and the author of the McEnerney Act, recently sustained by the Supreme Court of the United States. —*Ed.*

⁴Judge Murasky is judge of the juvenile court in San Francisco. —*Ed.*

⁵Judge Mogan is one of the judges of the Superior Court of the city and county of San Francisco.—*Ed.*

¹Judge Hunt, who presided at the banquet, is the senior Superior Court judge of the state, having been continuously in office since Jan. 1, 1880. —*Ed.*

²Mr. Shortridge is reputed the most eloquent orator in California. —*Ed.*

Mr. Justice Angelotti, in a specially concurring opinion, agrees with both Sloss and Shaw, JJ., but thinks the vowel should be sounded possibly as in "Sausalito." The Chief Justice dissents.

Thus, aided by the luminous learning of my *confrères*, I shall call it what I "darn please."

This expression is composed of "*nunc*," thought by some commentators to be an abbreviation of "*nunquam*" meaning "never again", "*pro*" signifying "for", and "*tunc*," a corruption of "bunk," meaning "shell game."

[The speaker here produced from beneath the table a portly valise from which he took sundry formidable looking volumes and from them read the following citations. He also apologized for indulging in oral argument, reminding his audience that there were no briefs on file.]

Nunc pro tunc, says one very learned commentator, is the one confession of the law that we have left undone those things which we ought to have done.

It is the equivalent of "Never put off until tomorrow what you can do a year from next Thursday."

It imports into the law that homely maxim, "If at first you don't succeed, try, try again."

Everybody loves it except the Clerk, who usually gets cussed for the original omission.

I have known a *nunc pro tunc* that would eat out of the hand, although it was a little timid in the presence of an appellate tribunal. When manipulated by a judge who is truly great, it settles titles, relieves chills, makes divorced people happy and raises variegated Hades with ultra-technical practitioners. Vol. 19, p. 23, H. O. H. O. (Hunt on Holding Office).

Mr. Justice Kerrigan, in his charming work entitled "Vox Populi at North

Beach," says that: "An order *nunc pro tunc* is usually an exemplification of the maxim, '*qui facit per alium facit per se*,' because it is the means whereby the careless lawyer makes the Court his agent for the repair of his bad breaks."

Dr. William Carey Jones, who spends his life making Roman Law popular among the Berkeley Indians, says: (citing Wheeler on Wheeler⁶), "The true scholastic meaning of *nunc pro tunc* is the appropriation of ancient learning with the claim of modern originality."

Perhaps the most lucid definition is this: "*Nunc pro tunc* is a term applied to those mandatory manipulations whereby the monstrous misprisions of mushy malpractitioners are moulded into vivid verisimilitude of impeccable historic truths." Chipman's "Brief Opinions," vol. 200, page 9009.⁷

Another view is this: "*Nunc pro tunc* means: Vote now as well as four times this morning." Devoto on Votes, vol. 1, page 1, section 1.⁸

"The words *nunc pro tunc*," declares another eminent authority, "are sometimes applied to those descriptions of mining claims written upon perfectly new paper, dated three years ago last week and deposited in old monuments. They might better be called 'Punk pro Bunk.'" Vol. X, page 23, Lindley⁹ on Assessed Excavations.

Another reference to this musical mixture of syllabic slaps in this: "*Nunc pro tunc* means Let the Court's kindness repair the parent's pusillanimity. Let

⁶Mr. Charles Stetson Wheeler, a very distinguished lawyer, is an intimate friend of Dr. Benjamin Ide Wheeler, President of the University of California, an unrelated namesake. — *Ed.*

⁷Mr. Presiding Justice Chipman of the District Court of Appeals for the third district is noted for his lucid and scholarly but lengthy opinions. — *Ed.*

⁸Mr. Devoto is one of the leading attorneys of San Francisco and devotes some attention to politics. — *Ed.*

⁹Judge Lindley, the retiring president of the Association, is best known by his work on Mines. — *Ed.*

the wise and gentle hand of now erase
the sordid story of yesteryear." Mu-
rasky¹⁰ on Making Men, page 77.

And now let us allow the poet to sum
up in a sonnet: —

NON FUIT, SED EST ET FUIT

Out from the storehouse vast of legal junk,
Where maxim jostles against dictum old;
Where ancient axioms of worth untold
Are mixed with myths as rank as Chinese punk,
Where jargon grim of mediæval monk,
Queer French, the heritage from Normans bold,
And quaintest Saxon, redolent of mold,
Are mixed in one inextricable hunk,
Comes that queer collocation: *Nunc pro tunc*,
An onomatopœia brave and strong
Yet gentle as a Kentish maiden's mien.
Just speak it, and you hear the plectrum's plunk,
On golden lyre that sounds to sombre song,
The definition, "Ah, it might have been."

From "Law, Leech and Lute," by Dr. Edward
Robeson Taylor.¹¹

So much for the definition of my
subject.

Upon the application of the rule I
have but little to say. I would, how-
ever, mildly suggest that when the
Commonwealth Club prepares our next

¹⁰See note 4 *supra*.

¹¹Dr. Edward Robeson Taylor, formerly Mayor
of San Francisco, is entitled to write M.D. as well
as LL.D. after his name, and is the author of sev-
eral volumes of excellent verse. — *Ed.*

batch of statutes for formal ratification
by the Legislature, something be done
for the lawyer.

For example, there might be a provi-
sion that each member of the bar might
correct two records a year by an order
nunc pro tunc.

Wouldn't it be lovely to insert in the
record of that proceeding wherein the
Judge icily remarked that he should
have credit for at least ordinary com-
mon sense, the reply of counsel, thought
of next day, that he never gave such
credit except upon some showing of
mental solvency!

How wonderful it would be to recon-
struct cases from the viewpoint of after-
thought, correcting mistakes, smiting
opposing counsel, whacking the Court
without danger of punishment, and
generally roaming in the realm of poetic
justice! It would change history, per-
haps, but what is history except the
visions of egotists?

Let us enjoy the good fellowship of
this evening with all the vim and
enthusiasm that each of us possessed
when first he faced a jury.

Gentlemen of the Jury, the case of
the *Bar Association v. Dull Care* is in
your hands — and stomachs.

The Indiscretions of a Juror

REFLECTIONS OF A VICTIM TO A THREE MONTHS SIEGE

BY JOHN MACY

[*Note.* — While Mr. Macy says that in his town any journalist is a "literary man," we can assure our readers that he is himself to be considered a literary man in the higher sense. We take an especial satisfaction, therefore, in presenting views on the law written by some one besides a lawyer — the views of a layman whose perception of life's values, grave and gay, undoubtedly measure up to the standard of professional acumen, and we would add that it possibly excels it, were it not for the fact that our lawyers are universally so witty and accomplished. The disguise of place names which the author adopts is a thin one; it is quite evident that he is writing of the home county of the

Green Bag, and Mortville is a transparent equivalent for Dedham. However, his observations are not to be deemed too closely linked with any particular section of the country, and may be typical of many a semi-rural county. The article was first published in the *Boston Transcript* of Feb. 8, 1911, and is reprinted with its courteous permission. — *Ed.*]

THE aged constable of the town of Fareham accosted me in the post-office, and holding a paper under my nose, informed me that I had been drawn as juror.

I was to report for the civil term of the Superior Court about to sit at Mortville in and for the county of Wessex-God-save-the-Commonwealth-of Massachusetts. From my neighbors I learned that there were various pretexts on which I might ask to be excused. But I was advised that being a literary man (in my town any sort of journalist is a "literary man") I should find the court experience good material. My fellow townsmen are always solicitous about my material. When I fell off the roof and broke my leg, they congratulated me because I could use the experience in a novel. I agreed that a session in the jury box would be good experience whether I ever wrote another word or not. Moreover, I had no excuse to offer the judge, because being a "literary man" I have no honest occupation, no private business which I have a right to regard as important. Finally, I consider it dishonest to try to escape public business and throw it on somebody else. I reported at the court house.

My fellow jurors were men of many occupations, of all ages, and of a good order of intelligence. It may be that in the cities respectable men shirk the duty, and undesirable job-seekers fill the jury boxes. I doubt if that is true, and I know that no such condition prevails in my county. Our jury was immeasurably superior to the lawyers in point of intelligence and honesty.

The panel numbered thirty-odd and that is a large enough handful of men to insure a good human average. (Lawyers by the selection of their craft are below the human average.) Our jury was well mannered, did not quarrel, was conscientious and laborious in the consideration of cases. There were two or three blockheads (who, of course, disagreed with me — a blockhead is always a man who thinks as you do not), and there were one or two idlers who paid little attention to the cases. The great majority were sensible, honest, hard-thinking men.

There is a notion current among half-educated people, who prove their inferiority by thinking themselves superior, that the jury system must be a great mistake. A few days after the opening of the term I went into a literary club in Boston. A Boston literary club consists of five members who cannot write and several hundred members who have never tried. I met one of those who have tried, a good man, but too highly cultivated ever to have had much real education. I told him of my jury duty. He said it was unusual to have a man like me on a jury. After the waiter had brought them, we continued the conversation. I found it was not that my club friend thought much of me, but that he had a poor opinion of juries. He knew nothing about courts or about the system of selecting jurors. Yet he was sure that juries were as a rule uneducated. I said these jurors were good men.

"Well, what sort are they?" he asked.

"Why, just thirty men, same as thirty men you might pick up anywhere, around this club."

He gasped protestation.

"Surely you do not mean that they are as intelligent as members of this club?"

How can a man like that ever delude himself into thinking he can write novels about human beings? I had to explain to him that in the first place the members of that club are not educated men in any select sense. They are duffers like the common run of us. One and another of us is educated to do some special thing. My friend, for instance, is admirably educated not to write novels. I tried to explain to him that the cases which come into court are the traditional quarrels of neighbors, and that experience in life is the only training for a juror (and the best training for a novelist). In the several arts and sciences there can be specially trained experts. But there can be no trained expert in life. Human wisdom, common sense, fairness of mind are not found in any one race, grade, class of men; they are virtues peculiar to this and that individual.

But the man who has had the privilege of special training as architect, novelist, school teacher, engineer, is likely to have a better all-round mind, more likely to rise above prejudices. So argued my friend and thereby disproved it. For he was evincing the little prejudice of his class, a prejudice that obscured his view of human nature. The prejudices of the so-called educated man are as inflexible as those of a man who has worked with his hands since he was fourteen. Imagine a jury made up wholly of college professors. Who would be litigant before such tribunal? (There is one of my educated prejudices.) The fact is, the human being is a tangle of prejudices. Only a few men are sufficiently self-conscious to know the dangers of their own judgments, to

be able to turn upon their own intellect and say to it: "Now, old intellect, clogged with myths and emotions and sectarian persuasions, get free as you can from all the lumber that burdens you and think as clearly as possible about this case which has been given you to decide." Few of us can do that, few have the will to try it. And those few are just as likely to be found in one class of men, in one trade or nationality as another.

Mary Anne sues grandfather's estate and tries to dispossess some prim old aunts, who think the little hussy is mighty ungrateful. The whole family row comes out in court. Who can settle it fairly? Nobody short of demigods. But a farmer and a blacksmith and a grocer and a motorman know just as much about the mess as forty Supreme Court judges. Moreover, they have no foolish theories of justice. They go at the problem just as they go at any neighbors' quarrel. Their opinions about the ordinary civil suit are as valid as those of any other men. Do juries give outrageous verdicts? They do. But can any decision of any twelve men compare unfavorably with some of the decisions of federal judges? We know that one man's judgment cannot be exactly as good as another's. But in practice we cannot tell which is better, for that involves a third judgment—our own.

Nietzsche says, "We are primordially illogical and hence unjust human beings, and can recognize this fact; this is one of the greatest and most baffling discords of existence." The whole matter comes to this, that none of us can ever tell who is fit to be juror, who is fit to be judge. The negative foundation of democracy is that though I am incompetent to govern myself you are still more incompetent to govern me.

A good proof of the inadequacy of human judgment of human judges is the way lawyers blunder when they challenge jurymen. After a few weeks we men in the box get to know each other a little; we think we have "sized up" the habits of mind of the other fellow. The lawyer often challenges the wrong man, just the man who, we think, would be on his side. Lawyers have had long experience in judging jurymen, but they make a bad job of it.

With the growing autocracy of our courts and the increasing alliance between so-called educated people, the legal system and wealth, the jury, being democratic, may fall more and more under the suspicion of our short-witted upper classes. The jury is the last element of democracy left in the courts. A movement to abolish it or control it may be expected any time. Such movement has already been begun in a subtle way by the politicians of Allegheny County, Pennsylvania. The ten thousand citizens whose names are on the jury lists are being investigated by the authorities. Each man is, or is to be, secretly spied upon by a detective armed with an inquisitorial blank:—

Name? Address? Occupation? Age? By whom employed (a significant question)? Industrious? Sober? Intelligent? Can he read and write? Is he fair-minded (an idiotically unanswerable question)? Hearing? Physical defects? Reputation? etc.

Now, on the face of it, it may seem a good idea to subject jurymen to close examination. But exactly the same kind of scrutiny should be exercised in the case of judges and lawyers. How would our judges pass the test? Is he fair-minded? By whom employed? I predict that in the next few years more and more power will pass into the hands of the judges and that there will be among

our upper classes an increased distrust of anything so democratic as the jury system.

Blackstone says (I get this quotation, of course, at second-hand out of the dictionary): "A competent number of sensible and upright jurymen, chosen by lot from among those of middle rank, will be found the best investigators of truth, and the surest guardians of public justice." Sensible and upright? Yes, but how are we to find them, unless we assume that most men are sensible and upright—as sensible and upright as other men, if not more so? And why "middle rank"? How slowly our Anglo-Saxon law emerges from the class distinctions of feudalism, and what a curious process is the refitting of legal inequalities bred in feudalism to the actual class distinctions of our modern commercial society!

Go out in the highways and byways and pick up a jury at random and the jury system will be safe. When any attempt is made to curtail or modify the broadest system of selection, democracy had better take a look into the courts and see what is happening. Common men are the only kind of men that are in this world. You cannot find twelve uncommon men in our county.

There is one great advantage in the present method of making up the jury list, which people who suspect the intelligence of jurymen do not perhaps consider. School teachers, clergymen and militia men are exempt. This raises the standard.

Much of the foregoing profound philosophy is of course far from the experiences of our session of the Superior Court which sat at Mortville in and for the County of Wessex-God-save-etc. We had a pleasant little family party. Most of the cases were trifling matters—somebody trying to get five hundred

dollars from somebody else and Lord knows whether he ought to have had it. The presiding judge was Mr. Justice Sheridan, a kind old grandfather, who sat, as it were, at the head of the table and carved the law for us children. Since he has committed the indiscretion of publishing his autobiography, he cannot object to what a jurymen says in print. I can never be guilty of contempt of court when he presides, for he is humorous and lovable, and more respectful to jurymen than to lawyers.

The Court is a dual personality, or rather it is the union of a person and an abstraction. This union survives from the time when it was necessary to wrap judges, priests and kings in a sort of superpersonal dignity, to dazzle the populace and keep it abjectly dependent upon a mysterious social mechanism. The Court actually is a human forked radish like the rest of us, clad in a frock coat and addicted to the incorrigibly democratic habit of putting its feet upon the desk, so that the toes of its boots are visible above the railing which divides its dignity from the other parts of the courtroom. When it comes in, a sheriff in sepulchral tones calls: "Co-o-art." Then everybody stands up until the Court is seated. This is a proper courtesy, but the motive of it is not courtesy. Courtesy demands that gentlemen stand up when other gentlemen enter a room and especially when ladies enter. Courtesy would require the jury to stand up when the stenographer enters, for she is a lady. But men and women alike must rise for the judge; the motive is traditional respect for authority; the psychology under it is that authority to maintain itself has to hedge its human commonplaces with ceremonials in order to keep our uncritical commonalty humble and agape.

Rise! women, children, sheriffs, litigants, witnesses, lawyers, jurymen and Miss Stenographer; the majesty of the law is in its high place! The plain fact is, Mr. Sheridan, an excellent man, is settin' down.

Tradition demands that the court-crier shall summon all persons having anything to do before the honorable the justices of the Superior Court to draw near and give attention. This is entirely superfluous, for the clerk has arranged over the telephone for the appearance of people having any business to do before the honorable the justices, etc. Most of these survivals from monarchical views of authority and obsolete dictions are amusing. The present effect of them is to make court procedure a trifle comic. Usages adapted to one state of society, which linger into a later state, often create an effect precisely the opposite from that obscurely intended when the tradition first arose. Some of the shabby brocade of court etiquette has been cleared out of our courts, such as gowns and wigs. Some that still hangs in faded shreds is dusty but inoffensive. But some surviving practices are seriously objectionable.

For instance, the outrageous habit of locking jurymen up. Why? During the progress of a civil case which lasts three or four days, jurymen can go home nights. But when the case is given to the jury, the jury must go into continuous session, under lock and key, until it reaches a verdict. There is no sufficient reason why we should not go home at the end of a day, and come back to our work next morning, just as men do in any other business. The imprisonment of a jury tends to hasty decisions, to the forced verdicts of weary minds incapacitated for thinking. Much better to drop a difficult case, go home,

sleep, come fresh to the juryroom in the morning, and resume deliberation. If jurymen are in danger of being tampered with after a case is given to them, then they are in equivalent danger of being tampered with during the progress of the case.

The incarceration of the jury is, I hold, against the rights and liberties of citizens. It remains from an age when citizens were frankly regarded as so many servants of the state (that is, the dominant classes). We are still the servants of our masters, whether king or corporation makes no difference; but we are rather ashamed of the fact and we try to cover it up. Confinement in a jury room is a dramatic reminder of what our real functions are in a democratic government. I am willing to give a portion of my time, without pay, to public business; but I resent the turning of the sheriff's key behind my back. I resent having to walk down the street to supper (or breakfast!) in military or criminal column-by-twos. The judge very often has to spend several days in deciding a question of law. Why not lock him up until his mind works to a conclusion?

I have mislaid a very interesting newspaper cutting. It announced a decision of the Supreme Court bearing on the rights of jurors. If I recall it correctly, the judgment of the court was that a jurymen in a criminal case cannot be deprived of mail, newspapers, and other things now forbidden. I should like to see a case brought to determine whether a jurymen may be detained over night or locked into a room without his consent. I wonder if the time will come when court business will be conducted like any other business. We have all decided, in conference with other men, a thousand more important things than whether a lady's internal unhappiness is due to the conductor's negligently

dropping a railroad ticket into her lap. And we have not been locked up while we were coming to a decision. The whole court theory is mediæval under its modern drabness. Law is supposed to be distilled and codified common sense. Law professors tell you so. Two days in court will explode that lofty superstition. Much court procedure has no more excuse for existence than those funny red manikins who ride in front of the governor at Harvard Commencement — a survival of the unfit.

The pompousness of legal theory in the face of a fact betrays its unreason. I was allowed four dollars a week for traveling expenses. One week there was a holiday and we served only four days. My allowance for traveling expenses was five dollars and seventy-six cents. I tried to explain to the county paymaster that I should not have more for four days' expenses than I got other weeks for five days. He looked at me with a slight, non-committal smile and said in grave tones, "It is a the-ory of the lawr." Eighty cents a day for five days is four dollars; eighty cents a day for four days is five dollars and seventy-six cents. I give it up. The law knows. The law knows why for many years in this state (now, happily, the statute has been changed) if a man had his arm cut off by a railroad train he had to prove simple negligence on the part of the company and could get what the jury gave him, but if he was killed, his heirs had to prove gross negligence and he could not get more than five thousand dollars. The law knows. The law knows. Maybe the legislative agents of the railroad companies have a little inkling of information on that point. But no matter. I give it up. I cannot understand law facts or law language.

Law language is a travesty of style. If we journalists took so long to say things, our space-book would be very fat the first week. The next week we should not have any space-book. The editor would have secured us a situation massaging the office windows or splitting wood instead of infinitives. What archaic echoes are in mine ears! "Then comes the plaintiff in the above entitled action and says that the Noo York, Naven, Nartford Railway Company is a corporation doing business in East Millville." That is where the plaintiff lives and it is necessary to make it clear that this is the Noo York, Naven, Nartford Railway Company that goes to East Millville, because there is always some idiot who will think it is the Noo York, Naven, Nartford Railway that carries Chinamen from Pekin to Canton.

When you see a man in court talking to his wife and his lawyers you may think that he is in existence. That is a delusion of common sense. The plaintiff's writ annihilates him, makes mince meat of each particular organ of his once Herculean body, deprives him of reason and every intellectual pleasure; it kills him, yet kills him not, for its vicious and heartless verbiage leaves the poor wretch just enough alive to get up on the witness stand and show the jury how hard it is for him now to touch his left ear with his right foot.

"And says that on said Fifth of July he was in a car, passenger coach, oil tank or other conveyance of said company. And that he was in the exercise of due care. And that a cinder, paving stone, shingle nail or other obstruction did enter, penetrate or otherwise move into his eye. And that as a result of the said foreign obstacle entering his said eye and therein lodging as aforesaid he became blind and otherwise unable to

see . . . great damage to his eyesight, earsight and all other kinds of sight whatsoever . . . distress of mind, sleeplessness . . . in the said defendant's passenger coach, automobile, wheelbarrow or other conveyance. . . ." O legal English, abomination of desolation! To think that masters of style, like Bacon, have been lawyers!

In conversation, to be sure, the lawyers do speak English—a poor grade, but intelligible to the jury.

Of all the parasitic classes, lawyers seem to one humble jurymen to be the most pretentious and quaintly hypocritical. Other business men simply do business, get all the profit they can, and except at banquets and on other oratorical occasions never pretend to be anything but business men. Lawyers carry with them a little remnant of professional ostentation. They use words like "justice," "right," "a fair and impartial consideration of the truth." They parade the lofty vocabularies of ethics, philosophy and religion, in their daily job of getting money out of somebody else. If they could only see themselves from a jurymen's point of view! If they could only know how transparent is their humbuggery and how useless their arguments! I think it would pay any large firm of lawyers to watch the courts, pick out the most likely-looking jurymen, send him to law school and take him into the firm, in order to have somebody in the office who had once got a glimmer of things from the unprofessional side of the rail.

One day we heard that a very prominent lawyer was coming to court. He had an enormous reputation. His opponent and even the judge treated him with marked respect. Maybe he was skillful, maybe he fetched forth the testimony he needed with an adroitness which a jurymen cannot appreciate.

But I thought him a quite ordinary bore. He had a cheap wit, a self-satisfied way of taking the jury into his confidence by a sidelong glance after a particularly irritating question to the witness. I could have killed him before that case was done. In his argument he indulged in school-of-expression eloquence. I was moved. I wept tears of vexation and weariness. He ought to be sent to Congress for life. If there is such a crime as contempt of counsel, I owe two million dollars in fines.

The Wessex County Court House is beautiful. It cost the taxpayers about four times what it is worth, but it is worth a great deal. All the panels, rails, chairs, tables are carved in the same design from oak that is a joy to look at. In front of our jury box was a bar as thick as a steamer rail, twelve or fourteen feet long. (On the witness stand I should not say it was twelve feet; I should say it was as long as from here over there.) How the lawyers pounded that rail! They are going to wear out that fine piece of oak, and then the county will have to put in a new one and taxes will go up. Cannot lawyers learn that they must not thump that rail? — that they are offensive when they protrude their faces into a jurymen's face and simulate an earnestness which the facts of the case do not warrant? If I were a prejudiced man, as prejudiced as other jurymen, I should have decided each case in favor of the lawyer who refrained from assaulting that oak rail. But unhappily the lawyer would not have paid the penalty. It is the clients who suffer — both clients in some cases.

Carlyle says: "Law courts seem nothing; yet in fact they are, the worst of them, something; chimneys for the deviltry and contention of men to escape by." Well, maybe so, old sage; the

trouble is there is no vent for the gas; it stays in the courtroom, near the jury box.

When you consider that in almost every case the lawyer can decide whether or not it shall be brought to court, the selfishness of the legal profession is quite patent. What cases they bring in! How righteously convinced they are of the truth of things they know aren't so! Judge Pierce said in a recent decision: "It would be a waste of time to analyze the testimony; much of it on either side was not commendable; it was false in spirit, though perhaps true in fact. It was diplomatic; it was not intended for the elucidation of truth, but for victory." Did any jurymen ever hear a case in which the lawyers tried to elucidate the truth? Does a lawyer ever think of anything but victory? Is not the whole profession of law, which makes a poker-game of the quarrels of life, essentially damaging to the character of the lawyer? I cannot indict a whole profession, and so I am forced to conclude that the lawyer who remains an upright man must have great character (and probably good home influences), to have resisted the corruptions of his daily business. It is the legal brethren who stimulate litigation, aggravate quarrels and keep law a muddle-tongued mystery in order that it may seem difficult and learned and make people walk into the attorney's little parlor.

The courthouse at Mortville is maintained chiefly for the purpose of determining how much money shall be paid to injured and uninjured individuals by The Elevated Railway Company, The Old Province Street Railway Company and The New York, New Haven & Hartford Railway Company (a corporation doing business in East Mill-

ville). The citizen should not complain of the almost exclusive use, by two or three corporations, of an expensive marble and oak-trimmed courthouse. The State Legislature exists chiefly to make laws which those corporations need in their business. So, why consider a few courthouses? My prejudice and my judgment after the fact are against corporations. In any case between a workingman and a corporation I should be on the workingman's side and unfavorable to the company. For this reason — the law was made by and for the corporation. A single citizen who goes a-gunning with a pea shooter encounters the corporations entrenched with twelve-inch disappearing guns. Therefore it is the moral duty of jurymen and such common folk, whenever they get a chance, to join their pea shooter to the armament of the under-defended individual.

Now, having put that as strongly as I can, I may say that in the majority of cases that I heard brought against the railroad companies the defendant seemed to me not clearly to blame. The public service company pays the penalty for being known as a wealthy corrupter of legislation, which most jurymen are inclined to punish. Ambulance-chasers, knowing this, bring the flimsiest cases against the companies, hoping to get at least enough to cover expenses. The result of this is that the company has to maintain a costly legal department and pay thousands of dollars to slightly damaged and undamaged passengers. The company gets the money back from the public, for the dividends go on just the same. Under the present system of private ownership of public carriers there seems no way out of this confusion of injustices. The individual who has a good case against the company suffers both for the notorious wholesale

dishonesty of the corporations and for the petty dishonesty of claimants — the kind of people who walk with a crutch until the day after the verdict and then throw the crutch away. If the woman who is just a little shaken up in a railway car could be made to realize that by going into court she helps to make it harder for her sister who is really hurt, I wonder if we should have so many fair perjurers on the witness stand. A court room is a good place to see the solidarity of society, and the way we all pay each others' debts willy nilly.

Since half the civil cases are actions in tort against public carriers, about every other case brings to the witness stand that moral brother of the lawyer, the medical expert. Suppose a locomotive runs over a lady and gives her severe contusions on the right thumb. Six months later she has a baby, and the baby eats a chunk of coal and dies. A doctor will tell the jury ("in your own words, Doctor") that in the absence of any other coal, it was the coal on the locomotive tender that killed the baby.

Cross-examination — But, Doctor, whether or not in this case there was any other coal.

C. P. — I object.

Judge — That is not competent. He has not qualified as a coal-heaver.

Jury (inwardly) — On a nice bright day we can see a barn door six feet away. It's a rotten case, but we'll give the lady some money anyhow.

The medical profession ought to come to its own rescue in the matter of court practice. I suggest that the American Medical Association pass a resolution that it is the duty of every physician to testify as expert whenever he is asked, and that the fee should be divided

and half of it paid to a public hospital. The effect of this would be to remove a part of the commercial curse from legal medicine and raise the ethical standard of "Court physicians." It would also diminish insanity. Hundreds of jurors, after listening to expert testimony about anatomy, have tried to put themselves together again and gone mad; the asylums are full of them. Think of the sufferings of a juryman who goes home in an electric car after having heard nine doctors declare that the jolting of a car produces premature old age, ingrowing teeth and cirrhosis of the liver! And it gives a man no compensating courage, no restored feeling of safety to have heard ten other doctors declare that a car can run over both your legs, cut them off above the knee, without doing you any harm.

Truly the law court is an excellent place in which to learn not only your social relations to your fellowmen but the anatomical relations of the organs with which nature has endowed you.

In a court of law you have opportunity to assimilate any kind of wisdom permitted by your private mental metabolism. The juryman is in better position to learn than any other character in the drama. The lawyers, the judges and the litigants stand in fixed attitudes toward each human quarrel and so their receptivity is throttled. But the juryman is a dispassionate spectator of the comedy in which he plays. If you have been a juryman, you have learned that you are not fit to be a judge; that you would be ashamed to be a lawyer; that you will never come to court as litigant if you can help it; that if you are ever a witness you will answer the questions in as few words as possible and not act so foolishly as some witnesses you have seen; and that you can never be a sheriff unless you weigh two hundred pounds. All these things are valuable to know. The wise citizen will not wish to shirk jury duty, but will welcome the opportunity to see how very human human beings are when they are under oath.

Systematic Classification of the Law*

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[*Note.* — The problem of mapping out the subject-matter of the law in accordance with a philosophically sound system of classification is one of obvious importance. The law is pre-eminently a systematic science, the progress of which is necessarily gauged by triumphs of analysis and co-ordination. The following extract from Professor Gareis's important work which has just been made accessible to American readers in Mr. Kocourek's translation, is the third article on Legal Classification which the *Green Bag* has published. The first two were Professor Terry's "The Arrangement of the Law," appearing in the issue of September, 1910 (22 *G. B.* 499), and Dr. Andrews' "The Classification of Law," printed in the October, 1910, number (22 *G. B.* 556).

— *Ed.*]

*Being pp. 93-114 of Prof. Gareis's "Introduction to the Science of Law" (part II, sections 14, 15 and 16a), reproduced by courtesy of the Boston Book Co.

FOCAL POINT AND SURVEY OF THE LEGAL SYSTEM

I IN ORDER to arrive at a systematic classification of the *corpus juris*, it is necessary to go back to interests. Interests, as already shown, are based on relations of persons and things (or only of persons). They are either interests of determinate persons or of communities. These interests may belong to both individuals and communities at the same time, interests of individuals being, however, of greater importance.

Man is endowed with the faculty of understanding and the capacity for working out the interests of society and harmonizing the impulses of egoism with sociality. This sense of law is derived from the basic principles of human reason.

Interests are of two classes: —

1. Special interests of individuals; and
2. Interests of the community.

Both of these classes of interests may have a material foundation; as, for example, the interest in subsistence. Both may have an ideal basis; thus, an interest in education. Interests become legal advantages when they are protected by law, the one class becoming the legal advantages of individuals, and the other the legal advantages of the community.

Interests of the community may be regarded in a double aspect, in the same way that, in the discussion of the sources of law, the twofold view of the community was of importance. By the term "community," may be understood —

1. The dominant social entity and its parts; thus, the empire, state, province, parish and other public corporations; and
2. Society and its parts, consisting of the people collectively in their economic

relations, associated according to employment, rank or otherwise, without regard to state organization.

The interests of these two classes of social aggregates — the dominant governing community and the economic community — are not necessarily identical. It is conceivable that the state may have an interest, as such, in excluding, or placing a burden on, the importation of goods by prohibitive or revenue tariffs. Again, it may be conceived that both communities may have an interest in the same relation, considered as an object, but from different motives and in unequal degree. Accordingly, there are legal advantages of the governing community and legal advantages of the economic community. This fact, with the addition of legal advantages of individuals, allows of a threefold division of the law into private law, public law¹ and social law. This follows to the extent that standards of law, either in the main or exclusively, relate to interests of private persons, the state and its parts, or the economic community and its parts, and to the extent that these respective interests are protected and transformed into legal advantages.

II. In two respects, this triple division of law is insufficient. The international community, based on an asso-

¹Public law (*öffentliches Recht*) is divided into *Staatsrecht* (state law) and *Völkerrecht* (international law). *Staatsrecht* again is divided into *Verfassungsrecht* (constitutional law) and *Verwaltungsrecht* (administrative law). According to German usage *Verfassungsrecht* is called *Staatsrecht* in the narrow sense. Translation requires the use of the expression "public law in the narrow sense" to distinguish *Staatsrecht* from international law, and the expression "public law in the narrower sense" to designate constitutional law, according to the usage indicated. If it were not for the fact that interests of society apart from the state are not made one of the divisions of juristic classification, a further verbal refinement would be necessary. The use of "state law" for *Staatsrecht*, while persuasive on the ground of convenience, does not appear to have gained a position in our terminology. — *Translator*.

ciation of international interests, is also legally protected. This is accomplished by standards which, so far as they are peculiar to the international association, are called International Law.

Again, the legal rules by which social interests are protected are in part no different from those which give legal protection to individual interests in private law² considered as a means of protection of the community. On the other hand, also, the state takes as its province, not only the protection of its sovereign interests, as a governing community,—which is accomplished by public law in the narrow sense (*Staatsrecht*)—but also assumes to protect and in part to further social interests. By reason of the historical reception of social interests by the state, which assimilation resulted under the greatest variety of operating circumstances, it has followed that social law (*Gesellschaftsrecht*), (so far as it is not at the same time private law,) has evolved alongside, in the name, and in the domain, of state law.

To a great extent, the means, by which genuine interests of the state which are not social interests—or at any rate are not such principally—are furthered and protected by non-private force, are of the same kind and operation as in the protection of social interests. For example, the coercive measures of the statutory domestic police, whether of preventive police security or *positive-welfare* administration.

The legal rules which have for their object protection of interests of the state and make public law in the narrow sense; those which are intended to protect and guarantee the interests of society and which form social law; and, finally, those

²This method of protection of social interests corresponds most nearly with the Manchester state or the legal state (*Rechtsstaat*) in the narrowest sense. Cf. sec. 41.

legal rules through which an international community of interests is elevated to the position of a legal community in international law, are collectively in contradistinction to the standards through which private individuals are protected in their private or civil interests. The distinction lies in this—that, in the first three cases, interests are involved which, in verbal opposition to private interests, must be called public interests. Therefore, the law which in such cases affords the contemplated protection of interests, is called public law, or *jus publicum*.

III. The principal division of the *corpus juris* into private or civil law (*jus privatum* or *jus civile*), and public law (*jus publicum*), thus arises.

Inasmuch as social law, for the two reasons considered, has no definite position in the classification, public law is separated into—

1. Public law in the narrow sense (state law, *Staatsrecht*, *jus publicum civitatum* or *alicujus civitatis*), including also the standards for the protection of social interests. Social interests, while not completely embraced by this division, yet can not be separated from it;

2. International law (*jus inter civitates*, *jus inter gentes*, *belli et pacis*).

Public law in the narrow sense, according to the leading interests and the chief functions which the state represents and furthers in its activities, is divided into—

1. Constitutional law, which includes the standards through which the stability of state sovereignty in its (a) organization and (b) elements is legally protected; and

2. Administrative law, which embraces the totality of legal standards which govern the activity of the state

in (a) legislation and (b) administration (understood in a sense opposed to legislation and embracing all non-legislative state activities).

IV. The relation of the several parts of the law to each other in developed systems is variable. It is impossible to derive the proper scope of public law in the narrow sense (state law) as against private law abstractly either from the nature of law itself or from the nature of the state. The same want of uniformity in the appropriate line of demarcation appears in actual systems as is shown in the theoretical view — the political science of legislation (*Gesetzgebungspolitik, de lege ferenda*).

In ancient times, and in the Middle Ages, there were a large variety of matters, which we now consider as belonging to public law, which were embraced by private law. In earlier times these matters only indicated individual interests and not social interests. The adjustment of social conditions appeared more simple through standards of private law than of public law. Nevertheless, every state must recognize, and must have recognized from the beginning, a large number of standards as belonging to public law.

Constitutional law and military law, even though in the most primitive form, and universally, the rudiments, at least, of private law, as such, must have been recognized by the state. But the residue of the law and its details present an extraordinary diversity of conception and practice. There is frequently a lack of distinction between public and private law, and universally so in lower stages of civilization. Interests of the community, which though imperfectly understood⁸ are yet present and vaguely

⁸In this connection the report of the German corvette captain, von Werner, of Dec. 19, 1878,

apprehended, receive protection unconsciously (and one may say instinctively) through the forms and standards governing the affairs of private persons.

The infringement of interests, such as in the present age are treated absolutely, in the law, as interests of the community, were, in earlier stages of civilization, sanctioned by the same means, and in the same manner, as purely private interests. Thus taxation, which in the modern view belongs solely to the fiscal sovereignty of the state, was provided for in the German Middle Ages to a large extent by a contractually derived legal arrangement, according to analogy of private law. The relations of feudal dependents received little regulation by means of public law.

Instead of legal interference by public law for the protection of public interests, there was allowed (as also in the Roman law) a system of private actions by private persons. Accordingly, instead of the legal personality of the community, the legal personality of the head of the state was regarded as the private legal owner of interests to be protected by public law. The community in private law was not considered as a person, but, instead, the head of the state.

On the other hand, however, it is to be observed, in lower orders of civilization,⁴

from the South Sea station, the harbor Makada of the Duke of York, is highly interesting: —

"There was no other way to preserve German influence in this region than the purchase of a harbor, as in the present low condition of civilization of this race the conclusion of an (international) agreement was out of the question. Their intelligence is not yet equal to such an agreement." (See the official memorial which was presented to the German Reichstag with the Samoan agreement of Jan. 29, 1879: No. 239, p. 153 of the proceedings of the Reichstag).

⁴Cf. the above memorial (p. 157), according to which there did not exist among the South Sea Islanders any secure personal ownership, but only family, tribal or chieftain ownership. See sec. 20, *infra*, with regard to the development of private ownership. With reference to community or chief-

that private law is pushed into the background by state law in the case of interests which we now recognize and protect as interests of individuals, and which by such civilizations are given a very extensive protection as interests of the community.

From the standpoint of the modern conception of law the following propositions must be advanced: —

1. The actual delimitation of private law from public law, a distinction which was already made by the Romans,⁶ is nothing other than an answer to the decisive question, Whose interest is to be protected? In the interest of whom shall an actual relation of fact be elevated to a legal relation? The answer to this question lies with legislation. It must be regarded as the greatest function of legislation to determine what advantages shall be legal advantages of the community. The state in this activity, in which it creates a legislative public law (in the narrow sense), is legally independent. It may therefore mark out the limits of public and private interests as it wills. In like manner, the state may also establish a common domain for individuals and the community, in which interests of the community and of individuals are coincidentally invested with the protection of public and private law.⁷

2. Rights are created by public as well as by private law. For example, the state by virtue of established legal standards governing military service has a right to demand the registration and

conscription of persons capable of such service. Official rights and official powers which belong to public officers (or to public societies), or to military commanders, are, in their essence, rights of the community. They are based only on social interests, and accordingly are public rights. These rights of public servants may also be considered as transferred on the part of the state. Or it may also lie in the public interest to regard the possession of official authority as vested rights of such public officers.⁷

3. The community, as well as individual private persons, may coincidentally have an interest as to any relation of fact. It is also conceivable that such an interest may exist concurrently in the international community; in the dominant governing entity, whether of one or more states; in a community within the state; and in individual private persons. In such case the relation is protected by international, state and private standards.⁸ The protection of the same interest by one standard does not exclude the others. Public interest may particularly require the fulfilment of a private agreement according to its terms.⁹

4. Ethnological, historical, climatic and other internal and external influences, which are of significance in legal evolution, operate with much greater difference of consequence on the form of public than of private law. It is true

⁷Cf. Gareis, *Allg. Staatsrecht*, in Marquardsen's *Handbuch d. öf. Rechts*. Bd. I, pp. 13, 14.

⁸E.g., the robbery and murder of a married soldier lying wounded on a battlefield by battlefield ghouls may possibly include an infringement of all the standards mentioned.

⁹Cf. *Str. G. B.*, sec. 329: "Whoever agrees with the public authorities for the delivery of provisions for the use of the army or the navy in time of war, or for necessities for use in a time of distress, and who shall intentionally fail to make delivery at the stipulated time, or in the stipulated manner, shall be imprisoned not less than six months, and may also be deprived of his civil status." — Gareis, *Reichsgesetze*, No. 143-146.

tain ownership among these people ("tabu" and "blu") and community labor ("makesang") see also Karl Semper, *Die Palaoinseln*, pp. 49, 72, 73, 120.

⁶Ulpian, *Dig.* 1, 1, 1, 2; also Julian, *Dig.* 1, 1, 4.

⁷As in the case of ownership, for the protection of which there may be public punishment, as in larceny, and action for a private remedy — restitution or compensation. The interest in human life and in human health is another example.

that a greater diversity is possible in the private law of a state than in its public law, inasmuch as the public law of a state must be unified in its structure. Yet there is a greater variation in the interests guaranteed by public law among states of the same level of civilization than in their private laws. Therefore, the reception of foreign institutions of private law is more easily possible than the reception of foreign institutions of public law; and the reception of the latter requires the exercise of the greatest circumspection.¹⁰

5. The supremacy of public law in the protection of established rights of the community demands that private interests shall, under definite conditions, give way in cases of conflict to the public interest. It is also a consequence of the sovereignty of public law, comparable to the force of the idea of law itself, that the dominant social entity shall assume the nature of a private person — in this sense called the *fiscus* — and, in this character, be regarded and treated like a civil person.

ELEMENTS OF CIVIL OR PRIVATE LAW

It is the function of private law to protect the interests of private persons. These interests consist of relations to objects, and the protection of these relations against deprivation, infringement and interference. Such relations, however, arise or exist under the influence of legal order as legally regulated relations based on definite facts, or so-called juristic facts. The law attaches its protection to these facts. Rights, therefore, spring from the creation, extinction or alteration of such facts.

¹⁰With reference to the relation between public and private law see Gareis, *Allg. Staatsrecht*, in Marquardes's *Handbuch d. öf. Rechts*, Bd. I, sec. 8, pp. 7, 11–15, and the literature in the notes.

The law recognizes private interests, not alone for the sake of the individual, but also for the sake of society. Its viewpoint is social as well as individual. Only those private interests are protected, by the authority of the community, which are conformable to the general welfare. Even in private law, where legal order first of all provides for individual interests, it must also strive for the common good. This is the social object of private law.¹¹

Out of the foregoing objects arise the following four elements of private law: (1) a legal subject, (2) a legal object, (3) a juristic fact, and (4) legal protection.

I. Legal subjects¹² are the owners of their legally protected interests. A person is any entity which may be the holder or owner of such interests. Legal order makes provision accordingly as to what entities have this capacity, which is called capacity for rights, and which is synonymous with personality. Capacity for rights is distinguishable from capacity for acts. The latter is a legally recognized capability of exercising the will in juristic acts.¹³

The law may distinguish various kinds of capacity — for rights, as well as capacity for acts — differing according to

¹¹Gierke, *Die soziale Aufgabe des Privatrechts* (Berlin, Julius Springer, 1889), particularly p. 6; cf. Jhering, *Zweck im Recht* I, pp. 64, 82, 99: "The truth of the proposition — every person exists for the world, and the world exists for every one — is found in society."

¹²Salkowski, *Inst.*, secs. 42, 79; Sohm, *Inst.*, secs. 20–25.

¹³Thus, according to German law, children under the age of seven years are capable of rights but incapable of acts; the same is true of those persons who, on account of mental defects, are prevented from exercising a free determination of will. See *B. G. B.*, secs. 6, 104, 105. Disposing capacity in the sense of *B. G. B.* is one of the subdivisions of capacity for acts. See Gareis, *Kommentar zum B. G. B.* I, note to sec. 104.

[Prof. Gareis's Science of Law abounds in luminous annotations of the German Civil Code (*Bürgerliches Gesetzbuch*).—Ed.]

age,¹⁴ sex, family status, rank, social position, residence,¹⁵ etc.

The distinction based on social position depends always on the political history of the people and has an internal connection with previous facts concerning the state. This is particularly true of the distinctions arising out of birth; thus, the nobility (higher, middle and lower), the common people, mancipated persons, and the so-called half-free and slaves. All these divisions are frequently separated by impassable barriers. Caste is of this nature. Social position arising out of calling or vocation also generates capacities; thus, ordinary citizens (*Bürger*), tradespeople, soldiers, the clergy, artisans, peasants. All these persons are set apart in particular classes under special legal standards.

All persons are recognized as having capacity for rights — even though, as pointed out, this capacity may be of different grades — unless these persons are regarded as things or slaves in the lowest stages of bondage. These subjects of rights are called natural persons.¹⁶

There are, however, certain entities which are not human beings and which still have interests to which the law assigns legal protection. In other words, legal systems recognize the possession of rights which are not interests of individual persons but of other entities, or aggregates of persons or property.

¹⁴*B. G. B.* distinguishes as follows: The period of minority up to the age of seven years; the period of minority in the strict sense, between the years of seven and twenty-one, in which there is limited disposing capacity (*B. G. B.*, secs. 106-113); and the period of majority beginning with the completion of the twenty-first year. Minors of the age of eighteen may receive a declaration of majority (*B. G. B.*, secs. 3-5).

¹⁵*B. G. B.*, secs. 7-11.

¹⁶The first section of *B. G. B.* provides: "Capacity of persons for rights begins with the completion of birth." This excludes every species of corporal ownership and bondage. Capacity for rights continues until death, or until legal declaration of death (*B. G. B.*, secs. 13-20).

It is not necessary that legal systems shall create such interests. The ideals and necessities of mankind recognize them before the law. Legal order under certain conditions invests such interests as are found to exist in fact with the protection necessary to transform such interests into legal advantages. The entities whose preterhuman interests are in such manner protected are called juristic (fictitious, artificial or moral) persons in contradistinction to natural persons. Juristic persons are either aggregates of persons (*universitates personarum*¹⁷) or aggregates of things (*universitates rerum*).¹⁸

Private law recognizes the following classes of juristic persons: —

1. The state, or the governing social entity, in its private legal relations. In this aspect the dominant entity does not authoritatively represent its interests by virtue of its attribute of sovereignty. Its activity here is the same as that of any free citizen in the state in the satisfaction of private economic necessities. In this activity a state is called the *fiscus*,¹⁹ or treasury, in contradistinction to the activity in which the state represents public interests of the community by sovereign law in the governing sense (*res publica*).

2. Public communities within the state, which represent public interests: thus, municipalities, parishes, towns, provinces and similar communities.

3. Aggregates of persons, such as associations (corporations)²⁰ arising from joint concurrence or agreement, which have legal interests, in that the law gives them a legal position. According to the conditions of the legal recognition of their juristic personality, such corpora-

¹⁷*B. G. B.*, secs. 21-79.

¹⁸Foundations (*Stiftungen*) and institutions (*B. G. B.* secs. 80-89).

¹⁹*B. G. B.*, secs. 89, 928, 1936, 1942, 1966.

²⁰*B. G. B.*, secs. 21, 55-79.

tions (*collegia corpora*) are: guilds and industrial fraternities, and those privileged aggregates of persons which are under state supervision (*collegia sodalicia*); for example, the Roman *collegia funeraticia*, and modern associations for accident, age and health insurance in the German Empire. These associations under state recognition have social objects as opposed to objects of the state or of individuals.²¹

4. Associations for profit (*societates quaestuariae*), which the law specially invests²² with the capacity for having rights; thus, share companies,²³ registered associations and mining companies, in the modern law.

5. Churches, churchly associations and institutions.

6. Foundations,²⁴ that is, complexes of property which are recognized by the law as holders of rights for the accomplishment of certain limited objects; *piae causae*, etc.

II. The object of an interest (which is the basis of all private legal relations) is always a relation of fact, of one or more physical or juristic persons, considered as legal subjects, with reference either to other persons or to things. The relation of a legal subject with reference to other persons forms either family law or the law of obligations.

²¹Of this class are associations for health insurance according to sec. 25, imperial statute (June 15, 1883) (Gareis, *Reichsgesetze* 5, 147-8, 40); also fraternal associations for accident insurance according to sec. 23, imperial statute (July 6, 1884) (Gareis, *Reichsgesetze* 6, 28-9, 40, 7, 14, 58, 60-1); and institutions for insurance according to sec. 68, *Invalidentversicherungsgesetzes* (July 13, 1899) (Gareis, *Reichsgesetze* III, 12). It is one of the chief objects in the social aspect of the law (*Sozialpolitik*) to promote such associations having social ends with functions legislatively determined, and with definite rights fixed by statute.

²²*B. G. B.*, sec. 22. Cf. Cosack, *B. R.*, sec. 29.

²³Share company (*Aktiengesellschaft*). Registered association (*eingetragene Genossenschaft*). Cf. below, sec. 23, III, 5.

²⁴*B. G. B.*, secs. 80-88.

The relation of a legal subject with reference to things by virtue of which a thing is under the dominion of the person entitled, either in its entirety, or only in a particular way, makes the law of real relations—the law of things.

Inasmuch as things (but not persons) may be subjected in whole, or in part, to the direct dominion of a subject, they are frequently called the objects of rights.

The conception, thing,²⁵ includes —

1. Material things, as follows: —

(a) Movable things (*res mobiles, Fahrhabe*); thus, money, articles of commerce, goods, animals (*res sese moventes*),²⁶ clothing, arms, provisions, etc.

(b) Immovable things (*res immobiles, Liegenschaften*); thus, lands.

2. Immaterial things; thus, corporal existence and freedom, reputation, authorship in works of literature and art, inventions, etc.

III. The relation which is the basis of an interest forming a private legal relation, is established, conformably to legal order, by a definite fact. By this fact, legal relations acquire a characteristic legal protection, and the imminent interest is elevated to the plane of legal advantage. The impulse by which this is accomplished is called the juristic fact.

²⁵Salkowski, *Inst.*, sec. 81; Sohm, *Inst.*, secs. 45, 46. The kinds of things classified, *B. G. B.*, secs. 90-103.

²⁶Completely dependent persons — that is, slaves, where slavery exists as an institution, or has existed, are to be included among things. For illustration, in Germanic *Volksrecht*, *servus* and *ancilla* were coupled together with *bos, equus*, etc. Slavery had its origin in ancient times and in the Middle Ages in subjugation in war, and in conquest. Slavery of individual persons arose out of the relation of such persons to a people subjugated in war; out of slave birth, captivity and servitude for debt. It is interesting to note that certain very ancient laws, in order to favor freedom of individual persons, in certain cases recognized a *presumptio libertatis*; thus, for example, the law of the Cretan city, Gortyn (about 450 B.C.). See A. Gmoll in the scientific supplement to the *Programm des städt. Gymnasiums zu Striegau* (1889), I, 14, p. 10).

Such a juristic fact is also required for the extinction or alteration of a legal relation or a legal advantage.²⁷

Juristic facts include —

(a) Elemental occurrences in the course of nature. Such occurrences may be destructive, as in the case of a hail storm, or the death of persons or animals. They may be productive, as in the growth or ripening of fruits, or the birth of persons. Finally, they may be alterative, as in physical or chemical processes, or in a destructive or productive influence upon life and human interests through lapse of time.²⁸

(b) Human acts, or the casually derived operation of the human will on the external world. These acts may be: (1) such as are in conformity with legal order, as governing external relations, and which accordingly are called lawful acts; or (2) such acts as are contrary to the rules of legal order, and which are called unlawful acts.

Juristic facts²⁹ arising out of lawful acts are either unilateral dispositive acts, as in a voluntary transfer on the part of an owner of his ownership, or in the making of a will; or

Such acts are bilateral, in agreement, which is a concurrence of will of two or more private persons, whereby a change is to be effected in their rights, in accord-

²⁷The situation in which a young man, capable of marriage, stands to a young lady, and his interest in her, in her affection and fidelity, are protected only by the impulse of the juristic fact of an actionable betrothal or marriage. The interest which one may have in the complete use of a garden is first protected by the impulse, or juristic fact, of a conveyance, or recording of a title which makes the garden his property. The interest which one who suffers a physical injury has in damages for the expenses of his cure, lost time and smart-money, arises at the same instant that the injury is sustained. If the damage is fully satisfied by payment, then the payment (*solutio*) becomes the operative juristic fact of the extinction of the claim for damages.

²⁸*Cf.* the legal institution of prescription, *B. G. B.*, secs. 194-225; usucaption, *B. G. B.*, secs. 937-945; concerning time and dates, *B. G. B.*, secs. 186-193.

²⁹Dispositive acts, see *B. G. B.*, secs. 104-185.

ance with legal order. The most important operation of agreement lies in the domain of the law of obligations. Yet there are agreements having a real operation (*tradition*, delivery); and some lie in the domain of family law and the law of inheritance.

Unlawful acts by virtue of positive law operate to create obligations to pay damages,³⁰ penalties, or both, and of course operate also to extinguish or alter rights.³¹

IV. The fourth element of private law is the protection of the relation itself,³² or the protection of the interest. This protection extends so far as is possible with the means afforded to legal order — command and prohibition — and so far as it desires to protect the individual having in view its social function.

This protection is afforded in a variety of ways.

1. In the abstract.

(a) Even in the ideal; that is, through the simple existence of legal standards. In this aspect, command and prohibition, as such, operate on morally governed and law-abiding men. It is sufficient for them to know what is commanded and what is prohibited, in order that their acts may conform to legal order.

(b) In a practical aspect, the simple existence of legal duties, the existence of courts, justice, the machinery of the law and public access to the courts with a possibility of judicial enforcement, are sufficient to deter many men from those acts which are prohibited, and to occa-

³⁰*B. G. B.*, secs. 823-853.

³¹The criminal act of setting fire to a house which completely destroys it extinguishes the object of ownership. The claim for damages therefore rests upon a different object than that of ownership. See note 30, *supra*.

³²*Cf.* Sohm, *Inst.*, secs. 26, 33.

sion those acts which are commanded by legal order.

2. In the concrete.

(a) Even to the extent of permissive acts of self-help, but only in cases of necessary defense (*Notwehr*), or necessity³³ arising from the existence of danger (*Notstand*).

(b) Through precautionary judicial and extra-judicial measures of security; thus, *Protestation*³⁴ (*Verwahrungen*) [declarations against consequences possible to be drawn from positive acts, or silence]; *Reservation*³⁴ (*Vorbehalte*) [declarations limiting the ordinary effect of the abandonment or transfer of rights]; *Kautio*³⁴ (*Sicherheitsleistung*³⁵) [an act by which a future injury to a right may be either avoided, or by which, in the event of its infringement, restitution may be secured]; *Realkautio*³⁴ [the giving of bail or pledge for security]; *Verbalkautio*³⁴ [an agreement by which the parties establish the compass of the right involved and the penalty for its violation]; *Immission*³⁴ (*Besitzeinweisung*) [the act of the creditor taking possession of property of his debtor for security, corresponding to the *missio in bona* of Roman law], etc.

(c) Procedural assertion of rights threatened or infringed, by means of action including either complaint or plea.

THE SYSTEM OF CIVIL LAW

The systematic classification of private legal standards must be based on those interests which subjects of rights have or may have by virtue of their existence, and their real or artificial will. These interests exist with reference to things, or the attitude of persons. Otherwise expressed, the object of these interests is —

³³B. G. B., secs. 227-231, 859.

³⁴German legal terminology. — *Translator*.

³⁵B. G. B., secs. 282-240.

(a) A situation with reference to a thing; or

(b) A definite attitude of a person.³⁶

Accordingly there arises a twofold legal division: —

(a) Legal standards by which a situation of persons to things is maintained; and

(b) Legal standards by which a situation of persons with reference to other persons, or an interest in the attitude or conduct of other persons, is maintained.

The legal division corresponding to the rights involved is —

(a) Rights with reference to things; and

(b) Rights with reference to persons.

Inasmuch, however, as things consist of material and immaterial property, the law of things falls into two groups: —

(a) The law of material things, and

(b) The law of immaterial things.

In like manner, interests in the attitude of persons present a further division.

Such interests may arise from natural (physiological) and ethical relations inherent in kindred life and from other relations growing out of such association.

³⁶A double sense is to be borne in mind . . . whether the interest is that of an unrestrained determination of the will, or whether the interest is in an object. It is to be further remarked that an interest in the conduct of a person may be directed immediately toward a thing. The vendee of a horse, to whom delivery has not yet been made, has, of course, an interest in the horse; but his situation with reference to a particular horse, or a horse in general, is not such as legal order will protect solely on the ground of a contract of sale. It is accordingly possible to distinguish between an economic interest, and a juristic interest or a legally protected interest.

The existence of an economic interest is recognized by law to the extent that a creditor is obliged to accept the performance of an obligation through a third person who is not his debtor. (See B. G. B., sec. 267, and cf. Windscheid, *Pand.*, sec. 342, 4, and literature there noted.) But the legally interesting, the actionable, and above all the protected fact is still the interest of the creditor in the conduct (performance, payment, etc.) of the debtor.

In other words, these interests may arise from the naturo-ethical nature of the family, or they may spring from voluntary acts of persons having a free determination of will. Obligatory interests may arise from duties voluntarily assumed and requiring a definite attitude in accordance with legal order, as when a person obliges himself to certain conduct by agreement. Such duties may also spring from acts in contravention of legal order — delicts — and oblige a person to a definite attitude; such as an obligation to pay damages.

The law of persons accordingly severs into —

(a) Family law, and

(b) The law of obligations.

The law of immaterial things, which includes the right of freedom from restraint, freedom from injury, the right of reputation, and the right to intellectual creation, may also be considered as the law of personality. This division relates to rights peculiar to one's own person (*Rechte an der eigenen Person, oder Persönlichkeitsrechte*).³⁷

The foregoing concludes the strict logical arrangement of the law. Didactic and practical considerations of expediency require a further distinction. Its basis is that certain events at one and the same time may essentially involve

material and immaterial things, the law of obligations and family law, and may affect the whole existence of persons in their economic relations. These events operate as juristic facts. They accordingly might, like all other juristic facts, remain unnoticed in a systematic arrangement of the law, except that in such case their position would necessitate separate prominence in every department of law. Such a plan would be extremely cumbersome, and would lose in that comprehensiveness and clearness which necessarily follow from a sameness of starting point which is systematically adhered to.

Events of such extensive influence as to involve the four groups of the law which have been classified are —

The death of a physical person; and

The creation, alteration or extinction of a family relation, which while susceptible of consideration as an object of interests, may be regarded at the same time as a dispositive juristic fact.

In consequence of the practical necessity of classifying such events, two groups of legal rules arise, which may be combined under the expression, "mixed law of persons and things." The first of these groups is based on the event of death and produces the law of inheritance. The second governs the relation of pure family law to the law of things and obligations, and is called the law of family property.

Private law, therefore, is classified into the following six divisions: —

- I. The law of personality;
- II. The law of material things;
- III. The law of obligations;
- IV. Pure family law;
- V. The law of family property; and
- VI. The law of inheritance.

³⁷To avoid possible confusion, it should be stated that these rights form simply one of the classes of the major division, rights *in rem*, as opposed to rights *in personam*. Rights *in rem* avail against the whole world, while rights *in personam* attach only as against definite persons.

There is another leading division of rights, *i. e.*, proprietary and personal. Proprietary rights have an economic basis, while personal rights have only a juridical basis.

Rights peculiar to the person in the sense here are one of the divisions of the law of things. See appendix. See also Salmond, *Jurisprudence* (2d ed., 1907), sec. 82; and Schuster, *Principles of German Civil Law* (1907), p. 67. — Translator.

Professor Gareis's Introduction to the Science of Law*

AS A CONTRIBUTION TO GENERAL JURISPRUDENCE

By ARTHUR W. SPENCER

THE inconvenience of the lack of a satisfactory term to designate the study of those larger problems of the law which are concerned with its nature, origin, function, and growth, tends to some confusion and no doubt hinders the full and symmetrical development of juristic science. Not wholly satisfied with the way this difficulty has been met by most writers on the theory of law, the present author has long sought in vain a descriptive term which should adequately differentiate the subject-matter of the broader science sometimes awkwardly called by the name of "theoretical jurisprudence," and that of the narrower science which has only to do with the ascertainment and interpretation of existing law and its application to technical problems arising in the course of everyday professional practice.

Speaking generally, there are two possible ways of approach to the law, and perhaps it is not really so complicated and difficult a matter to point out the distinction between opposite methods as might appear at first. One way of dealing with the law, and the way most familiar, sets apart from everything else the existing law, segregating it from other subjects and concentrating the whole attention upon that; to put it

differently, the law is studied solely from a legal standpoint. The technical sphere of the professional lawyer does not embrace subjects with which the law is closely related; it does not include the study of other social institutions, and of the relation of the law to the forces at work in society. The technical or specialized science of law does not require a knowledge of political science, or of economics, or of any other science. Such knowledge will of course be useful, and I am not saying that the juriconsult does not utilize its assistance in solving the problems of the law; my contention is that when he has recourse to any systematic knowledge outside the legal sphere he has abandoned the methods of legal science in the narrower sense adopted by the legal profession. Moreover, the books of the law, particularly the reports of decided cases, are full of unsystematic knowledge of matters not embraced in the law as it actually exists — they are full of deductions from rules of morality, and of observations which derive their sole sanction from an appeal to common sense — I prefer to think that such a method is properly to be described as extrajudicial when employed by a judge. It is surely extrajudicial, if the professional duty of a judge is limited to the task of discovering and applying existing law, and of molding the development of new law solely in accordance with a process of induction from accepted legal principles.

The other method of studying the law is by treating it not as a segregated

*Introduction to the Science of Law, Systematic Survey of the Law and Principles of Legal Study. By Karl Gareis, Professor of Law at Munich. Translated from the third revised edition of the German by Albert Kocourek, Lecturer on Jurisprudence in Northwestern University. With an introduction by Roscoe Pound, Story Professor of Law in Harvard University. Boston Book Co., Boston. Pp. xxix, 329 + 45 (appendix and index), (\$3.50.)

institution, to be taken up wholly by itself, with a view to examining its internal structure, but by studying it as the component part of an aggregate of institutions, and considering it in its external relations with subjects with which it is closely connected. In this case the standpoint is not simply that of the legal practitioner, but is that of a student of the general problems of human society. The law, however, is the real object of study, in this case as much as in the other. The science based upon this study is likewise legal science, but in a broader sense. As distinguished from jurisprudence in the specialized sense, there is another science of jurisprudence which is concerned with the law only in what I will call, for want of a better term, its extralegal relations.

One might suppose, at a superficial glance, that the antithesis between these two modes of study might be expressed by the terms "general" and "special" jurisprudence, and they might well answer, if the only controlling consideration were that of the availability or non-availability of a particular method for the circumscribed purposes of the legal specialist. The word "general" however, is not descriptive, for it suggests emphasis on general rules formulated by induction from a great number of special instances, and the science of law in the narrower sense is quite as fruitful of such general rules as the broader science of law. The term "general" is also distinctly misleading, for it might seem to bring the science of comparative jurisprudence within the scope of "general" jurisprudence, though it may really belong quite as well to the special science of law. If the nomenclature is adopted, therefore, it can be accepted only with reservations.

Prof. Holland's definition of jurisprudence, in the broader sense, is that "it

is a formal, or analytical, as opposed to a material one; that is to say, that it deals rather with the various relations which are regulated by legal rules than with the rules themselves which regulate those relations."¹

I confess that while this definition is clear as to substance, I find it somewhat confusing in its terminology. For it is not quite clear why certain relations regulated by legal rules should be described as formal and the rules themselves as material, when the contrary might equally or more readily appear to be true. The term "formal" science of jurisprudence, to me, suggests a science of legal formulas or formal rules quite as readily as a science of the material out of which such legal forms might be supposed to be constituted.

I hold Professor Holland's abilities in too high esteem to maintain that he is not justified in regarding the relations comprehended in the "grammar" of the law, to use his own metaphor, as belonging to the form rather than to the substance of the law. My criticism is only that an ideal terminology should be entirely free from ambiguity, and self-explanatory, and that the distinction between the external and internal methods of study of the law is not expressed with sufficient clearness merely by treating the difference as one between form and substance. It is reasonably plain, from his definition, that by "formal jurisprudence" Professor Holland means the study of the law in its broader aspect, from a standpoint not purely legal; that it is, in fact, a study of fundamental principles underlying and not included in the visible structure of the law, and his term "formal jurisprudence" is thus evidently meant to be synonymous with jurisprudence in the broader sense in which I have de-

¹The Elements of Jurisprudence, 11th ed., p. 6.

fined it, even though it may be hard to determine whether his treatise, as actually executed, is to be classed as a work of jurisprudence in the broad or in the special sense.³

Sir Frederick Pollock says that legal science, in its widest extent, falls into two great divisions, namely, the Theory of Legislation or Final Jurisprudence, and Jurisprudence Proper. The latter in its turn falls into two fundamental divisions, the Theory of Positive Law, and "the learning of lawyers in the special sense."⁴ By the Theory of Positive Law he means the study of the form of law, "showing us the general characters of existing laws and legal institutions," and he thus seems to accept Prof. Holland's distinction without committing himself to his terminology. By "the learning of lawyers in the special sense" it is plain that he means Special Jurisprudence as I have defined it. His term "Theory of Positive Law" however, seems needlessly broad, when we find him, a moment later, subdividing the special science of law into a theoretical and a practical branch. The term General Jurisprudence would be more specific. Whether the Theory of Legislation should be considered as included, partly at least, within General Jurisprudence, need not here concern us.

There is another term which suggests itself in this connection as possibly applicable to General Jurisprudence, and that is the word "encyclopedia," as used not in Anglo-American legal literature but in that of the Continent. "Encyclopedia" suggests first of all an alphabetical arrangement of the material of the law, but the term has been applied

to arrangements made on a different plan. Korkunov has sketched the history of legal encyclopedia on the Continent and has argued with great clearness what are its shortcomings as a distinct science.⁴ He maintains that encyclopedia has failed to realize the high hopes entertained of it by Schelling and Hegel, because, as a science of legal sciences, it has had no special matter to work upon apart from the matter of the law. It has been primarily a review of existing law, with its attention directed mainly toward exposition rather than toward philosophical investigation. Even those writers who have employed encyclopedia most scientifically, says Korkunov, with a reference to Gareis, have laid greater stress on a review of special juridical matters than on a general treatment of jurisprudence.

Whether encyclopedia is based on a visionary conception and cannot succeed in establishing itself as an independent science, as Korkunov contends, raises a question which has many side issues. Encyclopedia, "a circle of sciences," implies no particular method of investigation, but a combination of various methods. Gareis, for instance, indicates three possible methods of inquiry. In the fullest sense of the term, "encyclopedia" would necessarily mean the fusion of all special methods for the realization of one general aim. But the internal and external methods of study of the law will not blend, unless the subject-matter studied is identical. Law in the sense of a fixed formula is one thing, and law as a product of social forces is another. Any attempt to mingle the general science of law with the specialized science of the content of the law is like trying to mix oil with water — the two elements cannot be combined. We are apt, therefore, to find the encyclopedists

³Sir Frederick Pollock is inclined to take issue with Professor Holland as to the practicability of a science of the "grammar" of the law. See *Essays in Jurisprudence and Ethics*, pp. 7 *et seq.*

⁴*Essays in Jurisprudence and Ethics*, p. 262.

⁴*Theory of Law*, pp. 9 *et seq.*

either attempting to bridge the gulf between two distinct sciences, and failing to secure the unity at which they aim, or else confining themselves to the theoretical, analytical side either of general or of special jurisprudence. The notion of an encyclopedic science of law therefore breaks down, because it attempts to bring an artificial unity out of a necessary diversity.

The term "encyclopedia" is thus not available as an equivalent for General Jurisprudence, but Korkunov's term, General Theory of Law, though it may not be desirable to adopt, is meant to be synonymous. This is evident from the definition found in his comment on Müller's *System der Rechtsgründe*⁶:—

The general theory of law verifies everywhere the positive law from the technical and logical point of view, shows the internal connection, the essence of the social organism, and refers it to the general principles of human activity in society and the state. It is thus the keystone of jurisprudence. It binds into a whole the separate parts and their diverse contents. To attain this object it ought to observe rigorously the objective method, and avoid all subjective construction.

The foregoing considerations will perhaps make it easier to assign Prof. Gareis's "Introduction to the Science of Law" its proper place in the literature of General Jurisprudence. The full title of this work, which was first published in 1887, is, "*Enzyklopädie und Methodologie der Rechtswissenschaft (Einleitung in die Rechtswissenschaft)*." The section on Methodology, which is wholly concerned with methods of legal study, occupies only a few pages at the end of the book. The real title, therefore, is "Encyclopedia of Jurisprudence." The translator has wisely rejected the word "Encyclopedia" as misleading to American readers, but in seeking any sound

estimate it is necessary to notice the plan on which the treatise is constructed and the manner in which it fulfills the purposes of legal encyclopedia.

The real, if not the professed aim of the treatise is twofold: (1) to develop a theory of fundamental principles of legal science, and (2) to arrange and classify the main heads of German law in accordance with an application and development of that theory. The first part of the book, comprising somewhat less than half of its contents, is concerned with theory, the second and greater part with analysis of the underlying principles of German private law in detail. This plan doubtless answers to the notion of "encyclopedia," and as "encyclopedia" the work is perhaps open to Korkunov's objection that it is "more like a simple review of special juridical matters, for its general part is less developed."⁶ Or, if the second part, like the first, employs the method of general jurisprudence, the work is not an encyclopedia. Certainly Legal Survey, the translator's equivalent for "encyclopedia," is not to be confounded with the general theory of law.

Were the theory of law fully developed as a separate science, it would be unnecessary, as Korkunov intimates,⁷ for a writer to preface an analysis of a system of existing law, which this primarily is, with a discussion of general principles. There would be something even incongruous in the juxtaposition of treatises on two distinct subjects. But in the absence of a generally accepted scientific theory of law, which can serve as the basis of any compendious expositions of this kind, such an introductory portion prepares the way for an analytical presentation of legal principles with

⁶Theory of Law, p. 19.

⁷Theory of Law, p. 37.

⁸Theory of Law, p. 37.

terminological exactitude and with the orderliness of arrangement desired.

The chief interest of the treatise, for the American student, is naturally found in its first part; the interest of the second part, as a scientific analysis of German law, hinges on the soundness of the doctrines found in the opening portion and applied to practical use in the second.

The first part of Gareis's work is remarkably easy to read. There are no bristling idiosyncrasies of thought or language, no statements which overtax credulity or invite serious controversy. The theory that the law is a system of protected interests has already been made familiar to American students by the translations from recent German legal literature which have already appeared, and may be doubtless considered to have already made a place for itself as the orthodox doctrine of modern legal science. A book based upon this theory, therefore, and executed with the qualities of sanity and breadth of view so conspicuous in Gareis, makes a direct appeal to the scientific mind and can scarcely fail to meet with an appreciative and sympathetic reception.

Take, for example, Prof. Gareis's luminous definition of law:—

Law is the (means of) peaceable regulation of the external relations of persons and their social communities among themselves. It is a regulation (*norma agendi*), adjusting or standardizing through commands and prohibitions. Its object is the adjustment of the external relations of mankind and social communities. It does not concern itself with internal activities, which belong to the domain of morals or religion. Its end and purpose is such a method of influencing these relations by commands and prohibitions that it may be justly called peaceable regulation. It may involve, though not by necessity, measures of co-ercion.⁹ It is

denominated peaceable regulation even though there be a possibility and even a necessity of the maintenance of legal order, in the extremest cases, by supreme force, as in the event of insurrection or war. It is therefore peaceable regulation, inasmuch as its means (*i. e.* commands and prohibitions) are first of all peaceable, and as the establishment and maintenance of peace and tranquility are the conditions necessary to a development of human powers, and the progress of civilization.⁹

In only one respect does this definition invite criticism, and that is as to whether the law essentially implies *peaceable* regulation. This is undoubtedly a much controverted question. I am inclined to think, however, that if Gareis's definition would have to be modified in this particular, the modification would be only slight and would not go to the root of his definition. Jhering has strongly emphasized the nature of the law as a conflict of opposed interests, but it may be, and usually is, a peaceable conflict, in the sense that the contestants do not usually rely solely on physical force. And in the case of a state laboring to put down an insurrection, or a king striving to conquer a neighboring province, obviously the restoration of peace, though peace in that case be synonymous with subjection, must precede the complete establishment of law.

Germany unquestionably leads the world in the philosophical science of jurisprudence, and Gareis is a good example of the modern scientific school which includes Jhering, Gierke, Brunner, Kohler, Merkel, and others. This school has taken the place formerly occupied by the historical school in Germany, and will no doubt have an equally strong influence on Anglo-American legal thought. In England, the trend of general jurisprudence has been toward

⁹As to this point, the co-ercive nature of the law, Gareis is satisfactory where Korkunov seems too idealistic. Gareis puts the truth of the matter very clearly when he says: "Concrete compulsion

is not necessary as the object of a particular legal rule; but law nevertheless is excluded from those human activities where force is not possible." P. 37.

⁹Pp. 29-30.

the position of the modern German jurists. The so-called "analytical" school is giving way to a school of scientific jurisprudence which freely utilizes the results of the social sciences. Throughout the world, we are tending toward unity of legal knowledge and a common basis of legal investigation, and the work of contemporary German jurists, particularly of those who, like Gareis, have most successfully shaken off the shackles of Hegelian idealism, should no longer be regarded as alien and forbidding by the American lawyer.

Gareis's exposition of the principles of legal classification is marked by an extreme lucidity — the lucidity of invincible logic and strong common sense. Especially clear is the differentiation of

the fields of public and private law, and of the law of persons and the law of things. The publication of his treatise in this country should work a wonderful clearing of the atmosphere of juridical discussion.

In laying aside the book, I cannot too strongly emphasize the merit of its succinctness and brevity, which should in no way be confused with superficiality of treatment, the author having compressed a vast amount of pregnant matter within the scope of a short exposition. Its simplicity, in these days of complex and involved treatises, is an inestimable advantage. It also deserves to be prized by American students as a most useful key to the German Civil Code.

Reviews of Books

COLLIER ON BANKRUPTCY

The Law and Practice in Bankruptcy, under the National Bankruptcy Act of 1898. By William Miller Collier. 8th edition, with amendments of 1903, 1906 and 1910, and with decisions to date, by Frank B. Gilbert of the Albany bar, editor of Street Railway Reports, Annotated; joint author of Commercial Paper, etc. Matthew Bender & Co., Albany. Pp. lxxxi, 854 + 244 (General Orders and Forms) + 157 (Rules and Statutes) + 51 (General Index). (\$7.50.)

REGARDING the general merits of Collier on Bankruptcy, there is not much to say in addition to our comment on the seventh edition of this leading work on the subject (see *21 Green Bag* 587). The eighth edition has been made necessary by the important amendments to the national bankruptcy law adopted last year. These amendments were not radical, as they were the outcome of a careful study of the working of the law, and were framed to clear up some points concerning which there had been con-

fusion, but they were far reaching, overriding interpretations of the statute that had come to prevail in many jurisdictions. Moreover, during the two years since the preparation of the seventh edition, many important decisions on matters of bankruptcy law have been rendered. Mr. Gilbert, the high quality of whose work was exhibited in the seventh edition, has consequently made some important changes in his treatise. The new edition has kept pace with the latest developments of the law in this important field, and will continue to perform the service of an indispensable handbook of the law as it stands at the present time. The system of useful cross references and convenient appendix of general orders and forms continue to play the part of prominent features. There is no increase in the number of pages.

ENGINEERING CONTRACTS

Contracts in Engineering: the interpretation and writing of engineering-commercial agreements; an elementary text-book for students in engineering, engineers, contractors and business men. By James Irwin Tucker, B.S., LL.B., member Boston Society of Civil Engineers, and Assistant Professor in Civil Engineering at Tufts College. First edition. McGraw-Hill Book Co., New York. Pp. xii + 274 + 19 (appendix) + 14 (index). (\$3 net.)

THIS book is not primarily a law book, and is too elementary in character to be of use to the practising lawyer, being intended chiefly for students of engineering. The writer lays great emphasis on the importance of the business side of the engineering profession. Of late the number of undertakings of great magnitude has increased, and the technical knowledge of the engineer, if he has the requisite business training, renders his services invaluable in a great variety of positions in the employ of corporations. Hence the advantage of his familiarizing himself with the principles of business law involved in the successful practice of his profession on its business side.

The book deals mainly with the law of contract, but there is also much information regarding the subjects of agency, corporations, torts, and real property, presented in its bearings on engineering, and the engineer who has charge of large construction contracts should certainly have some knowledge of these subjects. It is a book evidently prepared by a man of careful and practical methods, and should well serve the purpose for which it was designed.

BLACK'S LAW DICTIONARY

A Law Dictionary; containing definitions of the terms and phrases of American and English jurisprudence ancient and modern, and including the principal terms of international, constitutional, ecclesiastical and commercial law, and medical jurisprudence, with a collection of legal maxims, numerous select titles from the Roman, modern Civil, Scotch, French, Spanish and Mexican law, and other foreign systems, and a table of abbrevia-

tions. By Henry Campbell Black, M.A. 2d edition. West Publishing Co., St. Paul. Pp. vi + 1238 + 76 (appendix). (\$6.)

THE first edition of this standard dictionary, issued in 1891, immediately took its place on the shelves of the legal profession as one of the most useful and convenient works of the kind in existence, and the second edition, just issued, has been brought fully up-to-date by the inclusion of new material, with no increase in the bulk of the book. Its advantages over some other standard dictionaries, executed with no less ability, are found in its one-volume form, in the copiousness and succinctness of its materials, and in its being distinctly a dictionary and not an encyclopedia. The book is not too bulky to be handled easily, and its makers have produced a great time-saver.

The new edition affords evidence of a high degree of skill, not the least merit being the discernment with which the author has employed well chosen brief quotations for the purpose of illustrating his definitions. The extracts from judicial opinions have been made, as he says in his preface, with the idea of bringing to light the "best and clearest thinking" upon the meaning of technical terms. As a consequence, a brevity and a lucidity are secured which are most commendable. The new matter which has been added, especially in the field of medical jurisprudence, will start the book on a career of renewed usefulness.

LAND REGISTRATION IN ENGLAND

Land Law and Registration of Title: A Comparison of the Old and New Methods of Transferring Land. By Eustace J. Harvey. Longmans, Green & Co., New York and London. Pp. 278. (\$2.60 net.)

THE writer of this book gives a clear exposition, evidently addressed pri-

marily to the layman, but sufficiently intricate for the American reader because of the complexity of the subject, of the English system of conveyancing and of the tremendous inconveniences of that system which call for the introduction of governmental registration and guarantee of titles. The last eight chapters are concerned with registration. The writer shows a thorough grasp of the English law of real property and conveyancing, and the American conveyancer who desires a well-rounded library of his particular specialty will make no mistake in adding a well-executed work of this kind to his collection.

The author shows himself an earnest believer in registration, and advocates the reform with almost partisan warmth. He perceives, however, the difficulties of carrying out this reform until the real estate law of England has been much simplified. The preparation of a register recording all forms of interests in land would necessitate no less labor than that of the creation of a second Domesday book, but Mr. Harvey does not share the feeling since expressed by the Royal Commission on the Land

Transfer Acts as to the difficulties being wellnigh insuperable. His able discussion of the problems of registration will interest the reader who cares to look into the English phases of this subject.

BOOKS RECEIVED

RECEIPT of the following new books is acknowledged:—

A False Equation: The Problem of the Great Trust. By Melville M. Bigelow, Dean of the Boston University School of Law. Little, Brown & Co., Boston.

Proceedings of the Thirty-first Annual Session of the Ohio State Bar Association, held at Cedar Point, Ohio, July 6, 7 and 8, 1910. V. 31. Pp. 135.

New York State Library Yearbook of Legislation, 1908. By Clarence B. Lester, Legislative Reference Librarian. *Legislation Bulletins* 37-39. University of the State of New York, Albany. Pp. 465 + index. (\$1.)

The Commercial Code of Japan. By Yang Yin Hang, Graduate in Law of the Waseda University, Tokyo, Japan, Master of Law, University of Pennsylvania. *University of Pennsylvania Law Series*, no. 1. Boston Book Co., Boston. Pp. xxxiii, 295 + 23 (index). (\$3.50.)

The Law Applied to Motor Vehicles; with a collection of all the reported cases decided during the first ten years of the use of Motor Vehicles upon the public thoroughfares. By Charles J. Babbitt of the Massachusetts Bar, author of "Index-Digest of Massachusetts Motor Vehicle Law." With an introduction by Francis Hurtubis, Jr., of the Massachusetts bar. John Byrne & Co., Washington, D. C. Pp. 75 (table of cases, etc.) + 748 + 329 (appendices) + 51 (index). (\$6.50 delivered.)

Index to Periodicals

Articles on Topics of Legal Science and Related Subjects

Administrative Law. "Administrative Exercise of the Police Power." By Thomas Reed Powell. 24 *Harvard Law Review* 268 (Feb.).

A large number of judicial decisions bearing on the exercise of administrative powers under various kinds of statutes are examined, with the aim of making a comprehensive study of the whole subject.

Agency. "The liability of an Agent to Third Persons in Tort." By Floyd R. Mechem. 20 *Yale Law Journal* 239 (Feb.).

A short monograph which states succinctly the rules governing the subject, with little discussion, and with very full citations.

Aviation Law. "Aviation and Future Legislation." By H. G. Meyer. 36 *Law Magazine and Review* 176 (Feb.).

"These observations deal only with a few of

the points that will have to be considered by the Government which places an Aviation Act upon the Statute Book."

Codification. "The Need for Codifying the Law of England." By Walter G. Hart, LL.D. 36 *Law Magazine and Review* 129 (Feb.).

"Why is it that so little progress has been made? The reason apparently is that there is as yet no sufficient body of public opinion in favor of it. The lay public is probably favorable to the idea, but is apathetic. It has long ago abandoned any hope of being able to deal with the amendment of so intricate, complicated and cumbrous a subject as the law of England. It feels that it is a matter it must leave to experts, the legal profession — and the legal profession is on the whole opposed to codification. Many still fear that a code would lack the flexibility of uncodified law and would stifle development. This has always been the main contention of those opposed to codification from the time of Savigny onwards, but its fallacy is proved by the test of experience. There is nothing to suggest that the growth of law has been stifled in those countries which have codes, and Savigny's own country has framed and passed into law the completest and most scientific series of codes that has ever been promulgated. No country that has codified its law has ever indicated the slightest desire to revert to the uncodified system.

"The efforts of reformers must therefore be directed towards overcoming this sentimental objection and to creating a body of professional opinion in their favor. When such a body of opinion has been formed, the battle will have been won."

Commercial Law. "Mercantile Co-operation for Legal Self-Defense." By Edward D. Page. 5 *Illinois Law Review* 431 (Feb.).

Describing different forms of mercantile co-operation in New York City, for the purpose of exchanging credit information, of securing the impartial enforcement of the bankruptcy law, and of handling the litigation of a large number of firms. The author favors simplification of court procedure in mercantile cases, and suggests that the establishment of mercantile courts in the larger cities, modifying the present "cumbrous rules of evidence," might be one means of diminishing the delay and expense of such litigation.

Conflict of Laws. "The Relation of the *Lex Loci Contractus* to the *Lex Loci Rei Sitæ*." By Sheriff Campbell Lorimer, K.C. 22 *Juridical Review* 275 (Jan.).

Discussing the case of *British South Africa Co. v. De Beers Consolidated Mines, Ltd.* (1910), 1 Ch. 354, 2 Ch. 502.

Conspiracy. "Conspiracy in Civil Actions." By R. S. Nolan. 36 *Law Magazine and Review* 151 (Feb.).

"In America, judges, basing their decision on the history of English law and on English cases, generally taking *Savile v. Roberts* (1 Ld. Raym.

374) as the leading statement of the law on the subject, have declared in terms enviable, at least, for their clearness, that an act which when done by one alone is not actionable, does not become so when done in pursuance of a conspiracy. The cases of *Wellington v. Small and another* (3 Cush. 145), *Kimball v. Harman* (34 Md. 407), and, especially, *Hutchins v. Hutchins* (7 Hill 104), are worth referring to on the question. . . .

"There seems to be authority affording ground for the proposition that a conspiracy to commit a legal injury, resulting in acts which inflict loss but are not in themselves unlawful, may be actionable, though the like result, if brought about by an individual apart from conspiracy through acts not in themselves wrongful, would not be actionable."

Constitutional Amendment. "A Convention to Amend the Constitution — Why Needed — How it may be Obtained." By Walter K. Tuller. 193 *North American Review* 369 (Mar.).

By means of a compilation of extracts from Elliott's "Debates of the Constitutional Convention," the writer considers it to be conclusively established that when the requisite number of applications from the states are received it is the *positive duty* of Congress to call a convention for the purpose of revising the Constitution. "In this one instance, which is perhaps the only one, *Congress acts not in a legislative but in a ministerial capacity*. . . . The form of remedy for compelling Congress to act would seem clearly to be a writ of *mandamus*."

"The Machinery of Constitutional Amendment." By J. A. R. Marriott. *Nineteenth Century*, v. 69, p. 236 (Feb.).

The writer examines the constitutions of the leading nations, particularly with reference to the method of introducing constitutional changes. He thinks that the popular referendum, in England, means the substitution for the present unwritten and flexible constitution of one "which shall be certainly written and probably rigid."

Contract. "Promises and Covenants." By Henry H. Brown. 36 *Law Magazine and Review* 141 (Feb.).

"Truth is said to be at the bottom of a well, and it is often a difficult operation to bring her undefiled to the surface. The process generally stirs up a quantity of mud, and occasionally a mass of poisonous matter. There is the same inequality in modern litigation that there was in the ancient wager of battle. The man who was in the right was not always the better swordsman; now he is not always the better disputant."

See Conflict of Laws.

Contract Labor Law. "The Supreme Court of the United States on the Alabama Contract Labor Law." By Erastus J. Parsons. *Editorial Review*, v. 4, p. 182 (Feb.).

Appreciative of the attitude taken by the Court, the good effect of the decision being pointed out by one evidently familiar with labor conditions in the South.

Corporations. "Corporate Personality."

By Arthur W. Machen, Jr. 24 *Harvard Law Review* 253 (Feb.).

"In these days, it has become rather fashionable to inveigh against the doctrine that a corporation is an entity, as a mere technicality and a relic of the Middle Ages; but nothing could be further from the truth. A corporation is an entity — not imaginary or fictitious, but real, not artificial but natural. Its existence is as real as that of an army or of the Church. This is the element of truth in the reality theory of corporate personality which, originating in Germany, has commanded wide acceptance not only in that country but also in France and Italy. . . .

"If by 'person' the law means, not a rational, living creature similar to a man but a mere 'subject of rights,' — and this is the teaching of the more moderate members of Gierke's school — then, in the name of clearness let us adopt some less ambiguous designation for this 'subject of rights.' But if we do not lose ourselves in metaphysical discussions of the nature of juristic personality but take common sense as our guide, we shall apprehend clearly that when a jurist first said, 'A corporation is a person,' he was using a metaphor to express the truth that a corporation bears some analogy or resemblance to a person, and is to be treated in law in certain respects as if it were a person, or a rational being capable of feeling and volition. . . .

The proposition 'A corporation is a person' is either a mere metaphor or is a fiction of law. This is the element of truth in the 'fiction theory' of the corporate entity which both in England and on the Continent may be regarded as the orthodox doctrine.

"But although corporate personality is a fiction, the entity which is personified is no fiction. The union of the members is no fiction. The acting as if they were one person is no mere metaphor. In a word, although corporate personality is a fiction, yet it is a fiction founded upon fact. It is as natural to personify a body of men united in a form like that of the ordinary company as it is to personify a ship. To argue that because the personality of a corporation is a product of the imagination, therefore the corporation itself, as anything different from the separate members, is a fiction, would be as reasonable as to argue that because a ship is not really a female, and is personified only by way of metaphor, therefore it has no real existence except as a number of boards and nails."

"National Control of Corporations." By Hon. Frederick W. Lehmann. 11 *Phi Delta Phi Brief* 1 (Mar.).

"It may not be convenient in industrial operations to eliminate bonds and preferred stock, but there can be no reason why the stock which represents no investment, which does not speak the truth, should not be eliminated, for falsehood, whatever shape it may take, can be productive of no good. No real investor, no real manager of the industry, no workman of high or humble function can be benefited by fictitious capital that is, and can be, only a burden upon the enterprise. . . .

"The banks are the present, living witnesses that the National Government, representing all the people of the country, is in every matter of general concern the best repository of all artificial powers, and the surest conservator of all natural rights, and we cannot fear that the same control will fall as a blight upon the factory, which has come as a blessing to the bank."

See Federal Incorporation, Monopolies, Railways.

Criminal Procedure. "The Seventeenth Century Indictment in the Light of Modern Conditions." By Charles A. Willard. 24 *Harvard Law Review* 290 (Feb.).

"No reform of the criminal procedure will be complete without radical changes in the law relating to indictments. Changes should not be made which would prejudice the *essential* rights of the accused. But if these are preserved the reform can go to any extent that may be thought advisable. . . .

"It of course shocks the American or English lawyer to suggest that a man can be brought to trial upon an indictment or complaint which states the commission of no offense. But why should he not be? There are countries whose laws do not make the requirements which ours do. Judicial systems that have been adopted by highly civilized nations cannot be said to be wholly wrong, even if they do consider the rights of their subjects fully protected although the notice given to them of a criminal charge does not specify minutely and in great detail every possible ingredient of the offense. . . .

"The Fifth Amendment to the federal Constitution provides . . . that no one shall be held to answer for a felony except on an indictment by a grand jury. The word 'indictment' must be construed to have the meaning given to it at the time the amendment was adopted. It there meant an instrument which set forth all of the ingredients of the offense. It seems therefore that no change of the kind here sought could be introduced in the federal courts in cases of capital or otherwise infamous crimes, except by an amendment to the Constitution. In cases of misdemeanors, however, it can be done by an act of Congress alone."

"The English Court of Criminal Appeal." By John D. Lawson and Edwin R. Keedy. 5 *Illinois Law Review* 389 (Feb.).

This is an extract from a special committee report printed in the Journal of the American Institute of *Criminal Law and Criminology*. The writers visited England to obtain information about the workings of criminal procedure. The history of the court, its powers, practice with regard to appeals, rules of court and judicial comments on the court all receive attention.

"Criminal Law as Administered in Hamilton County." By William Howard Taft. *Independent*, v. 70, p. 230 (Feb. 2).

President Taft wrote this paper for the Literary Club of Cincinnati in 1884. In it he attempted

to outline remedies for the delays in trying indictments, two courts being needed in the county instead of one, and the law in regard to continuances needing amendment.

Criminology. See Juvenile Delinquency.

Defamation. "The Panama Libel Case." Editorial. 24 *Bench and Bar* 43 (Feb.).

"No one can deprecate more than do we the publication of false statements regarding the conduct of high public officials. Their character, however, is safe in the hands of the tribunals of the states."

Direct Government. "The Present Status of Direct Nominations." By Louis M. Greeley. 5 *Illinois Law Review* 403 (Feb.).

Professor Greeley describes the progress of the direct nomination movement in a large number of states, the article being compact with information about direct primary laws. The author, while he thinks the short ballot, civil service reform, corrupt practices laws and reform of criminal law and procedure more important ends than direct nominations, considers the direct primary, the logical first step in the path of reform. He believes the partisan direct primary, cumbersome and expensive as it is, the most promising of all nominating systems proposed as substitutes for the convention system.

"The Referendum and the Plebiscite." By Yves Guyot. *Contemporary Review*, v. 99, p. 139 (Feb.).

Conditions in Switzerland and France are briefly reviewed. Really an argument against representative government as a denial of popular sovereignty.

"Where The People Rule." By Hon. Jonathan Bourne, Jr. *Columbian*, v. 3, p. 821 (Feb.).

Describes the adoption of the initiative and referendum and the popular election of United States Senators in Oregon, who is held up as an example to her sister states. See Constitutional Amendment.

Eminent Domain. "Incidental Damage to Personal Property in Condemnation Proceedings." By Wilbur Larremore. 11 *Columbia Law Review* 147 (Feb.).

Mr. Larremore thinks it doubtful whether the courts will come to allow compensation for the incidental taking of personalty involved in condemnation of real property, without the assistance of statutes. Outside of fixtures compensation for personal property, in the absence of statute, is not allowed in most jurisdictions, although its disregard is an example of arrested development and tends to nullify the constitutional purpose. Certain statutes of New York and Massachusetts which tend to relieve this hardship receive some attention, and the writer believes that they will be generally copied and their scope considerably extended, so that constitutional questions may become important.

Employer's Liability. See Workmen's Compensation.

Federal Incorporation. "National Incorporation." By Dorrance Dibell Snapp. 5 *Illinois Law Review* 414 (Feb.).

This is an able, strongly fortified argument for the constitutionality of federal incorporation, great stress being laid in the principle that the right to issue federal charters is incidental to the right to regulate interstate commerce. The sharp distinction, however, made by the Supreme Court between commerce and manufacture is deemed by the author of great importance. The federal power to regulate commerce should in no way be confounded with the sovereign police power of the states, and the extension of the doctrine of implication to include federal power to create manufacturing corporations would work havoc in the Constitution and destroy the authority of the states as to all conceivable matters.

Government. "The Law and the Facts." By Woodrow Wilson. 5 *American Political Science Review* 1 (Feb.).

This was the presidential address delivered at the seventh annual meeting of the American Political Science Association. The significance of the title is made clear by this sentiment: "The facts are precedent to all remedies; and the facts in this field are spiritually perceived. Law is subsequent to the facts, but the law and the facts stand related, not as cause and effect, but, rather, as life and its interpretation."

The following extract is suggestive:—

"I do not like the term political science. Human relationships, whether in the family or in the state, in the counting house or in the factory, are not in any proper sense the subject-matter of science. They are stuff of insight and sympathy and spiritual comprehension. I prefer the term politics, therefore, to include both the statesmanship of thinking and the statesmanship of action. Your real statesman is first of all, and chief of all, a great human being, with an eye for all the great field upon which men like himself struggle, with unflagging pathetic hope, towards better things. He is a man big enough to think in the terms of what others than himself are striving for and living for and seeking steadfastly to keep in heart till they get. He is a guide, a comrade, a mentor, a servant, a friend of mankind. May not the student of politics be the same? May not his eye, too, follow the dusty roads, scan the scattered mass, observe the crowded homes, heed the cry of the children as well as the silent play of the busy fingers that toil that they may be fed, follow the lines of strain, of power, of suffering, get a vision of all the things that tell; and then, with no precise talk of phenomena or of laws of action, interpret what he feels no less than what he sees to the man of action, too much engrossed, it may be, to see so much or over so wide a field, too much immersed to hear any but the nearby cries and clamors, too eagerly bent upon his immediate task to scan the distant view?"

"A Definition of Liberty." By Isaac L. Rice. *Forum*, v. 45, p. 267 (Mar.).

"Civil liberty is the result of the restraint exercised by the sovereign people on the more powerful individuals and classes of the community, preventing them from availing themselves of the excess of their power to the detriment of the other classes."

This paper by the founder of the *Forum* is reprinted from the *North American Review* of January, 1883.

Canal Zone. "Canal Zone Laws and Judiciary." By Theodore C. Hinckley. 11 *Phi Delta Phi Brief* 49 (Mar.).

A short descriptive paper which presents much information about the law and its administration.

Germany. "Tendencies toward Ministerial Responsibility in Germany." By Walter J. Shepard. 5 *American Political Science Review* 57 (Feb.).

"Were it not for the gross inequalities in the distribution of seats, the Reichstag would be a model of a popular representative body. . . . The indications from all by-elections to the Reichstag point to a greatly increased Socialist poll. How long can this tremendous human flood be restrained within the barriers of the Prussian Electoral Law? When it bursts its bonds will it not carry all before it? . . .

"The Prussian Electoral question is not, as von Bethmann-Hollweg wishes to make it, a purely Prussian matter. Because of the pre-dominance of the Prussian Government in the Bundesrath, through which it can practically nullify anything the Reichstag undertakes, any measure which tends toward liberalizing the Prussian Government must have a vital interest for the whole of Germany. The democratization of Prussia would bring about the democratization of the Empire. Everything would be thrown into the melting-pot. . . . The introduction of ministerial responsibility in Prussia would transfer the ultimate control over the Prussian delegation in the Bundesrath from King to Landtag, as ministerial responsibility in the smaller states would result in popular control of their delegations. And, since the principal power of the Emperor springs from his being King of Prussia and thus being able to control that state's delegation, this change would very seriously reduce his power in imperial affairs."

India. "British Democracy and Indian Government." By Rt. Hon. Viscount Morley. *Nineteenth Century*, v. 69, p. 189 (Feb.).

Written by way of comment on the views expressed by Valentine Chirol in his volume on "Indian Unrest," views for which Lord Morley entertains a strong sympathy. A deep realization of the complexities of the political and social problem in India, and of the necessity for patience in handling it, is conveyed by the article.

"India under Lord Morley." *Quarterly Review*, v. 214, no. 426, p. 203 (Jan.).

"Blended conciliation and repression, we have lately heard from the India office, was the only true policy. As if such a line of action was a

policy at all; as if both were not essentially expedients that should be unnecessary in any sound society."

Portugal. "The Portuguese Republic." By William Archer. *Fortnightly Review*, v. 89, p. 230 (Feb.).

A sketch of events before, during, and after the revolution.

See Constitutional Amendment, Direct Government, Interstate Commerce, Legal History, Local Government, Political Parties.

Husband and Wife. "When and in What Cases May the Husband Recover Real Estate Conveyed by Him to His Wife during the Married State?" By Walter J. Lotz. 72 *Central Law Journal* 78 (Feb. 3).

"It is a beautiful tribute to splendid American womanhood that the 'women in the cases' heretofore commented upon are rare and vile exceptions and not the rule. But fraud, like murder 'will out,' and justice does not plead in vain."

Immigration. "The Immigration Problem—Four Criticisms." *Outlook*, v. 97, p. 357 (Feb. 18).

Letters stating the views of a Western American, a Negro, a Japanese and a Hebrew.

Indictments. See Criminal Procedure.

Injunctions. "Labor's Struggle for the Right to Organize." By Samuel Gompers. *Outlook*, v. 97, p. 267 (Feb. 4).

The article deals with the history of this struggle in Great Britain, and makes an urgent appeal for the passage of the Wilson bill regulating the issuance of injunctions and limiting the meaning of "conspiracy," as substantially the equivalent of the British Trades Disputes Act.

International Peace. "The Dawn of the World's Peace." By Hamilton Holt. *World's Work*, v. 21, p. 14128 (Mar.).

Describing the various agencies that are at work for the attainment of international peace, and treating of the progress of the international arbitration, the Hague Conferences, the unofficial peace societies, and notable recent benefactions in aid of the movement.

International Politics. "Diplomatic Affairs and International Law." By Prof. Paul S. Reinsch. 5 *American Political Science Review* 12 (Feb.).

A review of the notable developments of the year in the field of international relations, expository rather than discursive.

See Treaties.

Interstate Commerce. "The *Gibbons v. Ogden* Fetish." By Frederick H. Cooke. 9 *Michigan Law Review* 324 (Feb.).

"It seems now to be generally understood that for practical purposes the word [commerce], as used in the commerce clause, is synonymous with transportation." Marshall's language, says

Mr. Cooke, though perhaps proper in the connection in which it was used, has "been extremely mischievous in its practical effect." Marshall said, "Commerce undoubtedly is *traffic*, but it is something more — it is *intercourse*." By a process of distortion, a fallacy traceable to this source has grown up in the Supreme Court, thinks Mr. Cooke, the fallacy, namely, "that a sale is an essential element of commerce within the meaning of the commerce clause, thus notably in the decisions excluding contracts of insurance from its operation. . . ."

Again, "Nothing can be clearer than that it is largely within the power of a state to regulate the conduct and liability of a railroad or other carrier engaged in interstate transportation. . . . The decisions of the Court, taken as a whole, suggest that, apart from the vague rule that the regulation shall not be 'onerous' or 'amount to a burden,' the Court recognizes no definite limitation upon the power of a state to regulate the conduct and liability of a carrier, even though such regulation be for the benefit of interstate travelers and shippers. That is to say, as applied to *the agency of transportation*, the states have a power of regulation concurrent with that of Congress. . . ."

"Much of the language of his [Marshall's] opinion has been mischievous in its effect. The fault, however, is not so much to be charged to him as to those that have made of his opinion a fetish. We have seen that by a process of distortion his language has been made the basis of an inadequate and misleading definition of *commerce*, as the word is used in the commerce clause; also the basis of the alleged doctrine of the exclusiveness of the power of Congress to regulate commerce, which turns out on examination to be a mere pseudo-doctrine, an empty form of words, and a source of much confusion. . . ."

"Marshall and his associates but imperfectly foresaw, if they did at all, the extent to which, many years later, under essentially different conditions, their language would be employed for the purpose of denying to the states the exercise of their constitutionally reserved powers, and of allowing to Congress the usurpation thereof."

"The Pseudo-Doctrine of the Exclusiveness of the Power of Congress to Regulate Commerce." By Frederick H. Cooke. 20 *Yale Law Journal* 297 (Feb.).

"There is a distinction between *the subject of transportation*, that is, what is transported, and *the agency of transportation*, in particular, a common carrier.

"Interference by a state with *the subject of transportation*, that is to say, with transportation from state to state, is forbidden, not by the commerce clause, but either by a rule of law that antedates and is independent of the commerce clause, or by the Fourteenth Amendment, or by both, by which one has the right, as against any restriction imposed by a state, to transport from state to state. The power of interference by a state with *the agency of transportation*, thus, by way of regulation of the conduct and liability of a common carrier, is concurrent with

that of Congress, even as to regulation for the benefit of interstate travelers or shippers.

"It follows that the supposed doctrine of the exclusiveness of the power of Congress to regulate commerce, has (apart from anomalous cases) nothing more than a nominal existence."

"The Regulation of Interstate Commerce." By Senator Albert B. Cummins. *Editorial Review*, v. 4, p. 132 (Feb.).

By strengthening the hands of government regulation, the Senator would "re-introduce into every field of production and sale the competition which the Anti-Trust Law is powerless to preserve."

See Corporations, Federal Incorporation, Railway Rates.

Judicial Interpretation. "Partial Unconstitutionality with Special Reference to the Corporation Tax." By Alfred Hayes, Jr. 11 *Columbia Law Review* 120 (Feb.).

The writer considers at length the rules which have been applied by the Supreme Court in determining whether a statute void in part is wholly unconstitutional. This discussion was suggested by Prof. Goodnow's remark (9 *Columbia Law Review* 649, 653, see 22 *Green Bag* 128) that if the corporation tax is unconstitutional as regards income derived from property, this circumstance will not render the whole law unconstitutional. Mr. Hayes says that if the doctrine of the *Pollock* case as to taxation of income were to be followed, the statute would not be likely to be sustained on the ground that it is practicable to eliminate from its operation income derived from property.

Judicial Precedent. "The Decadence of the System of Precedent." By John S. Sheppard, Jr. 24 *Harvard Law Review* 298 (Feb.).

"How manifestly absurd it is for the practising lawyer even to attempt to keep *en rapport* with the decisions of Great Britain, of the numerous federal courts, and of the other states, while he is laboriously endeavoring to read the opinions of the higher courts of his own state in the few leisure moments he can get from the other demands of his professional life! . . ."

"There is, moreover, another reason for the decay of our former system of precedent, apart from this breaking down of its own weight. I refer to the tendency of mankind to rebel at the application of an established principle to a particular case where it seems to work a hardship. . . ."

"There is no doubt that an intelligent and united effort now can overcome even the difficulties we have been discussing. We can escape the crushing accumulation of authorities and opinions by referring to the broad principle which any special line of cases lays down rather than to the particular cases themselves with their endless variation. Let us cease to be 'case lawyers,' in the sense of seeking a precedent with like facts. . . . Our system of precedent ought to be one of principles — not cases. Many of these principles are so clearly established that

authorities in support of them are superfluous. If we find one or more of our 'hard cases' which have departed from the principle, let us avow the error which such cases involve, and frankly cast them overboard, instead of seeking to distinguish them by ingenious sophistries. When the principle is clearly established and the cause to be decided manifestly governed by it, let us refrain from augmenting the mass of legal literature by further learned opinions."

Juvenile Delinquency. "A Child-Saving Station." By Ernest K. Coulter. *Outlook*, v. 97, p. 361 (Feb. 18).

A paper read before the neurological section of the New York Academy of Medicine last January, discussing how defective children may be prevented from growing into hardened criminals. It describes the work of the Children's Court of New York County, of which the writer is clerk.

Labor Problems. "The Case Against the Labor Union." By Washington Gladden. *Outlook*, v. 97, p. 465 (Feb. 25).

In this first of five articles dealing with problems of labor and capital, Dr. Gladden devotes his attention to some of the serious charges against unionism, and is of the opinion that they show the existence of some serious abuses; those abuses, however, are considered not to be essential parts of the system or to be incurable.

"Columbus — A Tragedy-Farce in Strikes." By Frederick Palmer. *Hampton's* v. 26, p. 331 (Mar.).

Describing, in the graphic style of this experienced correspondent, the labor conditions in the recent street car strike in Columbus.

See Contract Labor Law, Injunctions.

Legal History. "The Establishment of Judicial Review." By Edward S. Corwin. 9 *Michigan Law Review* 283 (Feb.).

Second and concluding instalment of an article forming chapter iv of the author's work on "The Growth of Judicial Review." (See 23 *Green Bag* 94.) This section treats of the period subsequent to the adoption of the Constitution.

"The House of Lords and Appeals from Scotland." By C. A. Malcolm. 22 *Juridical Review* 295 (Jan.).

"The appellate jurisdiction of the House of Lords in Scottish civil causes has been regarded by some very patriotic Scotsmen as an unauthorized infringement of Scottish rights, since neither by the Treaty of Union nor by direct legislative enactment has such jurisdiction been given to the House of Lords."

The treatment is historical, tending to show the antiquity of the right of appeal to a higher tribunal.

"The practice . . . of Scottish appeals to the House of Lords has been sanctioned and regulated by legislative enactments from 1689 onwards, and there is abundant evidence to show that even before 1689 the Court of Session was not regarded as the final Court of Appeal. The

unconstitutional Acts of Charles II did not confer that status on the Court of Session, but they were the means of leading to our present system of appeal to the High Court of Parliament."

"The Sorrows of a Sheriff in the Fifteenth Century." By Arthur Betts. 22 *Juridical Review* 305 (Jan.).

"A curious case is reported in *Year-Book*, 5 Edw. IV. (Long Quinto), p. 5, wherein a sheriff, from punitive officer becomes the punished offender." The article is a collection of antiquarian information about the case of John Paston, sued for trespass by William Jenney and William Hogan, leading to the "amercement" of a sheriff for the non-return of an important writ.

Legislation. See Legal History.

Local Government. "The Commission Plan of City Government." By Oswald Ryan. 5 *American Political Science Review* 38 (Feb.).

A sympathetic account, by an intelligent and fair-minded student of politics, of the experience of America in the new form of municipal government by commission. "The striking results which have been obtained wherever the new form has been established plead eloquently for the simplification of a system which, because of its decentralized and inefficient form, has long since proved itself inadequate for performing municipal functions. Whatever may be the future municipal system in the United States, we may reasonably predict that it will at least contain the fundamental principle of the commission plan, namely, a centralization of administrative power and responsibility."

Maritime Law. "The Declaration of London." By Lieut. B. E. Monsell, R. N. *Fortnightly Review*, v. 89, p. 263 (Feb.).

A lucid review of the effect of the Declaration, particularly with reference to actual warfare, criticizing it adversely from a military standpoint.

"The Immunity of Private Property at Sea." *Quarterly Review*, v. 214, no. 426, p. 1 (Jan.).

A historical sketch of the movement for the immunization of private property at sea, beginning with the eighteenth century and coming down to present times.

Marriage and Divorce. "The Evidence of Divorcè." By William Marston Weeks. 4 *Maine Law Review* 103 (Feb.).

The first instalment of a comprehensive treatment of the law of evidence with respect to actions for divorce.

Monopolies. "German Good-Will Toward Trusts." By Elmer Roberts. *Scribner's*, v. 49, p. 293 (Mar.).

The writer shows how monopoly, instead of being discouraged, has been fostered by the German government in the form of syndicates. "The breakdown of the old pooling system in the United States was chiefly due to the laxness of the contracts, and their constant violation

by less scrupulous members. The trust in America replaced the pool. In Germany any disregard of the syndicate contract is almost certain to be discovered and penalized. The continued disregard of syndicate contract obligations would probably bring about the financial ruin of the delinquent."

"Normal Corporations vs. Continental Monopolies." By R. M. Benjamin. 11 *Phi Delta Phi Brief* 65 (Mar.).

"Industrial monopolies are, to say the least, undesirable persons." The writer favors an anti-monopoly amendment to the Constitution, as they cannot be reached by the interstate commerce clause.

See Corporations.

Newfoundland Fisheries Case. "The Hague Tribunal." By Sir Allen Aylesworth. 31 *Canadian Law Times* 144 (Feb.).

An address delivered before the Ontario Bar Association. A discussion of the decision examined under a variety of aspects, particularly as affecting Canada.

Panama Canal Fortification. "Fortify the Panama Canal." By Rear-Admiral A. T. Mahan, U. S. N. 193 *North American Review* 331 (Mar.).

An argument for fortification, based on considerations of military expediency and the safeguarding of peace.

Partnership. "Joint and Several Liability of Partners." By Francis M. Burdick. 11 *Columbia Law Review* 101 (Feb.).

Professor Burdick has written a luminous sketch of the growth of the modern doctrine of joint and several liability of partners from its beginnings in the common law, the law merchant and equity. The equity rule, which is but a continuation of that of the law merchant, prevails in about three-fourths of our American jurisdictions. Professor Burdick's article is mainly inspired by the decision of the New York Court of Appeals in *Seligman v. Friedlander* (N. Y. 1910, 138 App. Div. 784, 123 N. Y. Sup. 583). He considers the construction of the sixth section of the partnership law (Consolidated Laws, v. 3, p. 2522) not only to have been reactionary in that it placed New York among the minority of states by so overruling the plain intent of the statute as to make the obligation of co-partners joint and not several, but also to have been based on the erroneous view that at common law the creditor could take out execution against a single partner only when the property held jointly was insufficient to pay the firm debts. Professor Burdick thinks that if the rule regarding joint and several liability in contract is thus to be changed, the reasoning of the court if consistent should likewise change the common law rule of joint and several liability in tort.

Penology. "The Outdoor Treatment of Crime." By Harris R. Cooley. *Outlook*, v. 97, p. 403 (Feb. 25).

Describing the methods of some outdoor prisons, such as the Ohio State Reformatory at Mansfield, the Guelph Prison Farm in Ontario, the Cleveland (O.) Correction Farm, the penal colony at Merxplas, Belgium, and the model prison farm at Witzwil, Switzerland.

"Witzwil, a Successful Penal Farm." By Prof. Frank A. Fetter, Cornell University. *Survey*, v. 25, p. 761 (Feb. 4).

A readable description of the Swiss model penal institution.

See Juvenile Delinquency.

Peonage. See Contract Labor Law.

Police Power. See Administrative Law.

Political Parties. "A Criticism of Two-Party Politics." By J. N. Larned. *Atlantic*, v. 107, p. 289 (Mar.).

A very competent discussion of the evils incidental to our two-party system. The writer thinks that some of the more malignant developments of the party spirit, due to senseless divisions on questions left wholly to religious and political bigotry, perhaps belong to the past, and surely one might wish it were so. In dealing with the questions of reconstruction, of protective duties and of money, the inherited two-party idea, in its actual realization in American politics, has had this effect, we are told, "to deaden public opinion as a political force, and to engender the senseless party spirit in its place." The Continental division into three parties, those of the Left, the Right, and the Centre, is better fitted to give expression to the chief shades of political belief. In this country there have always been three attitudes on the tariff, one proceeding from intelligently formed opinion, one resting on ill-considered, hasty conclusions, and one dictated purely by self-interest. A three-party system would have furnished better opportunity for instructing ignorance and combating selfishness. "Now there appear some glimmerings of encouragement to the hope that our politics may yet develop a Centre, with its Right and Left wings, disjoinable from necessary connection with the extremes of Right and Left."

Practice. "The Practice of Law in Quebec Province, Canada." By Howard S. Ross. 9 *Michigan Law Review* 317 (Feb.).

This article covers the interesting subject of practice under the system of mingled French law and British tradition which is in force in the province of Quebec. The Quebec civil code has been highly praised and is closely akin in its origin to the civil law of Louisiana. The customs and etiquette of the legal profession in Quebec will interest the American lawyer because they are so different from his own.

Procedure. "The Cry for Law Reform." By Robert C. Smith. 20 *Yale Law Journal* 292 (Feb.).

"That procedure should be simplified requires no argument. The fullest powers of summary

amendment should be vested in the courts, provided that no suitor should thereby be taken by surprise. That it should be possible for any cause to be disposed of upon technical grounds, without its merits having been determined, is a serious reflection upon our whole legal system. Delays must be shortened and costs reduced as far as possible. Let the subject, however, be approached with some sense of responsibility. One may not set any limit to discovery and invention in the natural sciences, but it is quite safe to predict that justice can never be administered by any penny-in-the-slot device. Neither in the wisdom of the ancients nor in all the ingenious novelties of today, do we find any substitute suggested for the exercise of judgment by skilled and disciplined intellects in order to define rights according to fixed rules of law."

See Criminal Procedure.

Railway Rates. "Railway Rate Theories of the Interstate Commerce Commission, II." By M. B. Hammond. *Quarterly Journal of Economics*, v. 25, p. 279 (Feb.).

In this concluding instalment the writer considers at length the factors of distance, as involved in rate-making, and those of natural advantages of location, competition between carriers, and competition between places or sections.

Railways. "Railway Speculation." By William Z. Ripley. *Quarterly Journal of Economics*, v. 25, p. 185 (Feb.).

"The foregoing outline of speculative manipulation of railway securities tells but a sorry tale at best. It presents the most unpleasant aspect of railroad financing, embracing a range of operations from mystification and petty deceit to utter fraud. But the conclusion must be carefully avoided that, because such offences have at times been committed, American railroad finance on the whole is unsound. Such a conclusion would be absolutely unfounded. A large majority of our common carriers are certainly as honestly administered as are private businesses as a whole. Nor has the standard of integrity in the main ever been as high as it is at present. But, as always, the innocent are condemned to suffer with the guilty. No single group of persons has a deeper interest in the prevention of such breaches of trust in future than that charged with the present management of this great industry."

Real Property. See Torrens System.

Social Legislation. "The 'Right to Work.'" *Edinburgh Review*, v. 213, no. 435, p. 180 (Jan.).

The writer considers at length the claim that "every workman not in employment has a right to work," and endeavors to prove it an economic fallacy. Such a scheme as that of the Unemployed Workmen Bill of 1908 "must destroy the mutual suitability of work and worker; . . . such a condition can only be attained if there is free play between the individual worker and the employer of labor."

"The Social Problem." By Prof. John J.

Stevenson. *Popular Science Monthly*, v. 78, p. 258 (Mar.).

Philanthropy, argues the author, begins its work at the wrong end. Instead of seeking to ameliorate the condition of the poor, it should encourage the restriction of competition, the restriction of population, the restriction of marriage, and the restriction of child labor, thereby abolishing the evil of poverty at its source.

"The Prevention of Destitution." By Henry H. Schloesser. *36 Law Magazine and Review* 181 (Feb.).

Describing in detail the Prevention of Destitution Bill, which follows the doctrine of the University report of the Poor Law Commission declaring for "the universal maintenance of a definite minimum of civilized life."

"National Insurance against Invalidity and Old Age." By Dr. Ernest J. Schuster. *Nineteenth Century*, v. 69, p. 351 (Feb.).

A reply to Mr. Carson Roberts' proposal for a scheme designed to lessen the burden of the Old Age Pensions Act and to accomplish insurance against invalidity under conditions entailing greater benefit and less expense. The writer seeks to prove that the plan is impracticable, illusory, unsound.

Taxation. "The Income Tax Amendment." By Governor Augustus E. Wilson. *Editorial Review*, v. 4, p. 142 (Feb.).

An argument against the proposed amendment as an encroachment on state rights, leading federal decisions being cited to support this decision, and as depriving the states of revenue that they need for their own purposes.

"The Taxation of Married Women." By Teresa Billington-Greig. *Contemporary Review*, v. 99, p. 210 (Feb.).

"A complete sweeping away of all the relics of the pernicious common law doctrine of woman's subjection is absolutely necessary."

For Federal Corporation Tax, see Judicial Interpretation.

Theory of Law. "The Mission and Objects of Philosophy of Law." By Josef Kohler, University of Berlin. *5 Illinois Law Review* 423 (Feb.).

The scholarly translator of Gareis's Science of Law has translated this paper written by the leading neo-Hegelian jurist of Europe, which partakes largely of the nature of a defense by Professor Kohler of his own theories from attacks of critics who deny that his "*Lehrbuch der Rechtsphilosophie*" has a philosophical basis. Professor Kohler states the objects of modern philosophy of law to be the history of civilization, ethics, psychology, sociology, philosophy of history, and finally metaphysics. There is a strain of mysticism in the article which is likely to repel the reader. But the following definition of law is interesting: "Law is the standard of conduct impressed upon individuals which arises from an internal impulse of the community toward a rational form of social life." And we have

never seen any differentiation of law and morality framed in such novel terms as this:—

"Law is distinguished from morals (as I have explained in '*Helmoltz's Weltgeschichte*,' and in my '*Lehrbuch des Bürgerlichen Rechts*,' I, 13) in this, that morals do not rest on ideas of social order, but upon conceptions of a hyper-social order which towers over the social order. Morals, therefore, relate not only to external conduct, but also touch the internal inclinations of men."

See Corporations.

Torrens System. "Registration of Title to Land—Royal Commission's Reports; II." By John Burns. *22 Juridical Review* 284 (Jan.).

Outlining a project of legislation for the immediate reform of conveyancing in Scotland, along the lines of registration of title, or as we should say, the Torrens System.

Tort. "The Rule in *Rylands v. Fletcher*." By Francis H. Bohlen. *59 Univ. of Pa. Law Review* 298 (Feb.).

At a time when there is a tendency to confuse tort with negligence (as, for example, Mr. Snow has done in his paper on Social Insurance, see p. 208 *infra*), it is a pleasure to come upon a clear analysis of common law principles, which brings out the fact that moral blame is not of the essence of tort.

Mr. Bohlen deserves gratitude for showing that in *Rylands v. Fletcher* Baron Blackburn did not originate new law, but merely applied a principle deducible from decisions in existing actions not founded on negligence.

"In trespass to real property, in nuisance, in case for the harm done by the spread of fire, except where modified by statute, the defendant who is innocent of any intention to do harm is as liable today, no matter how lawful his use of his land or however carefully he acts, as he was in 1461. Nor is the persistence of this conception attributable to any special rigidity peculiar to the actions in which redress was had. It was in the action of trespass that the extreme rigor of the early law was first relaxed when the injury was to the person. Not only was the action on the case the most flexible of all actions, the earliest remedy for the spread of fire, but, at a very early date this action came in also as the remedy for nuisance, in lieu of the assize of nuisance abandoned because of its procedural and other disadvantages. Now, while no action of the case for personal injuries appears to have lain for harm to the person indirectly done, unless the defendant was shown to be in fault, the action on the case for the spread of fire lay against a perfectly innocent defendant and when it superseded the assize of nuisance there was no tendency to alter or modify the principles of liability applied in the earlier action.

"It seems clear that every man was originally considered liable for the harm, whether to another person, personal property or real estate, which his acts had directly caused, quite irrespective of moral fault, and that while the rigor of the early rule was relaxed at an early date when the harm was done to the person or

personal property, it persisted unchanged where real estate was injured or invaded, or the owner's occupation and enjoyment of and dominion over it was interfered with. So at present, or at least until very recently, the basis of liability in the two classes of cases is, or has been, so entirely different that no proper analogy can be drawn from the one to the other."

Mr. Bohlen seeks to answer the question why the rule in *Rylands v. Fletcher* provoked such opposition in America, and his analysis of the legal and social prejudices which looked upon it as an oppressive innovation is highly illuminating.

See Workmen's Compensation.

Treaties. "Sanctity of Treaties." By Theodore P. Ion. *20 Yale Law Journal* 268 (Feb.).

"Leaving aside the transitory treaties, the inviolability of which seems not to be generally questioned, on account of their character of permanency *per se*, so to speak, let us examine the case of a treaty proper, concluded for an indefinite period, in which there exists no clause by which the parties have reserved to themselves the right to abrogate at any time such instrument without mutual consent. The question is whether treaties of that character can be abrogated without the mutual consent of the contracting parties.

"There seem to be three leading opinions on this subject. Some writers hold that treaties cannot under any circumstances be abrogated without the consent of all the contracting parties; others, after admitting the doctrine of the sanctity of international compacts, seem to favor the view that a change of circumstances not foreseen at the time of the conclusion, may justify a state in not considering itself bound to abide by the provisions of such compact; and finally there are some jurists who contend that when a treaty hinders seriously the development and progress of the people of a country it may be renounced even against the will of the other contracting party or parties."

The writer examines the opinions of leading authorities, and considers recent events in diplomatic history, reaching the following conclusion:—

"If, therefore, after the lapse of a certain time, it is found that on account of the change of circumstances, not foreseen at the time of their conclusion, or independently of any such change, it is evident that the execution of the provisions of such treaties would materially affect the interests of a state or endanger its safety or security, in such extreme cases of paramount importance, it may fairly be admitted that a state is justified in denouncing such treaties or in proposing modifications compatible with the interests of the nation. But when a state is compelled by necessity to resort to such an extreme measure, it is just and right that it should pay to the other party or parties a reasonable compensation, in case any damages would result from such an *ex parte* abrogation of a treaty, especially if the aggrieved state, in view of the execution of such instrument, has already made arrangements, which seem to be now irrevocable."

Trust Funds. "Some Considerations Concerning Investments by Trustees." By Frank G. McKinney. *24 Bench and Bar* 57 (Feb.).

"The fact that the creator of the trust was in the habit of investing in certain unauthorized securities does not warrant the trustee in continuing those investments and in claiming protection from loss for that reason." The subject is discussed from the point of view, chiefly, of New York law.

Uniformity of Law. "The Relation of Judicial Procedure to Uniformity of Law." By Thomas W. Shelton. *72 Central Law Journal* 114 (Feb. 17).

"If it be necessary for uniformity, why cannot the Judges or the presiding Judges, of the different State Appellate Courts exchange views when a new uniform statute is enacted and, if they fail to agree upon its meaning, let the majority rule? A congress of Courts, I venture to suggest, is within the spirit of uniformity. It is no impugment upon the dignity nor a breach of the ethics of courts to confer together. It is no sacrifice of states' rights but is an advantage to state interests."

Workmen's Compensation. "Social Insurance." By Alpheus H. Snow. *59 Univ. of Pa. Law Review* 283 (Feb.).

The writer assumes — and it is doubtful whether he will be generally upheld in this contention — that employer's liability and workmen's compensation acts depriving the employer of his common law defenses are really an exercise of the taxing power, rather than of the general police power. As such, he says, they must be treated as parts of a general scheme of social insurance, and the question for the courts is whether they are a valid exercise of the taxing power "for a public purpose." The writer does not oppose such statutes, but he does think that they should be framed only in accordance with fundamental principles of social insurance.

In this connection, we would like to call attention to the article following Mr. Snow's in the same review, on *Rylands v. Fletcher*. If the law of negligence is to be changed so as to deprive the employer of existing defenses, the state may change it without creating a form of liability which is radically differentiated from the liability in tort at common law, merely because it is not the old liability for damage due to negligence. There is something analogous in the carrying on of a hazardous business which may endanger workmen and in the keeping on one's premises of dangerous substances which may escape and do harm. No real violence to the principles underlying the common law is done by a workmen's compensation act. It is unnecessary, to justify such a statute, to resort to any theory of the valid exercise of the taxing power. (See under Tort, p. 207 *supra*.)

"German System of Compensating Disabled Workmen." By Ralph M. Busser. *68 Legal Intelligencer* (Philadelphia) 117 (Feb. 24).

The writer, who is American consul at Erfurt, Germany, succinctly states the chief principles

of the German system and outlines their practical application.

Miscellaneous Articles of Interest to the Legal Profession

Banking. "The Masters of Capital in America — The Standard Oil Company, Bankers." By John Moody and George Kibbe Turner. *McClure's*, v. 36, p. 564 (Mar.).

Dealing with the growth of the financial power of the Standard Oil Company during the past fifteen years, during which, by using their great capital in varied and ingenious ways, these men have gradually centralized and increased the control of ready resources, till this power has become a formidable one "menacing, in many minds, the whole present organization of society."

Biography. "A Law Student's Recollection of Abraham Lincoln." By Jesse W. Weik. *Outlook*, v. 97, p. 311 (Feb. 11).

The author was joint author with W. H. Herndon, Lincoln's law partner, of a *Life of Abraham Lincoln*.

Business Methods. "The Awakening of the American Business Man." By Will Irwin. *Century*, v. 81, p. 689 (Mar.).

Setting forth the principles of "efficiency engineering," which were recently made the basis of Mr. Brandeis's argument that the railways could reduce expenses; the introduction of these methods means the beginning of "a new movement in American industry."

Detection of Crime. "Great Cases of Detective Burns: The Monroe-Head Counterfeit." By Dana Catlin. *McClure's*, v. 36, p. 542 (Mar.).

Detective Burns here tells of the wonderful ingenuity of Taylor and Bredell in circulating counterfeit money while they were in prison, and of the methods he used to break into the counterfeiter's workshop.

Express Monopoly. "The Great Express Monopoly, II." By Albert W. Atwood. *American Magazine*, v. 71, p. 620 (Mar.).

Treating mainly of the Adams and American Express companies, which dominate the transportation system of New England and exercise great power in other sections.

Fiction. "*Dabchirr v. Tiem*." By "Niger." *46 National Review* 1031 (Feb.).

A very amusing story, racily and slangily told, of a ridiculous dispute between two natives of Northern Nigeria, over the ownership of a horse which is really the property of neither. The Assistant Resident nonsuits the complainant and directs that the horse be brought into court, only to find that the animal died "at the end of last rains."

Lawyers. "The Lawyer: Our Old Man of the Sea, III." By Ignotus. *Westminster Review*, v. 175, p. 73 (Jan.).

"In the United States we see a weak or an unscrupulous legalism in the service of a rapacious commercialism. This paralysis of justice is a symptom which encourages the enemies of Anglo-Saxondom and fills its friends with misgivings. Unequaled prosperity, national, corporate and individual wealth, fabulous in amount and extensive in distribution, will not avail to stave off disintegration if this ailment cannot be arrested."

Merchant Marine. "Constitutional Merchant Marine Legislation." By William W. Bates. *Editorial Review*, v. 4, p. 160 (Feb.).

"The governments of the shipping states should consider it their duty to their own citizens to call the federal government to account and demand the performance of the compact for navigation laws."

Mormonism. "The Viper on the Hearth." By Alfred Henry Lewis. *Cosmopolitan*, v. 50, p. 439 (Mar.).

The first of a series of articles on the havoc wrought by Mormonism in family life.

Party Politics. "The Political Predestination of Woodrow Wilson." By George Harvey. *193 North American Review* 321 (Mar.).

"The finger of Predestination, guided by Logic, Circumstance, Conditions and History, points unerringly to Woodrow Wilson, Democrat, as the opponent of William H. Taft, Republican, in 1912."

"American Affairs." By A. Maurice Low. *46 National Review* 1001 (Feb.).

"The most experienced politicians believe that Mr. Taft will be renominated by his party. They can see nothing else. It is not at all unlikely that there will be a contest in the convention and that the Radical wing of the party, led by some of the extremists from the Middle Western states, will endeavor to defeat Mr. Taft; . . . but it is not believed that they will command sufficient strength to be able to prevent Mr. Taft's nomination or to dictate the nomination of a candidate more agreeable to them."

"Politics and Parties in the United States." *Quarterly Review*, v. 214, no. 426, p. 225 (Jan.).

Mr. Roosevelt occupies a prominent place in the subject-matter of this article, which is mainly a review of recent events. The reviewer appears to have derived his view of the present political situation from our popular magazines and kindred sources, as he professes to see in the money power a grave menace to American civilization.

Pensions. "The Pension Carnival." By William Bayard Hale. *World's Work*, v. 21, p. 14159 (Mar.).

This sixth article deals with the "correction" of records, admitting deserters, embezzlers, murderers and cowards to the benefits of the honorably discharged.

Speculation. "The Get-Rich-Quick-Game." By C. M. Keys. *World's Work*, v. 21, p. 14112 (Mar.).

This is the most remarkable article on fraudulent stock selling that we have ever seen, setting forth the names of hundreds of companies whose stock is wholly or practically worthless, and exhibiting the seductive advertising artifices employed by unscrupulous so-called "bankers."

Supreme Court. "The New Supreme Court." By Isaac F. Marcossou. *Munsey's*, v. 44, p. 739 (Mar.).

An entertaining anecdotal description of the personnel of our highest federal tribunal.

Tariff. "The United States and the Tariff." *Edinburgh Review*, v. 213, no. 435, p. 32 (Jan.).

A sketch of the developments of Taft's administration as regards the tariff question, and of the outcome of Insurgent activity in the last Congressional elections.

Taxation. "The Things that are Cæsar's, IV." By Albert Jay Nock. *American Magazine*, v. 71, p. 631 (Mar.).

Treating of the extent of the exemptions from personal taxation in New Jersey.

Latest Important Cases

Bankruptcy. *Secured Creditors — Application of Proceeds of Sale.* U. S.

In *Sexton v. Dreyfus* and *Sexton v. Lloyds Bank, Ltd.*, decided Jan. 23, the United States Supreme Court held that a secured creditor is not entitled to apply the proceeds from the sale of his security first to interest on his princi-

pal accrued since the filing of the petition in bankruptcy, and then to the principal and to prove a claim in a bankruptcy court for the balance of the principal.

Mr. Justice Holmes said that the English rule would be followed by the Supreme Court:—

"For more than a century and a half the theory of the English bankrupt system has been that

everything stops at a certain date. Interest was not computed beyond the date of the commission. *Ex parte Bennet*, 2 Atk. 527. . . . We take our bankruptcy system from England, and we naturally assume that the fundamental principles upon which it was administered were adopted by us when we copied the system, somewhat as the established construction of a law goes with the words where they are copied by another state. No one doubts that interest on unsecured debts stops. See § 63 (1). *Shawnee County v. Hurley*, 94 C. C. A. 362, 169 Fed. 92, 94. The rule is not unreasonable when closely considered. It simply fixes the moment when the affairs of the bankrupt are supposed to be wound up."

Chinese Exclusion Act. Seamen not Excluded — Intent to Leave Vessel must be Alleged in Indictment.
U. S.

That the captain of a vessel who, having one or more Chinamen in his crew, permits them to land in New York on arrival, does not violate the Chinese exclusion act, was the gist of an opinion handed down Feb. 3 by Judge Hand in the United States Circuit Court, sustaining a demurrer to an indictment. The indictment charged that Robert Jamieson, as master of a steamship, did knowingly bring to the port of New York a Chinaman named Ah Farr, a seaman and a member of his crew, and did knowingly land the said seaman and permit him to be landed.

Judge Hand held that a seaman or member of a crew of a vessel is not comprehended within section 9 of chapter 1015 of the First Session of the 50th Congress, 25 Stat. at Large, 476 (Act of Congress of September 13, 1888), providing that the master of any vessel who shall knowingly bring within the United States and land or attempt to land or permit to be landed any Chinese laborer, or other Chinese person, shall be guilty of a misdemeanor, etc.

The intent to leave, the Court also held, is included in the term "bring" as used in this statute, and must be alleged in an indictment thereunder in like manner as any other specific intent which is the ingredient of a crime. *U. S. v. Jamieson*, *N. Y. Law Journal*, Feb. 11.

Insurance. Requirement of Written Notice of Illness.
N. Y.

In *Whiteside v. North American Accident Insurance Co.*, decided Jan. 3 (44 *N. Y. Law Journal* 1681, Jan. 24), the New York Court of Appeals held that one holding an accident policy containing a provision that written notice

of sickness must be mailed to the company by him or by his representative, within ten days after its commencement, is not excused from complying with the condition though incapacitated from giving the notice by the sudden and serious character of his sickness. The Court (Hiscock, J.), said: —

"Here the parties by their free and voluntary action have entered into a contract by which each has assumed certain obligations. The insurance company has agreed to make certain payments on account of sickness, and the assured as a condition precedent to the enforcement of such obligation has agreed to the payment of certain premiums and to the service of the notice in question, which might have been prepared and served by some one else in his behalf if he was incapacitated from personally doing it. All of these provisions and engagements enter into the substance of the contract which respondent is seeking to enforce, and under such circumstances the courts will not relieve either party under the conditions here presented from fulfillment of the engagement which he has voluntarily undertaken. This distinction between obligations imposed on a party by statute and against his will and those voluntarily assumed by him as a part of a contract is clearly recognized by the decisions."

Judge Haight dissented.

Negligence. Contributory Negligence of One Who Blinds Himself to Objects in Busy Street.
N. Y.

A photographer who stands at the curb of a city street in the act of taking a photograph and on looking about and seeing no vehicle in sight except a city ash cart, a hundred feet or more away, with no person on it, covers his head and face with a dark cloth, thus preventing his seeing approaching objects, and remains in that condition for about five minutes when he is struck and injured by the approaching cart, is guilty of contributory negligence as matter of law, which precludes a recovery by him for the injury in an action against the city. Such was the holding of the New York Court of Appeals in *Mastin v. New York City*, decided Feb. 14 (44 *N. Y. Law Jour.* 2297, Mar. 3). Judge Willard Bartlett, who wrote the opinion, said: —

"My brother Werner's suggestion in the dissenting opinion, that the question of contributory negligence should be deemed a question of fact for the jury instead of being decided against him as a question of law because a majority of all the judges who have considered the case have entertained that view, would preclude us from

ever reversing a judgment of this character for contributory negligence when there were three dissents in this court. He concedes that instances may arise where persons engaged in lawful street occupations are so affirmatively careless as to preclude them as matter of law from recovering for injuries which they sustain through the negligence of others, but declares that the case at bar does not belong in that category. This is the precise point upon which we differ. He would be entirely right if the element of time could properly be disregarded; but we think that the time during which the plaintiff voluntarily blinded himself was too long to be excusable upon any reasonable theory of prudent conduct."

Railway Rates. Returns not Allowed on Capitalization of Profits — Carriers' Burden of Proof — Economy of Management. U. S.

By two unanimous decisions handed down Feb. 23 by Commissioners Lane and Prouty, respectively, the Interstate Commerce Commission declared against the proposed increases in freight rates in the Official Classification, and the Western Traffic Association territory, which the railroads in those organizations had been attempting since early last summer to put into effect. Practically all the roads east of the Missouri River and north of the Ohio were affected by the decision in the Official Classification territory case, and all the roads in the Great Middle West were similarly affected by the other decision.

Commissioner Lane, who wrote the opinion in the Western Traffic Association case, said in part:—

"New improvements should bring new revenue. The risk of the stockholders investing their money in these improvements is the same risk that they took when they invested their original funds in the original property. But because traffic grows and a railroad endeavors to meet it, are rates to steadily rise? The state of Illinois may add a hundred millions in value to the Burlington road by a donation of water front for a terminal. Would this justify rates higher than before the gift?

"Our position is that a railroad may not increase rates upon shippers for the reason and as an outgrowth of the fact that it has accumulated out of rates a balance of profit which has been invested in the property. This investment must take care of itself; it must bring a return for itself, either in increased traffic or in the reduction of expenses of operation. There is no justification for the investment of this surplus

if it is to have the effect of increasing the rates upon the shippers over the original line. If the theory is to be recognized that by increasing the value of their property by putting back operating revenue into the property a carrier may as a legal right increase rates, then the shipper is worse off each time he pays a rate which allows a revenue over and above a reasonable return on the original investment. . . .

"The strength of the carriers' case is in these two contentions:—

"(1) That the roads are not earning a fair return upon the value of their property.

"(2) That the cost of operating has increased because of increased wages.

"It is true that cost of operation has increased by the amount shown as allowed to labor and addition to wages. But it is also true that operating revenues have increased so as to more than absorb increased operating expenses. Moreover, cost figures furnished would indicate that under skilful management an additional tonnage may be handled under a higher wage schedule without increasing the cost of the service given.

"The Constitution of the United States guarantees the carriers against the confiscation of their property or the taking of the same without due process of law. Without this constitutional guaranty, which is distinctively American — for here property rights are more sacredly safeguarded than in other lands of more mobile law — the railroads of our country are protected from injury of any lasting character by the popular consciousness that they are essential to the industrial life of the people. To harm these roads is to injure ourselves. Our laws do not seek to establish dominion over private capital for any other purpose than to make sure against injustice being done the public, and thereby make such capital itself more secure. We are dealing here with a difficult problem, involving multitudinous facts and an infinite variety of modifying conditions, which make the establishment of principles and the framing of policies a matter of slow evolution. Congress has laid down a few rules. These rules we are attempting to apply. It is not for us to say that we represent the Government and may have a policy of our own which in any degree runs counter to the power granted to us or the duty imposed upon us. The railroads may not look to this tribunal to negative or modify the expressed will of the Legislature. They have laid before us the facts and law which would make for a justification of their course in the increasing of rates. To our

minds their justification has not been convincing."

In announcing the decision in the Official Classification territory case, Commissioner Prouty made these two observations:—

"First, it has been several times stated in the course of this discussion, and should be repeated here, that in view of the complex character of this problem nothing but an actual test can satisfactorily determine the financial results from the operations of these several carriers. There is no evidence before us which establishes the necessity for higher rates. The probability is that increased rates will not be necessary in the future. In view of the liberal return received by these defendants in the past ten years they should be required to show, with reasonable certainty, the necessity before the increase is allowed. If actual results should demonstrate that our forecast of the future is wrong, there might be ground for asking a further consideration of this subject.

"But it would be further said that before any general advance can be permitted it must appear with reasonable certainty that carriers have exercised proper economy in the purchase of their supplies, in the payment of their wages, and in the general conduct of their business.

"Second, we have been compelled to dispose of this case upon the evidence available. As previously noted, there is no testimony tending to show the cost of reproducing these properties. It is plain that a physical valuation would introduce into the calculation a new element, which might lead to a different conclusion. The conclusion reached here extends, therefore, no further than the facts upon which it is based."

Railway Rates. Expensive Management will not Justify Higher Rates. U. S.

That "expensive management" on the part of a railroad company "will not justify higher rates to pay expenses and dividends to stockholders," is declared in an opinion recently rendered at Carson, Nev., in the United States Circuit Court for the District of Nevada, Circuit Judge W. W. Morrow, and District Judges E. S. Farrington and W. C. Van Fleet sitting, in which the Court refused to enjoin the Railroad Commissioners for the State of Nevada from enforcing the provisions of an order fixing joint rates for the transportation of forest products in carload lots from Verdi to Tonopah and Goldfield. The orders were attacked on the usual ground that they were unjust and confiscatory and tended to deprive the complaining railroad companies

of their property without due process of law, and, in the case of the Southern Pacific Company, that they interfered with interstate commerce.

In two cases, *Woodside v. Tonopah & Goldfield R. R. Co.* and *Southern Pacific Co. v. Railroad Commission of Nevada*, Judge Morrow delivered the opinion of the Court and held that "the rates fixed by the Railroad Commission are reasonable and just, and ought to be fairly remunerative," and refused a temporary injunction.

The Court said: "The Railroad Commission has presented to us a statement of the expenses of the Tonopah & Goldfield Railroad as compared with the Nevada Northern Railway. The two roads are in Nevada and have many features in common. It appears that the Tonopah & Goldfield Road is under very expensive management as compared with the Nevada Northern Railroad, and that it is very much in excess for substantially the same service. Such expensive management, under the circumstances, will not justify higher rates to pay expenses and dividends to stockholders."

Retroactive Laws. Kentucky Blanket Grants Cases — Ex Post Facto Laws Invalid Only when they Relate to Criminal Punishments — Taxation.

The titles to a large tract of land in Kentucky were litigated in *Kentucky Union Co. v. Kentucky* and two other cases in the federal Supreme Court, which were tried together and decided Jan. 3 in favor of the commonwealth of Kentucky.

These lands were granted by the state of Virginia before Kentucky was admitted to the Union, to patentees who had never taken possession, and practically no taxes had been paid on them up to the passage of the Kentucky Act of 1906, which provided for the assessment of taxes for the five years preceding and for forfeiture in the event of non-payment of such taxes. The defendants argued that the statute in question was *ex post facto* legislation and, as such, unconstitutional. This argument was overruled by Mr. Justice Day, who said:—

"Laws of a retroactive nature, imposing taxes or providing remedies for their assessment and collection, and not impairing vested rights, are not forbidden by the federal Constitution. *League v. Texas*, 184 U. S. 156, 46 L. ed. 478, 22 Sup. Ct. Rep. 475. This court had occasion in a very early case to consider the meaning of an *ex post facto* law as the term is used in the federal Constitution, prohibiting the states from passing any law of that character. *Calder v. Bull*, 3 Dall. 386-390, 1 L. ed. 648-650. In

that case it held that such laws, within the meaning of the federal Constitution, had reference to criminal punishments, and did not include retrospective laws of a different character. That case has been cited and followed in later cases in this court. See *Kring v. Missouri*, 107 U. S. 221, 27 L. ed. 506, 2 Sup. Ct. Rep. 443; *Orr v. Gilman*, 183 U. S. 278, 285, 46 L. ed. 196, 200, 22 Sup. Ct. Rep. 213."

The Kentucky statute was sustained as imposing, as construed by the highest court of the state, no retrospective penalties or punishment of a criminal nature.

Taxation. *Equity cannot Interfere to Determine Validity of Unpaid Taxes — Bills of Interpleader.* Mass.

That equity will not interfere to determine the propriety of taxes before they are paid over to the collecting officials, or to decide whether taxpayers are assessed in the towns or cities in which they have a legal residence, was the holding of the Massachusetts Supreme Judicial Court in *Welch v. Boston*, 208 Mass.—, decided March 3.

This was a bill in equity brought by Francis C. Welch *et al.*, as executors and trustees of the estate of the late Quincy A. Shaw. The residue of the estate amounted to about \$23,000,000, the cities of Boston and Beverly and the towns of Milton and Brookline each claiming their proportionate share of the taxes. The executors desired to leave the decision as to the proportion in which they should pay to the Court, and expressed their willingness to abide by the result.

The Court held that it had no jurisdiction of the bill:—

"It is not a case to settle the right to certain property which is brought into court. The claim of each of the defendants is entirely independent

of that of each of the others. It is not a case in which the plaintiffs are free from interest in the controversy. The plaintiffs ask the court to determine the truth as to certain facts which are in dispute between the parties and upon the existence of which the legal rights of some of the parties, in the performance of their official duties, depended when they assumed to perform these duties. The suit cannot be maintained as a bill of interpleader.

"It is at least very doubtful whether, apart from considerations to which we have already referred, the bill could be maintained as a bill in the nature of interpleader. But these considerations arising from the laws in regard to the raising of money by taxation are conclusive. We have an elaborate statutory system covering this subject, the purpose of which is to assure a prompt collection of revenue for the Government, in its different departments and subdivisions. Remedies are provided for those who are compelled to pay taxes illegally assessed, which are direct and adequate. For this reason it has been decided many times, in this Commonwealth, that equity will not interfere to determine the validity of a tax, but will leave the machinery of the government to move precisely as it was intended to move by the framers of the laws in regard to the assessment of and collection of taxes."

The Court held, therefore, that the only remedy available to the executors lay in their paying over the tax and afterward suing to recover it.

A similar result was reached in the case of *Sears v. Assessors of Nahant*, 208 Mass.—, decided on the same date, the court sharply denying the authority of officials of cities and towns to waive their duty of collecting taxes legally assessed pending a test suit as to the validity of the assessment.

"DIFFERENT persons have different forms of amusement and relaxation. Some might enjoy spending a few quiet evenings revising the Constitution of the United States."—ALBERT MARTIN KALES, in *Illinois Law Review*.

The Editor's Bag

THE RECALL OF JUDGES

THE proposition for a popular recall of judges, without impeachment, is so radical and so unreasonable that it is hard to conceive why it should win favorable support in any intelligent quarter. It certainly cannot benefit any particular class, like the labor unions, for example, for it is particularly to the interest of every special class that it be protected from oppression by raising rather than by lowering the standards of the bench. By whatever means it be attempted, whether by paying inadequate salaries, by limiting tenure of office, or by making the judicial office completely the bauble of popular caprice, the lowering of the standards of our judiciary needs earnestly to be opposed by every high-minded, law-abiding citizen.

It seemed to us that a paper out in San José, California (the *Mercury*), put it pretty well the other day, when it said: —

When Lord Mansfield took his oath of office as Chief Justice of England he knelt before the throne during that portion of the obligation which bound him in loyalty to the King; but when he was to receive that part of his oath which bound him to justly administer the laws of the realm, he rose and stood erect; and his attitude then and judicial acts thereafter have entitled him to immortal eminence as the type of the just and fearless Judge. Yet only a few years later the British populace tore down his house during the Gordon riots because of a decision which is now regarded as one of the great milestones of human liberty. What would have

happened to Lord Mansfield, if the passion-mad populace of England had possessed the power of Recall?

Another illustration: Chief Justice Marshall is rightly esteemed the noblest figure in American judicial history. In the year 1808, when the career of John Marshall as the great pathfinder of our constitutional law had little more than begun, the people of Baltimore burned him in effigy because of his decision in a notable case, which, though sound in law, was offensive to public opinion, and was especially obnoxious to President Jefferson and his adherents. What would have become of John Marshall, had the dominant democracy of that hour possessed the power of Recall?

Whether Arizona's adoption of the recall should be a bar to its admission to statehood is a matter regarding which there will be different opinions. By some the ground may perhaps be taken that the federal government, in raising a territory to statehood, owes something to a community comparatively without political experience. Others will say that this community should be free to govern itself in whatever way it pleases. That issue, however, does not touch the folly of the recall of judges, which is indisputable, and which must arouse grave doubts of the ability of this new community to frame a constitutional law adapted to the needs of an orderly, well governed society.

A ROLAND FOR AN OLIVER

THE Supreme Court of California has reversed itself, ruling that it was guilty of a technical error that

might have enabled a notorious criminal, in the end, to escape justice, but for the persistent and determined action of the Attorney-General of the state.

On January 22, the whole country was surprised and shocked by the announcement through the press, that Abe Ruef, convicted on his own confession and sentenced to the penitentiary three years before, had been granted a rehearing by the same Supreme Court which had released the infamous Schmitz on a technicality.

The rehearing, of course, was the first step necessary to a new trial, and a new trial meant the certain release of Ruef; Heney was out of the district attorney's office, Johnson was in the Governor's chair and the most important witnesses were either dead or securely in hiding.

Indignant public opinion, dumfounded at first by the decision, soon made itself heard in the newspapers, in the legislature and in the Department of Justice. The fact that the action of the court had been delayed until the very last day on which it could be of any use to Ruef, had been noted by Attorney-General Webb, who was watching the case in readiness to act when the proper time came. The Attorney-general also knew that of the four justices who concurred in the opinion, one — Henshaw — was out of the state, out of the jurisdiction of the court on the day the opinion was handed down.

He at once determined to spring upon the Supreme Court of California one of its own reversed technicalities: the proposition that four justices did not legally concur, that the time limit had now expired, and that Abe Ruef must go to the penitentiary and enter upon his fourteen years' sentence.

And now the whole country awoke to the unique character of the case — a technicality for a technicality; a Roland

for an Oliver — Ruef and the Court had been met on their own ground, the people smashing ancient precedent to wring justice from their highest judicial tribunal.

The General Assembly woke up, and a senator at once introduced a resolution asking for a thorough investigation of the proceedings of the Supreme Court in the Ruef case, and there was even some talk of possible impeachment. Meanwhile a demand for an amendment of the constitution providing for the recall of judges — an unwise but readily explainable demand — made itself known with an insistence that could not be misunderstood.

Here is the decision of these judges on the Attorney-General's question: "The Court exceeded its authority. It had no right to grant the rehearing in the matter it did. Henshaw was judicially dead on January 22, the day the opinion was rendered."

Nothing further could be done to save Ruef — he must go to prison; but the big boodlers — the men who paid Ruef the money and secured franchises worth multiplied millions — they do not go to prison. Why? If Abe Ruef was bribed, then some one bribed him, and that some one is just as deserving of punishment as Ruef; can anything be clearer?

FRENCH SECRET EXAMINATIONS

THE French practice of secretly examining witnesses finds few defenders, even in France, placing, as it does, absolute dependence upon the integrity of the judge and his clerk, who alone hear the testimony of the witnesses, one after the other. Even in the case of an absolutely honorable justice, there is entirely too much room for the entrance of personal emotions.

This practice was established by Francis I, and was authorized by the commissioners who prepared the ordinance of Louis XIV in 1670. A mistake seems to have been the cause of it. Voltaire explains from Bernier that a passage in the civil law had been misunderstood — a passage enjoining witnesses, *intrare judicii secretum*, which only signifies that they should enter the judge's private chamber, but does not direct that they should be secretly examined.

ACTIONS SPEAK LOUDER THAN WORDS

THE following anecdote sent us by F. Rockwood Hall, Esq., is a typical illustration of how ridiculous and absolutely nonsensical the examination of a witness, which was perfectly intelligible at the time, may appear when in cold type without the accompanying gestures or plan.

A clothing manufacturer brought suit to recover damages from the defendant, who occupied the floor directly above the plaintiff's workrooms, for negligently allowing a sink on the defendant's premises to overflow, and water therefrom to fall on the plaintiff's goods piled on cutting tables in his workshop, thereby injuring them. At the trial the janitor of the building, an old colored man familiarly known as "the Major," was called as a witness, and was cross-examined by the plaintiff's attorney as to the position of these tables relative to the falling water. He testified on this point with the aid of a diagram and with considerable gesture. The evidence was taken stenographically, and the following extract from the defendant's argument is delicious and straight to the point: —

"There is only one piece of cross-examination which is worthy of any

serious consideration, and that was, I admit, a masterly piece of cross-examination, namely the cross-examination of our friend the Major. It was so convincing, so forceful, that I took the pains to have it written out, and I think, in justice to my brother, that I ought to read it.

Q. On what side of the cutting table did you go?

A. On the side where the water come, *that side*. The cutting table is more over the centre of the floor.

Q. Now let us see.

A. Just like *this now*.

Q. Here is the office door.

A. I pass through *that*.

Q. And you went on *that side* of the table?

A. I went on *this side*.

Q. There is the office door.

A. I just come right in the office door, and went down *that way*.

Q. Why did you say *this side* first?

A. I went the side where the boxes is on. I said *this side*; you misunderstood me.

Q. Why did you say *this side* first; how did *that* happen?

A. It happened *this way*, *that* the table —

Q. What direction did you point in with your hand when you said *that side* first?

A. Coming into the door, then I come in between the boxes and the table; I come along *that side*.

Q. Didn't you point to *that end*?

A. I point *this end* that the table was more near *that way*.

Q. Didn't I ask you on what side of the table; and didn't you say on *that side*?

A. Yes, sir.

Q. You said *that side*, didn't you?

A. When I said *that side* I meant *this side*.

"But the difficulty with my brother is that it is not original. I have taken pains to find the original, and I am sorry to rob my brother of the only glory he has got in the case, but I am going to read the original: —

"He killed the noble Mudjokeewis
With the skin he made him mittens,
Made them with the skin side outside,
Made them with the fur side inside.
He, to get the cold side outside,
Put the warm side fur side inside;
He, to get the warm side inside,
Put the inside skin side outside.
That's why he put the fur side inside;
Why he put the skin side outside;
Why he turned them inside outside.

"There is the inspiration of the cross-examination in this case."

SAXON COMPENSATION

THE Anglo-Saxon tendency to place a money value on accidents and injuries, even when the latter are of a wilful nature, is of pure Saxon stock. The Saxons had a well-established scale of pecuniary compensation for injuries, the amount being more or less according to the time and place of the crime, and the part of the body injured. The cutting off of an ear involved a penalty of thirty shillings; if the hearing was lost, sixty shillings. To strike out a front tooth cost eight shillings; a canine tooth, four shillings, and a grinder, six-teen shillings.

In the time of King Athelstan the notion of money-compensation reached such a degree that every man's life had a fixed value, called a *were*, or *capitis estimatus*. Under the law fixing the *were* of every order of person in the kingdom, the King himself, who on this occasion was distinguished only as a superior person, was rated at 30,000

thrymsæ; an archbishop or earl at 15,000; a bishop or alderman at 8,000; *belli imperator* or *summus præfectus* at 4,000; a priest or thane at 2,000, and a common person at 267 thrymsæ.

A CARD GAME IN COURT

Adolph Bouchnik, of Cleveland, O., sued Abram Auerbach of the same city for recovery of money lost while playing "vingt-et-un" with a marked deck. A. E. Bernstein, attorney for Auerbach, played a game with Bouchnik in court to show that marked cards could be of no advantage in "vingt-et-un." — *News Item*.

YES, many games are played in court,

But here we have a new one.
The Judge and jury had fine sport
When Bouchnik played vingt-et-un.

We do not know who lost, who won
In that peculiar contest.
But that game of vingt-et-un
Did liven up the inquest

Into the mysteries of luck
And whether rogues could do one
By marking cards and all such truck
In the game of vingt-et-un.

SIRIUS SINNICUS.

THE JEST THAT MADE A LAW

NO STATUTE ever enacted in England is of greater importance than the Habeas Corpus Act, yet the passage of this enactment, at least at the particular time when it finally came before the House of Lords, was due entirely to a jest.

Lord Grey and Lord Norris were named as tellers when the vote upon the bill was to be taken. Lord Grey was heartily in favor of the bill, which, however, seemed doomed to defeat. An immensely fat lord declared for the passage of the act, and Lord Grey

jestingly counted him for ten. Lord Norris, without looking up, set down ten votes. Lord Norris instantly went, on with his reckoning, or misreckoning and in due course it was reported to the House that those for the bill were the majority, though, as an actual matter of fact, the majority of the lords had declared against it.

AN ERROR OF RECORD

IT HAPPENED thus. Attorney Hall, *In re* Estate of Nancy Snider, Dictated this way: "In the fall She put her apple crop in cider."

Which, when his secretary heard,
Although her eyes grew somewhat wider,
She wrote it down without a word:
"She put her apple crop inside her."
ROY TEMPLE HOUSE.

A PATRIOTIC CRIMINAL

THE criminal is generally regarded as an enemy to the state, and one would hardly look for much patriotism in a convict, but in one instance at least, a convict gave evidence of a patriotism equal to that of any soldier who ever fell upon a battlefield.

In the year 1640 one John Goodman was tried and sentenced to death, but was reprieved by the King, much to the popular displeasure. Whereupon the prisoner forwarded to Charles I the following extraordinary petition:—

To the King's Most Excellent Majesty.

The petition of John Goodman, condemned, Humbly Sheweth,

That whereas your majesty's petitioner hath understood of a great discontent in many of your majesty's subjects, at the gracious mercy your majesty was freely pleased to show upon your petitioner, by suspending the execution of the sentence of death pronounced against your petitioner.‡

These are humbly to beseech your majesty, rather to remit your petitioner to their mercies that are discontented, than to let him live the subject of so great a discontent in your people against your majesty, for it hath pleased God to give me grace to desire with the prophet, "That if this storm be raised for me, I may be cast into the sea, that others may avoid the tempest."

This is, most sacred sovereign, the petition of him that should esteem his blood well shed to cement the breach between your majesty and your subjects.

HIS NATURAL GOOD SENSE

EXASPERATED Prosecutor (addressing stupid defendant in a lawsuit) — "Man alive! I should think you could see for yourself that you're a born idiot. I should think your natural good sense would tell you!" — From *Fliegende Blaetter*.

THE BUSINESS OUTLOOK

A GRADUATE from an eastern law school decided that the road to glory in his profession was a somewhat long one in this part of the country, and that there were too many other persons trying to travel it. So he considered Horace Greeley's advice to "go West," and it seemed to him that Alaska ought to offer a new and promising field.

He wrote the postmasters at several of the Alaskan towns, and the first answer he received showed Uncle Sam's employees to be acquainted with the needs of their locality. The letter read:

"In answer to your letter I have to state that for a town of one hundred inhabitants we are very well supplied with lawyers, as every other person you meet calls himself one. If you are any kind of a tinsmith at all you might make a success of that as a side line to the law, and if you have money enough to start a small saloon in connection with the tin shop I would say to come on."

The graduate has about decided to remain in the East. The practice of law in the Northwest seems rather complicated somehow.

IS IT A CASE OF MAYHEM?

IN THE capital city of one of our Western states, which is justly noted for the ability and culture of its bar, a lawyer of considerable eminence has recently filed in the State Supreme Court a brief as *amicus curiae*. The amusing thing about it is that, wherever the phrase occurs in the brief, he refers to himself as "amicus curæ."

Quære: — Who is responsible — proof-reader or lawyer? — and is it not "con-

tempt" to knock an "i" out of the *Court*? — to say nothing of the ethical insinuation involved in a lawyer's becoming "a Friend of *Care*?"

ARGUMENTUM AD HOMINEM

THE following is a current German anecdote, source unknown:—

Lawyer (to old Jew whose son has become a Christian) — "And now, my friend, when you are called up before the great Judge at the last day, and He asks you: 'Why did you allow your son to leave the ways of his fathers and be baptized?' what can you answer?"

"I can say: 'But, Lord, did not *Thy* son do the same?'"

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, factia, and anecdotes.

USELESS BUT ENTERTAINING

A Scottish nobleman one day visited a lawyer at his office, in which at the time there was a blazing fire, which led him to exclaim, "Mr. —, your office is as hot as an oven." "So it should be, my lord," replied the lawyer, "as it is here I make my bread."

The following will was filed about forty years ago in the Surrogate's office in New York: "Unto my beloved wife —: All my worldly goods I have in store, I give my beloved wife and hers for evermore. I give all truly; I no limit fix. This is my will, she my executrix."

The following verdict was rendered in Calhoun county, Illinois: —

"Kurners Verdict — We, the jurys, find the deceased dead man kum to his deth from the hans of some unbeknown purson, with an unlaful iron weeping — named a ax with a hickory handel; which unlaful weeping was used with deadly inant to kill the killed Ded Man.

"P. S. We, the forsed and undercigned jurys, hopefully believe that the Ded Man was headed by the Sed Ax."

The late Justice Brewer was noted for his tolerant and broad-minded views. A Washington diplomat recalled the other day a story told by Justice Brewer in illustration of the need for tolerance.

"We should respect the views of others" — so the story ran — "for morality itself is but a matter of environment.

"A missionary in the South Seas was distressed because her dusky parishioners were nude. She decided to try delicately to get them to wear at least a little clothing, and to this end she left a great many pieces of scarlet and green and yellow calico lying about the hut.

"An elderly dame called one afternoon for spiritual advice. The missionary noted how enviously her eyes rested on the calico, and she took up a two-yard piece of the yellow, saying: —

" 'I'll give you this if you'll wear it.'"

"The female draped the calico about her like a skirt and departed in great glee.

"But the next day, nude as before, she returned with the fabric under her arm. Handing it sadly to the missionary, she said: —

" 'Me no can wear it, missy. Me too shy.'"

— *New York Tribune.*

The Legal World

Uniform Partnership Act

A Uniform Partnership Act, drawn up in accordance with the aggregate as opposed to the entity theory, was favored at the meeting of the Committee on Commercial Law of the Conference of Commissioners on Uniform State Laws, at Philadelphia Feb. 3-4. Three drafts were presented to the Committee, the original one based by the late Dean James Barr Ames on the entity theory, one by Dean William Draper Lewis and James B. Lichtenberger based on that theory, and one by Dean Lewis and Mr. Lichtenberger based on the aggregate or common law theory. The merits of the two theories were discussed by able speakers. The advocates of the entity theory included Prof. Samuel Williston, who thought this theory was consistent and solved some of the difficult problems of our present law. He believed it to be the idea underlying the decisions in most states. A letter from Judge Hough of New York favoring this theory was read. The aggregate theory was supported by Prof. Francis M. Burdick of Columbia, Prof. Floyd R. Mechem of Chicago, Prof. George D. Zohm, Prof. William R. Vance, Prof. Aymar of New York Law School, and George Wharton Pepper of Philadelphia, and a communication from the late Judge Francis C. Lowell of Boston favoring the aggregate theory was read. The committee resolved that the draftsmen, Dean Lewis and Mr. Lichtenberger, revise the draft adopting the aggregate or common law theory in accordance with the views expressed, and present the same to the committee for further consideration at Boston in the latter part of August, when the Conference

of Uniform Commissioners and American Bar Association will meet.

Personal

Alfred Stedman Hartwell, Chief Justice of the Supreme Court of Hawaii, who is in his seventy-fifth year, resigned Feb. 2. Chief Justice Hartwell was a member of the Massachusetts legislature in 1867.

Gen. George B. Davis has retired from the office of Judge Advocate General, U. S. A., on reaching the age of sixty-four and has been succeeded by Col. Enoch H. Crowder, with the rank of Brigadier-General.

The following nominations have lately been confirmed by the Senate: George E. Martin of Ohio, Associate Judge of the Court of Customs Appeals; Walter I. Smith, Circuit Judge, eighth circuit; Frank H. Rudkin, District Judge, the eastern district of Washington; Pedro De Aldrey, Associate Justice of the Supreme Court of Porto Rico; Alfred E. Holton, United States Attorney, the western district of North Carolina; Edward Engerud, United States Attorney, district of North Dakota.

Applause which lasted several minutes greeted Justice Charles E. Hughes of the United States Supreme Court when he rose to speak last night at the annual banquet of the New York County Bar Association, Feb. 18, at the Hotel Astor. The demonstration was considered remarkable from the fact that the gathering included men who were vigorous opponents of Mr. Hughes during his

political ascendancy. Alton B. Parker, president of the organization, was toastmaster, and in introducing Justice Hughes declared that when the community discovered a great lawyer and a splendid state executive it had also uncovered a brilliant statesman. Attorney-General Wickersham pleaded for a fearless and independent judiciary.

Bar Associations

Connecticut. — The annual meeting of the Connecticut State Bar Association was held Feb. 6 at Bridgeport. President George E. Hill of Bridgeport read his annual report, reviewing the work of the association for the past year. The annual reports of Vice-President Hadlai A. Hull of New London and Secretary-Treasurer James E. Wheeler of New Haven were also read. Talcott H. Russell of New Haven read a paper on "Sham Issues." There was a banquet in the evening at the University Club. The election of officers resulted as follows: President, George E. Hill of Bridgeport; vice-president, Hadlai A. Hull of New London; secretary-treasurer, James E. Wheeler, of New Haven.

Illinois. — Reform of the law of procedure and practice was the subject of discussion at the semi-annual meeting of the Illinois State Bar Association held at Springfield on February 16. The Illinois Conference on the reform of the law, consisting of delegates from all parts of the state, proposed certain amendments to the Practice Act for discussion at this meeting. The discussion was opened by Edgar B. Tolman of Chicago, President of the Conference. The proposed amendments which brought forth the most discussion were those relating to sections 73 and 74 of the present Practice Act. It is pro-

posed to amend section 73 so as to read as follows: —

"Hereafter no judge shall instruct the petit jury in any case, civil or criminal, unless his charge is reduced to writing and he shall before the same is read to the jury, submit it to the counsel for the respective parties and give them an opportunity, in the absence of the jury, to state specifically all their objections to the instructions therein contained and to the refusal of the court to embody in his charge any instruction requested by counsel, together with the reasons for such objections."

It is pretty generally conceded that the amendment to this section would be a decided improvement on the present practice. It is substantially the practice now pursued in the state of Indiana.

The proposed amendment to section 74, which found both supporters and opponents, is as follows: —

"Exceptions to the charge as read to the jury and to the refusal of the court to embody in his charge any instruction requested by counsel for the respective parties, may be entered at any time before the jury retires, but not afterwards, and no objections or exceptions shall be considered on review except those specially called to the attention of the court, as provided in the foregoing section."

It is believed that the proposed amendments to these two sections would be of far-reaching importance and highly beneficial to the practice. They would do much toward rescuing the practice in Illinois from the general charge made by President Taft last year in his speech at Chicago, wherein he said that the administration of justice in our courts was a disgrace to our civilization. These amendments must appeal to every lawyer who is honestly endeavoring to aid the court and jury to arrive at a correct conclusion of the case. If adopted the court would be protected when

instructing the jury by the combined advice and counsel of the attorneys on both sides. It is believed that these proposed amendments would greatly reduce the number of retrials and also greatly diminish the number of appeals taken on account of erroneous instructions.

If the judge who reads the instructions to the jury and the lawyer who wrote the instructions, as well as the attorney for the other side, are not misled by them and believe them to be the law when read to the jury, the laymen who compose the jury certainly will not be misled by them. The principle involved in both these proposed amendments is the correct one, viz: That the lawyers on both sides shall help the court in correctly applying the law to the case on trial and if they do not do so, they shall not be permitted to take advantage of their own negligence.

These amendments are now pending before the Legislature and are incorporated in House Bill 418 and Senate Bill 327, together with the other amendments proposed by the Illinois Conference on the Reform of the Law.

The ceremonies attending the unveiling of the portraits of the former Justices of the Supreme Court were held in the Supreme Court building. The Supreme Court room was crowded with judges and lawyers representing all sections of the state. Chief Justice Alonzo K. Vickers opened the exercises. Edward C. Kramer of East St. Louis spoke on the Supreme Court under the Constitution of 1818. Stephen S. Gregory of Chicago had for his subject the Supreme Court under the Constitution of 1848, while President William R. Curran of Pekin delivered an address upon the Supreme Court under the Constitution of 1870. The response on behalf of the Court was made by Justice

James H. Cartwright. The meeting closed with a banquet at the St. Nicholas Hotel at night, which was attended by about three hundred members of the bar. The speakers and toasts were as follows:—

Toastmaster, President William R. Curran, Pekin; "The State," James A. Connolly, Springfield; "The Law," George T. Buckingham, Chicago; "The Court," Frank J. Loesch, Chicago; "The Bar," Adlai E. Stevenson, Bloomington.

Miscellaneous

The new United States Commerce Court had its first meeting Feb. 6 at Washington, D. C., in the office of Judge Martin A. Knapp, former chief of the Interstate Commerce Commission. The four other members of the Court are William H. Hunt of Montana, Robert Wodrow Archbald of Pennsylvania, Julian W. Mack of Illinois and John Emmet Garland of South Dakota. An order has been entered designating April 3, 1911, for the first hearing.

The draftsmen of the Arizona constitution followed the advice of President Taft as regards the length of that document, the President having, in the course of a speech in Arizona, held up the Oklahoma constitution as a "horrible example" and advised the state to make its constitution as brief as possible and free from legislative details. The constitution goes the entire length of the "progressive" program, incorporating not only the initiative and referendum but a radical provision for the recall of the judiciary. By a vote of more than 76.12 per cent the constitution was ratified at the recent election. The official canvass was completed Feb. 27. Out of 16,009 votes cast, 12,187 were in favor of the constitution and 3,822 against it.



THE LATE CAPTAIN MICAJAH WOODS

A LEADER OF THE VIRGINIA BAR

1844-1911

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Captain Micajah Woods

By R. T. W. DUKE, JR.¹

THE death of Capt. Micajah Woods, which occurred on the 14th day of March, 1911, removes from the Virginia Bar one of its best known and most distinguished members. Captain Woods was born in Albemarle County, Virginia, at Holkham, on the 17th day of May, 1844. His father, Dr. John Rodes Woods, was for many years considered the leading authority upon stock-raising in Virginia, and his mother was Miss Sabina Lewis Stuart Creigh. On both sides of his family he is descended from Scotch-Irish ancestry. His first American progenitor, Michael Woods, received a patent to a large tract of land from George II in 1737, in the western part of Albemarle County, which was then Goochland County. The wife of this Michael was Mary Campbell, who belonged to the clan of which the Duke of Argyle was the head. William Woods, the great-grandfather of Micajah Woods, was a member from Albemarle County of the Legislature of Virginia in 1798 and 1799, and his son Micajah was a member of the Albemarle County Court from 1815 to 1837, and was High Sheriff of the County, *ex officio*, at the time of his death. Through his mother he was descended from Col. David Stuart, County Lieutenant of Augusta County, from 1755 on for several years.

His early education was obtained at the Lewisburg Academy, the Military School of Charlottesville taught by Col. John Bowie Strange, and at the Bloomfield Academy, taught by Messrs. Broun and Tebbs. In 1861 he entered the University of Virginia, and like many of the other young men of the South, was soon a member of the Confederate Army. He first served when barely seventeen years of age as volunteer aide on the staff of Gen. John B. Floyd, in the West Virginia campaign of 1861, and then in 1862 as a private in the Albemarle Light Horse Company, in the Second Regiment Virginia Cavalry, and afterwards was first lieutenant in the Virginia state line. In May, 1863, he was elected and commissioned first lieutenant in Jackson's Battery of Horse Artillery, Army of Northern Virginia, in which capacity he served until the close of the War. Among the battles in which he participated were Carnifax Ferry, Port Republic, Second Cold Harbour, New Market, Second Manasses, Sharpsburg, Winchester, Fisher's Hill and Gettysburg.

At the close of the war he returned to the University, where he studied in the Academic Department for one year, and then studied law, being graduated therefrom in 1868 with the degree of Bachelor of Law. He immediately

¹Of Charlottesville, Va.

opened an office for the practice of his profession in Charlottesville, Virginia, and in 1870 was elected Commonwealth's Attorney for that county, which position he filled for nearly forty-one years without having had opposition for the nomination since 1873. The office of Commonwealth's Attorney for Albemarle County for over sixty years, up to the time of Captain Woods' death, has been held by only three lawyers, all of them highly distinguished in the profession: Judge William J. Robertson held the office from 1850 up to his election to the Supreme Court Bench in 1858. Colonel R. T. W. Duke was then elected and held the office until he was elected to Congress in 1870. Captain Woods was then elected and held the office up to the day of his death, his successor by appointment being Judge R. T. W. Duke, Jr., the second son of Col. R. T. W. Duke.

In 1872 Captain Woods was made a member of the Board of Visitors of the University of Virginia, a position which he held for four years, having been at the time of his appointment the youngest member of that Board ever elected.

In politics he was a Democrat. He was Chairman of the Democratic party of Albemarle County for several years, and as elector represented the Seventh Congressional District of Virginia, and also was a member of the Presidential Electoral Board in 1888, which cast the vote of Virginia for Cleveland for President. He was permanent Chairman of the Virginia Democratic State Convention which met in Staunton in 1896 to elect delegates to the National Convention. In two Democratic Congressional

Conventions of the Seventh District he received the almost unanimous vote for Congress of all of the Eastern Counties in the Seventh District, and each time failed of nomination by only a few votes.

In 1881 he was elected captain of the Monticello Guard at Charlottesville, and commanded that famous old company at the Yorktown celebration in October, 1881. In 1893 he was made Brigadier-General of the Second Brigade of Virginia Confederate Veterans, which position he held until 1901, when he declined reelection.

Captain Woods was elected President of the Virginia State Bar Association on August 5, 1908, and his address delivered at the meeting in 1909 upon "The Necessity for General Culture in the Training of a Lawyer," was very able and eloquent.

Captain Woods as a lawyer was noted for peculiar painstaking accuracy in the preparation of his papers. As an advocate he was able, zealous and earnest, and as Commonwealth's Attorney, whilst fair and just, he was a terror to the evil doers brought to the bar of justice.

He was a man of exceedingly handsome presence, genial, affable and very popular, both with the profession and the public at large.

Captain Woods was married in 1874 to Miss Matilda Minor Morris and had five children, E. Morris, Sallie Stuart, now the wife of James Rucker, Maude Coleman, a noted Virginia beauty, who died in 1901, Mary Watts, who intermarried with Dr. Frank Lupton of Birmingham, Ala., and Miss Letty Page Woods.

Is This the Law?

By JOHN MCG. GOODALE

OF THE NEW YORK CITY BAR

"LAST month," said the Nature-faker to the Barrister, "I rambled and reveled for a week over the Tweed Courthouse of the City and County of New York. One must have his whiff of the mountains occasionally in this malarial maritime city."

"Whiff of the mountains!" retorted the Barrister. "Remember, young man, that I have to practise daily in the fetid air of Tweed's courthouse."

"The air may be fetid; but why not forget it?" said the Nature-faker. "Does the Swiss mountain lover recall that the sun reeked till he gasped yesterday on the rocky trail? Does he not forget the noisome insects of alp and joch, just as I can forget the sordid faces that swarmed round me in the courthouse? No, the more just scenic comparison is between the lawyers and the gushing rills of the mountains."

"Lawyers and water are fluent," said the Barrister complacently, "but call them rivers instead of rills. Roll on, tremendous torrents, roll!"

"Mountain rills, because upland waters, like the lawyers, roar magnificently along the higher courses, yet are smooth and sinuous when they reach the rich low levels. But my heart is in the highlands and all my week of courthouse trotting was spent aloft among the juridical glaciers."

"Juridical glaciers — contempt of court!" said the Barrister.

"Not at all. I am talking of cold scenery, not of cold people. And why not scenery? Let me show you some picture postcards of your scenery. Look! You, with your dull mind, call this a package of the week's *Law Jour-*

nals. They are postcards. Do they not sell for five cents apiece, with some reduction if you buy a series as I did? Look here, for mountain views. See this great mass of glittering crystals — this matter more or less translucent. 'Decisions,' the absurd name you give these things, you and the editor of the *New York Law Journal* — 'decisions' because they are so seldom decisive. There is better reason to call them picture cards. Look again at this frozen cascade of leaping thought — frozen only because judicial. Look at this dense wreath of fog, and above it just the glimpse a picture lover likes of some towering storm-swept headland of the immutable common law. Come, good peasant, this is not merely scenery, but it is of the finest in the world."

The Barrister looked at the Nature-faker askance; he did not like to be called a peasant; and then he said cynically: "I trust your week on the Tweed moraine yielded more profit than my week did to me. Perhaps you were able to clamber up to the Justice's chambers with your bouquet of *edelweiss*."

"Not at all," said the Nature-faker, "I go to your courthouse for purely scientific purposes, for the astonishing phenomena to be studied there, for measuring the glacier's annual advance or recession, for the prosaic work of noting well-holes and the seepage of water."

"Will you say that again?" said the Barrister.

"You agreed with me already about lawyers and rivulets. Well, water, that is argument, permeates the glaciers of Manhattan. Argument oozes upstairs,

downstairs and in the Judge's chambers. Argument crystallizes daily into new decisions; it is a never-ceasing solvent of old decisions. Argument honeycombs and undermines the glaciers, dribbles into their inmost recesses, crashes out some day when a pent-up reservoir gives way and floods out its masses of detritus. Argument leaves its fantastic traceries everywhere; it covers over the well-holes of the glacier with a seemingly solid crust; it carries you out to destruction on the treacherous little bridges it has stretched across the crevasses. Were it not for argument you would not have the tales of adventure I am about to tell you of the *Mauvais Pas* of the Written Law."

"Proceed, I beg you, my charming Nature-faker!"

"I will proceed, and by the Book, *vis.* the *New York Law Journal*. Let us turn to the marvelous *eismeer* incident of page 1768, January 28, 1911, reported by the prosaic editor as the Decision of '*People ex rel. Short v. Warden*' but which I should headline thus: 'Special Extra. — Another Slip-up on Written Law's Slippery Slopes. — Caught on Extortion's Mer de Glace finds New Statutory Hole and Escapes.'

"Penal Code, sec. 851, relating to Extortion, is a characteristic section of our great codal glacier. Here in a seemingly solid mass of firm ice are found some thirteen varieties of Extortion loosely thrown together at every conceivable angle in crags and ledges (the result of some legislative convulsion) and the whole spread over with the merest crust of verbiage. Two of these ice crags, *vis.* Extortion by Threat of Injury to Person, and Extortion by Threat of Injury to Property, had been thought to have practically no crevices between them. Between the towering sides, says Baedeker, of these gloomy

codal twins is not even a loophole of escape. So close is the one clean-chiseled crime set to its analogue that the merest Assistant District Attorney can reach from one to the other. Short thought otherwise. His title, *People ex rel. Short*, shows him to be a popular guide, and he knows his glaciers as the good citizen knows the Law. Short had heard somewhere that there is sometimes a *tertium quid* between person and property. A man's job is not his person, nor is it his property, as has been settled by judicial determination. Then why, between the crimes of Extortion by threatening one's neighbor's person and Extortion by threatening his property, is there not the third crime of Extortion by threatening his job? There ought to be such a crime, said Short, but knowing the written code, I'll venture to say there isn't. I'll try it and see. He went up on the glacier, where he thought the gap might be between the two codal Extortions, and tried the ice. It bent beneath him. Suddenly he tripped and stumbled. His foot was caught in an indictment. Jerking hard to free himself quickly, the loose verbiage under his feet flew in clouds in every direction. He found himself sinking bodily into a hole or chimney which opened beneath his feet. It was a hole not so large as a barn door, but still would serve an active man to crawl down between the two Extortions. His surmise was right. There was free space between the two codal crags. He clambered down the chimney joyfully, reached terra firma and there rejoined his family and friends. But his adventure is matched by that of Bromwich on the *Mauvais Pas* of the Statute of False Registration.

"This is reported in the *Law Journal* of January 27, at page 1739, *People v. Bromwich*. He was a guide also, and

he was out one day on a very bad bit of the glacier when the ice pack suddenly shifted and he found himself a prisoner inside it. Now you know that where two or more statutes come crushing together as they did around Bromwich they will not weld solidly nor make a perfect joint everywhere. This cold fact as to the Written Law gave our man hope, for he knew he was caught somewhere between stiff sections of the Codes of Criminal Procedure, and Civil Procedure, and a chunk of the Bill of Rights, while what seemed a mass of Documentary Evidence had fallen across his legs. As you lawyers would state his predicament, he was convicted of the statutory crime of False Registration in this State of New York. He claimed he had been duly naturalized at Bridgeport, Connecticut, but there was written evidence against him in the shape of certificates from the Clerks of all the courts at Bridgeport showing there was no record of such naturalization, and this convicted him. But Bromwich knew the ways of glaciers, and so in his icy prison began to finger each joint and crevice of the detaining walls around him. The Clerks' certificates were by the Codes proper evidence against him, but by the Bill of Rights a man accused of crime should be 'confronted' by the hostile witnesses. Bromwich now sent word to Court that although convicted he had not been sufficiently confronted. To this claim the District Attorney replied that Bromwich had been well confronted, and with unimpeachable documentary proof. To this Bromwich rejoined that he was insufficiently confronted till all the Clerks of all the Bridgeport Courts had been brought to face him. To this the District Attorney retorted that Bridgeport, Conn., was out of the sovereign reach of the State of New York,

and that the aforesaid Clerks could not come if they would, and would not come if they could. To this Bromwich replied with a sur-rebutter. He sur-rebutted that he himself was a busy man, that he had several engagements to keep outside of jail, and that finally, as the District Attorney had not confronted him according to the law as plainly written, he, Bromwich, would not stay in jail longer. And so it happened. The Courts said that the men who wrote the law might have omitted confrontation by witnesses when documentary proof sufficed, but it was not so written. The prisoner went free."

The Nature-faker smiled. "I fancy," said the Barrister sourly, "you think anybody can drive a coach and four through the written law."

"Of course not," said the Nature-faker cheerfully. "As to that, you should read the *Law Journal* of January 23, 1911, page 1670, *ex parte* Heigho. Said Heigho was an Idaho man who struck another to such ill purpose that it killed the latter's mother-in-law. Her heart, it was said, was ruptured by the excitement of witnessing her son-in-law in an altercation, and Heigho was indicted for manslaughter under some statute. To most laymen far more promising technicalities than any I have yet mentioned would seem to offer in this Heigho case, but the layman would be wrong. Even the point that killing a woman is not manslaughter seems to have been unavailing, for the indictment has been sustained by the highest appellate tribunal. On the other hand, the criminal law last week failed to hold a man fast even after he had actually pleaded guilty. Did you read in the *Law Journal* of the laughable Incident of the Mountain Echo?"

"I did not," said the Barrister.

"Then do read *People ex rel. Patesoni*,

Law Journal of January 27, 1911, page 1750. This interesting case is founded upon the quaint custom in your local mountains of consulting an echo. A good echo up in the alps serves the purpose of the Written Document in low-land civilization. Like the written document the echo does not depart from its original instructions, and is a useful servant accordingly, though lacking intelligence of its own. Its chief service is when some violent crime is committed in high altitudes, and the mountain echo makes its eloquent and immutable record of the guilty deed. This Patesoni was a local mountaineer. He had done something or other, was promptly brought up for it before a Justice of the Peace, and, on his own plea of guilty, was sentenced and taken to jail. What he was guilty of I cannot say exactly. It is proper to assume he knew himself. It is just to the Justice to assume that at least he too knew something. But in the noise and hubbub of the due administration of the law, such a detail goes disregarded or is quickly slurred over. 'Your Honor,' the prosecutor in this case may have said, 'Your Honor, this infamous man has committed the heinous crime of * * * train-riding.' And then the eloquent attorney for the accused may have replied, 'Your Honor, my unfortunate client will confess to the distressing crime of * * * train-riding.' Then after the Justice had spoken a few well-chosen words about certain criminal aspects of * * * train-riding, the prisoner duly pleaded to the crime of * * * train-riding. And all the time Echo, which pays little heed to such things as * * *, was making up the official record of the case. Once in jail, Patesoni cried to the warden, 'By my faith, I like not this place. Now bring me a good walking-staff of *habeas corpus*

and we will fare up the mountain side to the echo.' So they journeyed up to the Supreme Court and there Patesoni said, 'Your Honor, here stand I, Patesoni, who have committed no crime, yet stand committed for it.' And the Judge said, 'What means this? What has this man done?' And then the warden said nothing, as was proper, and pointed to the echo. So they loosed the echo, and the Judge asked it 'Of what was this man guilty?' And Echo answered faintly, 'Guilty of train-riding.' And the Judge asked Central for more power, and again questioned the echo. And Echo, now resonant and clear, answered 'Guilty of train-riding.' Then the four corners of Monte Rosa caught and sent back the sound. And the stately Matterhorn, the Breithorn, and the Rimpfischhorn proclaimed it back again: 'train-riding,' till even distant Finsteraarhorn with sombre chortle, solemnly whispered 'train-riding.'

"But the Judge was angry and said, 'Ten thousand wooolsacks, now what is this crime of train-riding! Do we not all train-ride? the infant, mewling and puking in its nurse's arms? the lean and slippered pantaloons? the justice, his belly with fat capon lined — all go train-riding in their proper times and places. But what cannot be a crime is not a crime. Warden, unshake the shackles from this man!'

"So Patesoni came down from the mountain a free man, and saw the sun slanting down in long golden levels through the valley, and the little hills rejoicing with him while the echo lullabyed, 'train-riding.'"

"Did Patesoni pay his lawyer a proper fee for all that orchestration?" said the Barrister, morosely.

"You can ask the echo," said the Nature-faker.

Some Observations on the Proposition to Elect United States Senators by the People

BY JOHN R. DOS PASSOS
OF THE NEW YORK BAR

THE Constitution of the United States provides: —

The Senate of the United States shall be composed of two Senators from each state chosen by the legislature thereof for six years and each Senator shall have one vote.

The debate in the Constitutional Convention upon this clause was thorough. It was necessarily entwined with the debate upon the method of electing the members of the House of Representatives. From the report that exists, it is significant that the proposition to elect the Senators by the people was distinctly presented, fully considered and overwhelmingly negatived. One must judge of the painstaking care given to this question not so much from the debate upon it, as by the character of the men who composed the Convention, and who brought to the work as the result of years of study the most varied and profound knowledge of the origin and purposes of government. Any suggestion that this clause of the Constitution did not receive full thought is therefore foundless. And Hamilton in his many explanatory and defensive essays of the Constitution did not feel it necessary to say more upon the method of electing Senators than the following (p. 385, *Federalist*): —

It is equally unnecessary to dilate on the appointment of Senators by the state legislatures. Among the various modes which might have been devised for constituting this branch of the government, that which has been proposed by the convention is probably the most congenial with public opinion. It is recommended by the double advantage of favoring a select appoint-

ment, and of giving to the state governments such an agency in the formation on the federal government as must secure the authority of the former and may form a convenient link between the two systems.

After an existence of nearly a century and a quarter as part of the organic law, we are confronted with the most serious attempt ever made to change this clause, and place in the hands of the people, instead of the legislature, the power of electing Senators. A majority of the Judiciary Committee of the United States Senate through its distinguished and brilliant sub-Chairman, has submitted a report advocating this Amendment to the Constitution. The time has arrived when the question should be taken to heart and studied and disposed of with intelligence and patriotism. In my humble opinion unanswerable arguments have been made against changing the method of electing Senators by many members of that body, notably by Senator Hoar, since deceased, and ex-Senator Edmunds. But they have been forgotten and long since interred in that vast mausoleum of parliamentary literature into whose deep and musty caverns none ever penetrate except the student who seeks to enforce his statements and principles by the authority of great names. *Unfortunately, many prominent men on both sides of politics have thoughtlessly or hastily given their assent to the proposition to change the Constitution, and unless it be demonstrated that the substitution of the people for the legislature is fraught with actual danger to our*

institutions; that it involves an alteration of the whole machinery of the Constitution by removing the checks and balances therein so exquisitely adjusted, a step may be taken without the people realizing the grave consequences it involves. I respectfully dissent from the view that this move to change the manner of electing Senators is a popular one, or that there is any clamor of public opinion demanding it. On the contrary, notwithstanding many states have pronounced in favor of it, I believe that the people at large have taken very little interest in the question. Certainly as a separate national issue it has never been seriously discussed. In the last Presidential campaign Mr. Bryan distinctly tendered it and the people distinctly voted against it. It has been largely engineered by a class of reformers which overlooking the lurking dangers involved in the change, has blown the infectious doctrine throughout the land upon the wings of a false *vox populi*.

After examining with more than superficial attention the small library of official and academic literature accumulated upon the subject, I have not seen a solitary ground based upon principle, reason or fact to sustain this proposition. On the contrary in my humble judgment history, reason and principle unite in an emphatic and deep protest against it. In unfolding my views I shall in the proper places endeavor to fully answer the several grounds urged by the advocates of the amendment.

Any change of any kind in the organic law is a serious event and unless there be plain and very substantial reasons demanding an amendment it should not be encouraged. Constitutions are not like laws, which closely follow the temper, customs and present

tendencies of the people. These can always be changed by legislation to suit existing conditions. They are not unlike fashions of dress which are often altered to meet the whims and caprices of the people, and if they do not suit they can promptly be modified or abandoned. Constitutions are bodies of permanent rules, general and wide in their language and application, and intended to meet every condition and phase of national life. These monuments of wisdom comprehending in their text and spirit the humanity, justice and freedom of a people, are made to endure and like the magnificent architectural structures of the world, have been erected to withstand the storms, changes and ravages of centuries. Unhappily this important distinction has been frequently overlooked, and many state Constitutions are unnecessarily loaded with provisions whose subjects should be dealt with by the legislatures. This has encouraged a looseness of thought among many of our public men and propositions to change the organic law are often treated as if only ordinary legislation were involved.

A change in the method of election of United States Senators will eventually result in the absorption of the two houses of legislation as now constituted by one large popular Assembly. For, it may be asked, of what efficacy are two houses of legislation chosen in the same manner? Two legislative bodies popularly elected? And a resolution has already been introduced in the Michigan Legislature asking for the abolition of the Senate. The Thane of Cawdor had but one bloody step to take and he would be King. This legislator of Michigan, gifted with the prophetic vision of the witches, would hasten the course of evolution and precipitate a result which must inevitably follow a change in

the method of electing Senators — the abolition of the Senate. The Articles of Confederation provided simply for a House of Delegates sent by the respective states to represent them — one legislative body — but the nature of our present Constitution, recognizing the necessity of proper checks and balances, created two — to act as one when wisdom prevailed, but to operate separately when the folly or passion of the lower house would result in injury to the people.

The proposition now is practically to make the two one; one body listening to, and inspired solely by the voice of the people. The question preliminarily arises why such a radical change in our government is required? What are the defects of the present system? What are the mischiefs that arise from the Senate as now constituted? Has the United States Senate made such an unenviable record that we must resort to the serious step of amending the Constitution?

There are two propositions which must be demonstrated before such a change can fairly be demanded; first, that the method of selecting Senators by the legislatures has proven a failure; second, that the remedy proposed will give the people a better class of Senators than we now have by legislative selection. The former is incapable of being affirmatively answered by facts; and the latter is a pure dream or speculation utterly insufficient to justify a change in the organic law.

Naturally these questions must be squarely answered before the people of this country should move; naturally there must be some demonstration of existing evils before we apply a knife to the Constitution which will cut away root and branch a function so important as the Senate.

It affords me infinite satisfaction and pride as a citizen of this Republic to make this statement: *That since its creation, looking at it as a whole, the Senate of the United States compares very favorably with any legislative body of ancient or modern times.* It has fairly fulfilled all of the predictions of its authors and friends. Its usefulness as a check has been illustrated on many occasions, memorably when a few Republican Senators rising high above party and partisan political motives repulsed the scandalous attempt to remove Andrew Johnson from the Presidency by impeachment. In point of intelligence, patriotism, wisdom and of the political and moral honesty of its members it is a legislative body which the people should be proud to sustain in its entirety. Surely it has at times been the subject of just criticism; I grant that at times some of its members have been partial, ignorant and even corrupt, but it is as near an approach to political fitness as any other branch of the government. Hold it up to the mirror of comparison with the Executive, the Judicial — or the popular body — the House of Representatives — go back through all the mutations of party and political strife — and it does not suffer by the view.

It may be true that a few men have obtained seats in that body by the use of money; it may also be true that some have been returned through the worse influence of partisan politics; and it is true that some of its members have been ignoramuses, demagogues and blatherskites, but neither of these classes has had any appreciable influence upon legislation. One thing is sure, that in no legislative body do men find their true level so quickly as in the upper House of Congress. He who has been returned by corruption; he who,

being a pure demagogue, has obtained the Senatorial toga; he who has mere tongue and no brains; the first, the second and third, the men of these classes may cut sensational and dramatic fantasies in that body but they will soon sink into oblivion and contempt — derided and despised by their associates and finally condemned by their constituents and countrymen. The American people are not slow to mark their public men and where political crimes or personal defects are discovered the finger of scorn is soon raised to point them out as unworthy public servants. That a few demagogues; that some bad and ignorant men have made their way to the Senate; or that even the Senate as a body has on occasions been derelict in its duty to the people, is no reason whatever for a change in the method of electing its members. Compare its members and the history of the Senate with the members and acts of the House of Representatives, and then let anyone conscientiously, if he can, say that the method of direct election by the people would be better for the interests of the country, or would produce a higher class of representatives than those elected by the legislatures of the different states.

It will be a sad sight to this country when the Senators of the United States shall as a body make a confession to the American people that they are unworthy of the trust committed to them and no longer fit to represent the sacred interests which the states have confided to their hands.

The nature of our two Houses of Congress renders it most dangerous to the true interests of the people to alter the method of election of Senators. In every free government there must be two houses of legislation chosen by different methods and distinctly examining proposed legislation from different standpoints. The popular house

has its hands constantly on the pulse of the people and knows its immediate desires and wants; the upper house determines how far these desires and wants are consistent with the settled and fixed happiness and prosperity of the people. As Plato substantially puts it: forecast should direct providence, reason control passion and wisdom command folly. Our political system is based upon checks and balances, each function or branch as delicately arranged, as nicely adjusted, as the works of a watch. Any change like the one contemplated will throw out of gear the whole machinery of the Constitution. The three departments of our government are separate from each other but they are all contiguously connected. We enter from one branch into another as one walks from one room to another in a symmetrically arranged house; yet each branch is an entirety and independent of the other. The Senate is a check upon the House, and the Executive a check upon both, and each of the houses severally a check upon the Executive and upon each other.

John Adams, in a letter to John Taylor, gives the following description of the United States Government:—

First, the states are balanced against the general government. *Second*, the House of Representatives is balanced against the Senate, and the Senate against the House. *Third*, the executive authority is in some degree balanced against the legislature. *Fourth*, the judiciary is balanced against the legislature, the executive and the state governments. *Fifth*, the Senate is balanced against the President in all appointments to office, and in all treaties. *Sixth*, the people hold in their hands the balance against their own representatives by periodical elections. *Seventh*, the legislatures of the several states are balanced against the Senate by sextennial elections. *Eighth*, the electors are balanced against the people in choice of President and Vice-President.

In fact we have more checks upon each department than in any government ever instituted. To wantonly remove one or more of these when there is no semblance of weakness or sign of decay, with great respect to its advocates, would be an act of sublime folly.

The Senate is peculiarly a representative of the states; the House photographs the present feelings of the people. The House ebbs and flows according to the caprices of popular vote, the Senate is the permanent agent of the states — it is unchangeable without the consent of all of the states as such. No popular current, no matter how strong, can sweep a state out of the Senate without its own consent.

So if we look beyond the surface of things into the causes for the creation of the Senate we can hardly fail to be convinced that the different method of choosing the members of each house of Congress is based upon the profoundest study of the workings of governments. *To maintain the checks and balances each must be fed from a different political breast. If not, their inspirations of duty and the result of their labors would always be the same.* It is impossible to get a full conception of the theory and spirit of our Confederation by reading the sometimes jejune reports of the debates and proceedings of the Constitutional Convention of 1787 or of the state conventions which ratified the Constitution. These must be supplemented by historical and political research, which light up the meaning of the remarks of the distinguished statesmen who created it, and which show why, and of what material, the different branches of the government were created.

The members of the Convention had both ancient and contemporaneous precedents for electing the Senate and

House of Representatives by different methods. The state of New York, for example, had adopted a constitution at Kingston on April 20, 1877, ten years before the Constitutional Convention assembled, in which it was provided that the electors of the Assembly should possess a freehold of the value of twenty pounds but that the Senators should be chosen by the freeholders possessing freehold of the value of one hundred pounds over and above all debts charged thereon. This discrimination between those voting for members of the Assembly and for the Senate was not a capricious one but based upon sound and substantial grounds to which I shall hereafter refer.

I could quote very extensively from the greatest constitutional, philosophical and historical writers to show that the distinction is fundamental, but I do not deem it essential. Perhaps at some stage of the discussion it would be interesting to do so. But at present when the advocates for change show no defects in the existing system and in fact make no criticism of its work, and where their whole argument for a change rests upon speculation and guess, a recourse to general principles is sufficient.

The Senate has as its prototype the English House of Lords, but with three profound differences: First, the members of the one are in substance hereditary peers, the members of the other are selected by the legislatures of the different states. The former has its origin in birth or appointment by the King — the latter owes its selection to the people through their legislative bodies. As the people choose the members of these legislatures with special reference to electing United States Senators, it is after all the people themselves, considered this time as

citizens of the state, who choose their Senators. But as to one main purpose, the House of Lords and the Senate of the United States are substantially identical. They both represent the maturity, the wisdom, and as has been well said, the second thought of the nation. They protect the wealth, the property and substantial rights and interests of the people; they are a break-water against the seas of passion and prejudice of the excited masses which sometimes roll in against the vested interests and rights of the people. At times the people must be protected against themselves. Willoughby ("The Nature of the State") well expresses the thought:—

The people even when acting in their most direct manner cannot always be trusted to act wisely and according to their own best interests; that passion and prejudices of the moment will urge an electorate or assembly to measures destructive as well to the welfare of the state as to its stability, and that at times the despotism of the multitude can far exceed in severity that possible of exercise by the most autocratic of monarchs. (P. 399.)

On such occasions, happily rare in our history, the Senate checks attempted encroachments upon the rights of persons or things urged by the other house, it balances the scales—and maintains the equilibrium of the Constitution. A select council or an upper House of Legislation exists for the twofold protection of minority interests and of property. A nation with one house chosen by popular vote cannot live long, and it would not alter the result that there were two parliamentary bodies chosen by popular vote instead of one; or that the term of one was two and the other six years. The same breath would blow them into a twofold rage—and the eventual consequences would be the destruction of the form of government. Some public

men seem to think that in discussing political questions property and the minority interests must be considered secondarily. Indeed they are often not referred to at all. The class of which I speak regard it as a quick road to public favor to frame an issue of the people against wealth. *But personal rights and private property are so entwined that in fundamental legislation it is impossible to separate them.* Indeed, nothing is more superficial and evanescent than to ignore these interests, in any class of legislation, for, when such political issues reach the final stage of adjustment—when the chaff is separated from the wheat, when a true analysis is made—it is found, especially in this country, that all classes of the people are property owners—they have their farms; their small houses in the city; their deposits in the savings banks; their various businesses, and interests in industries; and in many different ways the working classes (in which I include all men who employ or are employed) the merchant, farmers, professional men, clerks and laborers, are the substantial owners of the property of the country. *These interests—of incalculable value—the result of years of toil and suffering, are entitled to the same protection as the purely personal rights of the proletariat—a word again coming into use but which in this country is yet happily limited to the individual who can pack his belongings in a satchel and segregate himself from society. Let us not be chary or timid in asserting and upholding the rights of property, not only to a full protection of the law, but to a distinctive participation in legislation.* The true and ultimate interests of all of the people require it. This phrase "the people" is a very popular one—but it is frequently misunderstood or misapplied. In all discussion respecting

the organization of governments what is meant is the people massed and acting as a body. Such a body becomes a distinct department, call it what you please — an assembly, a legislature, a *wittena gemote*, a council of wise men, House of Commons, or what not. As a department of government it must be subject to the same checks as the Executive. The tyranny of "the people" thus concentrated is as far reaching as that of a monarch or despot. The general people recognize this fact for in making constitutions they expressly create check reins against their own impulses. No government could be operated unless the people subjected themselves to checks.

There are three elements in every organized government; first, the state; second, the magistrates (which includes legislative and judicial officers); and third, the people. All internal disturbances come from a lack of adjustment between these three. It is conceded the state must have absolute power within the sphere of her operation, hence the real difficulties lie in a proper division of power — too much to the executive or magistrates or too much to the people, or too little to one or the other produce discord. The success of a government reaches its climax when by an adjustment of the different parts all work harmoniously.

I confess I am amazed at the argument used by the advocates for this amendment: that a changed condition of the country from that which existed when provision was made for electing the Senate by the legislature, demands that the people be now substituted in place of the latter. ON THE CONTRARY IT IS THE STRONGEST REASON IN FAVOR OF RETAINING OUR PRESENT SYSTEM. A republic with thirteen million of inhabitants presents an entirely different

question from one with one hundred million of individuals. I respectfully maintain that contemporaneous history shows that the natural political trend of our country as our population increases is towards a representative government; that each day we drift farther away from a pure democracy; and that the necessity of the people in all of the affairs of the government to be represented by political agents has increased almost tenfold since its formation. He who advocates the application of pure democratic principles to existing conditions, it seems to me but poorly comprehends our real political, commercial and social status.

Convinced of the absolute impracticability of governing directly, the voters have committed their interests to representatives, whom they choose at stated intervals, either voting directly for the nominees of party conventions, or, in the case of Senators, through legislators, duly chosen by them.

It is a physical and political impossibility that any but a representative government can exist here, unless forthwith we agree to a despotism, or divide the country into hundreds of states, each so small in the number of its inhabitants that every member thereof could directly exercise a voice in it — another remote possibility — and one reaching into the confines of a political millenium. At the bottom, however, of this representative government, we find the people. They are its movers and its inspiration. They choose freely their representatives to political conventions, and govern by exercising a perpetual control over their political agents, *having always in their hands the power to correct the evils, mistakes or shortcomings of the former*. The spirit of democracy breathes through and vitalizes all our political forms. Now

many of the potential reasons which prevent the establishment of a pure democracy in this country, operate to render impracticable the proposed movement to vest in the people the power to nominate directly their officers. The people in such instances cannot act spontaneously or work harmoniously together. If it be a question of national charity or national insult all hearts beat as one — all eyes are turned in one direction, and all hands work together; but in the multiplicity of ordinary national concerns the people must delegate their power. Our population has become so dense and numerous that it is utterly impossible for the masses to nominate competent candidates; they cannot know whom to choose; they cannot put their finger upon the proper men. An excessive number of voters was the primary motive for the original creation of a representative government. It now has an additional cause growing out of the complications of modern commercial, economic and political questions. The selection of candidates is a particular business, requiring special knowledge. The people must, therefore, from the necessity of things, act second-hand, through political agents and conventions. The members of the legislature are known to the voters — a direct responsibility can be fixed upon them. It is true that in many instances the occupation of a political agent is sordid rather than patriotic. *We must, however, recognize that professional politicians are a necessity, and the more respectable we make the occupation, the better government we will have.* I believe that wholesale and indiscriminating criticism of this class is unjustified. Here is a movement which involves a bitter criticism of forty-eight legislative bodies. All of the sessions of the legislature and of political conventions

are held in the broad light of public opinion — all of its acts are reflected in a press, most powerful in number, most vigilant in scanning every movement, and spurred on by conflicting views and by competitive business interests. An existing investigation into an election for a Senator shows the utter hopelessness of legislative bribery. On the other hand, out of a system of direct voting there must inevitably arise irresponsibility. No one can trace the movements of an unorganized body, each one insisting upon his own candidate or choice. For each office, instead of two or three candidates, we should have many. Political modesty, a quality already sufficiently rare, would soon disappear, and each citizen would feel that he was as good as another for a given office. The demagogue would come to the surface — not disguised as a patriot, but in his real costume, and then the people would hear of nothing but political candidates who would swarm upon the rostrums to the detriment of all our business interests and the real good of the people. Is the nation not already sick of the spectacle of self-nominated candidates who patrol the different states declaring their own political greatness and personal virtues?

Mr. Hallam says, in the sixteenth chapter of his *Constitutional History of England*, that "Numerous bodies are prone to excess both from the reciprocal influences of their passion and the consciousness of irresponsibility, for which reasons a democracy, that is, the absolute government of the majority, is the most tyrannical of any."

Property, small or great, of one hundred dollars or one hundred million dollars, is entitled upon all political and social principles to distinct representation; for the establishment of liberty, the encouragement of industry and the

protection of property are the underlying motives of all social organization. The guaranty of such is found in an upper, the creation and development of personal rights and property in a lower House.

No matter how a select council is created, whether by appointment of the state executive or selection by the state legislative authority, it must when necessary act as a check to popular encroachment upon fundamental or constitutional rights. Cæsar, after he became dictator, exercised the particularly important right of nominating Senators, but, having the power of nomination, the office of Senator became dead as to him, for it was conceded that its work did not apply to the Emperor — which meant the concentration and perpetuation of official power in his hands. I by no means assert that when Cæsar absorbed the whole government it was a bad step for the Roman people; but we are not yet ready for an Emperor, although the present movement, if successful, will be a large advance in that direction. But whether we have a Cæsar in the Executive, or whether we have a Cæsar in the Congress separate or united, concentrating and perpetuating all power in its hands, either is equally distasteful to our political education and incongruous in our free institutions. No government can exist where the people exercise capricious power any more than one can exist where the Executive is a despot. JOIN A POPULAR EXECUTIVE WITH A POPULAR LEGISLATIVE BODY, FOR THAT IS PRECISELY WHAT IS INVOLVED IN THE PROPOSED AMENDMENT TO THE CONSTITUTION, AND WHAT REMAINS OF THE GOVERNMENT ESTABLISHED BY THE CONSTITUTION? The best government is that in which the checks and balances are properly and equally regulated —

so that when one branch leans it is instantly held up by another.

The Senate is endowed with wisdom and strength to resist all innovations of fundamental rights. It is just and necessary, therefore, that the power of appointment of Senators should be lifted out of the chaos and tumult of popular election and lodged in a different body. The member of the House represents the people of a small district, and of the Senate the whole state, and all of the people therein. *If the people are neglectful or indiscriminating in the election of representatives to the legislatures, they will be equally so in their choice of Senators.* Cannot the people trust themselves to exercise the same care in choosing their state legislators as they would in the selection of Senators? The alleged reform is then nothing less than a stab at the people themselves — at their intelligence and discrimination. This argument has never been, and never can be answered. *Besides, the deprivation of the legislatures of the power to elect Senators would be a direct and powerful blow at the morale of these bodies.* It would be in effect the destruction of their usefulness. It is an unfounded and indiscriminating assault upon forty-eight legislative bodies *en bloc*. It is argued that the state legislatures often have “deadlocks” and that their time is frequently misapplied or wasted in an effort to elect a Senator, and that in the interim the state loses representation in the United States Senate. With great respect, this is a matter for the individual states to settle. It is purely a question of internal policy. Political manhood, state politics, religion or economy may be involved and the internal strife may be carried on to settle a great principle. It may be thoughtful and patriotic for the United States Senate to suggest to a state thus

situated that it has none or only a half representation in that body, and while it might not be the best of good manners to make the reply, it would be logical for the state to say to the Senate: "Mind your own business." And I cannot see how a state Senatorial deadlock is any worse than a long drawn out contested election case, or that the former are as frequent as the latter.

In the light of history one is safe in asserting that in the advancement of the doctrine of the rights of man and of protection of property, the upper House, in this country and England, has always been found reliable. It was the aristocrats of England — the Barons — who extorted Magna Carta from King John. But the wars waged by the Barons, by Simon de Montfort, were waged not for the aristocrats alone, but for the WHOLE PEOPLE of England. Magna Carta is the instrument from which the people draw as from a perpetual reservoir all of their inspirations of justice — it is the Anglo-Saxon fountain head of the rights of man to free government. In fact, at an extreme juncture, one would be more secure in entrusting his personal rights and property interests to a Senate as ours is constituted than to any popular body chosen directly by the people. The Senate receives its propositions second class, as it were; it has the advantage of the debates and thoughts of the popular assembly. When the latter is bubbling over with excitement; when its leaders are red hot with partisan prejudice, the Upper House is cool and wise. Their eyes not only see the present but they look into the future. They distinguish between a mere temporary and evanescent policy and one which is stable and for the real and permanent good of the people. Moreover, if the Senate is elected by the

people, whether the elections for members of both houses should be simultaneous or held at different times, or under federal or state regulations, the theory and spirit of the Constitution that the Upper House should contain a class of men superior in experience, knowledge and wisdom would be lost sight of, and the same stamp of individuals will be candidates for the Senate or House of Representatives indiscriminately as circumstances may dictate. The fruit follows the seed. Pumpkin seed will not produce oranges.

But there is another and second profound distinction between the Senate of the United States and the English House of Lords — growing out of the difference between the two governments. The one is a limited monarchy — the other a Republic. The members of the House of Lords represent the whole nation; the members of the United States Senate represent the individual states of the Union and are in the Senate to maintain the sovereignty of their respective states — they are its agents. This government could not have been formed if a council had not been provided for so that there would be absolute equality of the states in that body.

And in this respect I feel it important to say one word as to the nature of our government.

Our federation is a union of states for mutual protection and benefit. The states maintain their individuality but give to the general government as much power as is necessary to make the federation a real sovereign as to all external and sufficient though limited powers over internal affairs, but the states have not stripped themselves of all of their sovereignty. Very much to the contrary. Which creates this anomaly: A citizen of the United States

has two sovereigns — the United States and the individual state of which he is a member.

After an experience of nearly a century and a quarter, we find that the tendency of the federal Government is to usurp more power, either through the courts or national legislature by an unjustifiably broad construction of existing provisions of the Constitution. On the other hand, the states aggressively resist federal encroachment and seek to uphold the integrity of state sovereignty in its historical and political conception, and to maintain a true federation by yielding to the central government only power enough to enable it to support itself well and vigorously within the four corners of the compact of association — the Constitution. This tendency on the part of the federal Government to draw to itself more power directly leads to centralization and *the obvious effect of selecting Senators by the people is a blow at State sovereignty, for when the Senate is elected by the people, it eo instanti becomes a popular body* and it does not adequately secure the rights and safety of the states, nor is it a citadel in which property holders and minority interests can seek refuge from the storms of unfounded popular attacks. As Wiloughby substantially puts it, the independence of the Senator is lessened, the temptation to subordinate the general to local interests is increased, and the pressure brought to bear to give immediate and complete expression to a popular will, that may be ignorant or misinformed, is proportionately enhanced. And De Tocqueville observes that the existence of democracies is threatened by two dangers, *viz: The complete subjection of the legislative body to the caprices of the electoral body, and the concentration of all the powers of*

the government in the legislative authority.

The more we encroach upon state sovereignty, the more the trend toward nationalism becomes visible, to the consequent destruction of our theory of a federation of states, and the advantages of that form of government are gradually lost sight of. The states bear the same relation to the central government that a domestic family bears to a municipality. The family looks after its own particular foyer in its own way — it eats, drinks, lives according to its own conceptions of health and propriety, without interference by the municipality. The latter supervises the public concerns, the highways, the streets, the schools; it intrudes not into the domestic affairs of its citizens. The same relation should exist in practice as it does in theory between each individual state and the central government. In the performance of its state duties, it has no superior; its citizens understand its wants; they are alive to its interests and their state pride makes them ambitious to see their state thrive and advance. But in proportion to the weakening of state sovereignty the interests of its citizens wane, and soon state independence and individuality disappear, all power becomes vested in a central government, the domestic interest of the citizen in his state eventually dies, and the people are governed by a national head.

The identity, equality and individuality of the states is peculiarly preserved in the Senate because each state has two Senators. In most Senates or select councils of ancient governments, the Senators enjoyed a life tenure and while this was discussed and advocated in the formation of our Constitution, a very wise and happy medium was adopted to have the Senate refreshed and re-

invigorated as to one-third of its members every two years, so that the tide of public sentiment was always flowing through its deliberations. But if the identity of the states is not preserved in the Senate, all state sovereignty becomes a mere name and the legislative powers, we repeat, now concentrated in two, will gradually melt into one popularly chosen assembly. If the American lawyers cannot appreciate where this condition will lead, I am sadly mistaken in their knowledge. The French Revolution offers interesting study in this connection. But one thing is sure, that centralization and state sovereignty cannot exist together; they are incompatible. Where will the small states be; what will be their position under such circumstances?

As it is provided "that no state without its consent shall be deprived of its equal suffrage in the Senate," there is a very grave moral question *whether any part of the clause in question should be altered without the unanimous consent of all the states*, for if the effect of the election of Senators by popular vote be to destroy or decimate the sovereignty of the states in the Senate or to diminish their full and intended influence therein as states, then how can this suggested change be made without the consent of all of the states? I place this proposition not on any technical ground, but upon good faith between all of the states of the Union. If altered, it was the opinion of Senator Hoar, one of the best lawyers who ever graced the Senate, that it would absolve the larger states from the Constitutional obligation which secures the equal representation of all the states in the Senate. I am bound to admit that I do not clearly follow this view, but others may understand the argument better than I do.

It is said over and over again that in

many states the people already dictate to the Legislature their choice of Senators, and that as a matter of common practice the Legislature would not venture to disobey the directions of the people in this respect. Unhappily for our country the postulate is true, but I do not admit the conclusion. The Constitution is still preserved and the choice is actually sanctioned by the Legislatures, no matter at whose dictation they act. In some instances, not necessary to be discussed, it is quite obvious that a Legislature would be fully justified in disobeying the commands of the people.

But the real answer to this suggestion is that it is an experiment outside of the Constitution which may, and I believe, will be quickly abandoned, for when the people exercise full intelligence and discrimination in selecting their legislators they will not wish, nor will it be necessary for them to dictate the names of the Senators. The Legislatures will always faithfully represent their constituents in the selection of Senators, when the constituents exercise care and discrimination in choosing the legislators. If the change in the method of choosing Senators be adopted and this important attribute of state legislative power be taken from the members, where will it end? *It will inevitably be followed by a change in the method of choosing the executive and the judiciary! And then will follow the crowning step of all — the people will dictate the particular laws which the state legislators shall make* (they are already doing this in at least one western state); *confusion and chaos will follow the destitution of the legislators of all discretion and judgment, and then — ochlocracy.* To avoid this, educate the people, bring to their direct attention all political questions, give them time to study and understand them. BUR,

MOST OF ALL, ELEVATE THE PROFESSION OF POLITICS AND DO NOT FORCE OUR CITIZENS TO APOLOGIZE FOR FOLLOWING SUCH A CALLING.

The third difference between the English House of Lords and the United States Senate is that the Senate acts as a court in cases of impeachment of the President by the House of Representatives. The King of England cannot be impeached. But the House of Lords tries other impeachments presented by the Commons. When the President of the United States is on trial the Chief Justice of the Supreme Court of the United States temporarily quits his high place and presides over the Court of Impeachment. But the House impeaches and the Senate decides. *If both Houses are elected by the people, the same tribunal acts as accuser and judge.* They both receive their inspirations and conceptions of the case from the people and the impartiality and independence of the Senate disappears. This is not the American conception of justice.

Moreover, the Senate is associated with the President in making treaties, and in this respect again it differs from the House of Lords; it is only with the advice and consent of two-thirds of the Senators present when the question arises that the President has power to conclude a treaty. The King of England can make treaties without the concurrence of either house of Parliament, but the people have seen fit to associate the Senate with the President in the exercise of this Executive function.

Jay, in an article in the "Federalist" upon the provision relating to the making of treaties, said:—

The power of making treaties is an important one, especially as it relates to war, peace and commerce, and it should not be delegated but in such a mode and with such precautions as will afford the highest security that it will be exercised by

men the best qualified for the purpose and in the manner most conducive to the public good. The convention appears to have been attentive to both these points; they have directed the President to be chosen by select bodies of electors to be deputed by the people for that express purpose; AND THEY HAVE COMMITTED THE APPOINTMENT OF SENATORS TO THE STATE LEGISLATURES. *This mode has in such cases vastly the advantage of elections by the people in their collective capacity, where the activity of party zeal, taking advantage of the supineness, the ignorance and the hopes and fears of the unwary and interested, often places men in office by the votes of a small proportion of the electors.*

Has this logic lost its strength because our population has increased from thirteen to nearly one hundred millions of people?

The influence which naturally results from these considerations is this — that the President and Senators so chosen will always be of the number of those who best understand our national interests, whether considered in relation to the several states, or to foreign nations, who are best able to promote those interests and whose reputation for integrity inspires and merits confidence. With such men the power of making treaties may be safely lodged.

Finally, it is only with the advice and consent of the Senate that the President can appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States whose appointments are not otherwise provided for in the Constitution.

It thus will be seen that the Senate is not only a legislative body but it has co-ordinate judicial and executive functions and possesses much more power than the House of Lords, which rarely acts as a check to the House of Commons, because of the peculiar character of the whole government.

The Senate of the United States has an unbroken record since its establishment that no legislative department of any government ever excelled.

It is to be destroyed by an *ipse dixit*, for no arguments are made against the general capabilities, honesty or patriotism of its members, and no arraignment of its usefulness is presented. It is to be brutally abolished because somebody THINKS and someone BELIEVES that the people will be better served if they directly elect the Senators. One of the most firmly established branches of the government is to be torn up by the roots and sacrificed to a spirit of speculation. All the teachings of history and principle are to be cast aside to satisfy a most superficial spirit of reform.

The main argument put forth that there has been a change in conditions since the Constitution was adopted is the strongest in favor of its retention. The Senate was organized to meet not the existing but a future history when the nation would have a greater population and be confronted with more complicated questions of politics and commerce. The framers of the Constitution did not entertain the silly opinion that this country was to stand still, and that the Constitution was to be adapted merely to the situation existing when it was promulgated. It was launched for a voyage into the future centuries; it was constructed and equipped to meet all the emergencies and vicissitudes which an increased population and a growing nation would develop.

Wherever the population of a country is so large that an absolute democracy cannot exist a representative government is necessary, and a Senate appointed or elected by some power at least a degree removed from the people is not a mere form but an essential to a permanent government.

The conception of a Senate was not original with the creators of our federation. Even the name and age of the Senators were borrowed.

A Senate existed in Athens, anterior to Solon, and he organized this branch with 400 members above thirty years of age chosen by lot, among the four tribes from among the citizens of the three first classes. It deliberated upon all affairs before they were carried into the assembly of the people. Being mindful of the experience of ages we have reversed conditions. It was substantially the same with the Spartan Senate which was organized by Lycurgus.

The Senate of the United States was only new in the aspect of the federation, each state small or great having two Senators to represent it. But if a Confederation had not been formed and the individual states had dissolved themselves and coalesced into a nation, a Senate independent of the people and of the Executive, would have still been essential.

In conclusion, I feel that the only strength of this movement is that it has secured the support of Senators and others whose names and opinions are entitled to respect and weight. I could have hoped that in an issue touching a fundamental alteration of the Constitution there would exist practical unanimity. Unhappily, the opponents of the proposition to change the method of election have allowed this movement to run unchecked without organization or serried opposition. Many have believed that there would come a time when it would check itself and that sober second thought would suffice to kill it. Once started, however, it has gathered momentum from the inertia of the people until it has reached a point where the Senate of the United States is asked to declare itself incompetent to fulfil its mission, and to pronounce the work of Washington, Hamilton, Madison and the other illustrious framers and supporters of the Constitution, a failure. It is time the whole country aroused

itself. We are passing through an epoch so momentous that the American bar should organize to resist the most dangerous innovation ever attempted since the formation of the government.

Secession aimed to deprive the Union of part of the states, but the present scheme obliterates their sovereignty and changes the federation into a nation with one popular assembly.

The Common Fund and Co-Equal Right Theory of Capital and Labor

A NEW and interesting theory of the law that should govern strikes, lock-outs, picketing, the boycott, and other questions arising from the conflict between capital and labor, has been suggested by Judge Francis E. Baker of the United States Circuit Court, in a paper read before the Chicago Bar Association of February 10 of this year and printed in the *Illinois Law Review* ("The Respective Rights of Capital and Labor in Strikes," 5 Ill. L. Rev. 453).

The gist of his contention is that the rights of capitalist and laborer to the product of industry and to free access to the labor market being co-equal, these rights should be exercised on each side so as not unnecessarily to interfere with the exercise of the reciprocal and equal right of the opposite party. If either party exercises one of these rights not for a beneficial use but purely to inflict intentional and needless injury, his acts should be treated as wrongful. A sympathetic strike is thus wrongful, and the secondary boycott, and picketing which involves force and intimidation, are likewise wrong. On the other hand, a strike may inflict harm, but if the harm comes from a truly competitive act — that is to say, if demands are actually pending and the strike is based upon the immediate interests of the employees — then there is the beneficial

use of a co-equal right, and the strike is lawful.

To clear the path for his contention, Judge Baker takes up the principles laid down in natural gas cases. In Indiana¹ the Supreme Court ruled, in substance, "that the surface proprietors had co-equal rights of access to the common source of supply — the common fund; that the right of each was therefore not an absolute right, but was limited and restricted by the co-existing and co-extensive rights of the others; that each therefore had the right to the beneficial use and enjoyment of the whole supply except as it was cut down by the beneficial use and enjoyment of the others; that while the loss that came to each from the beneficial use of the common fund by the others was *damnum absque injuria*, a loss without cause of complaint, none of them was bound to suffer a loss malevolently inflicted — inflicted 'for the sake of the harm as an end in itself and not merely as a means to some further end legitimately desired.' And so it was held that wasters could be stopped by injunction. . . .

"And if a landowner has no absolute and exclusive right, but only a limited right, qualified by the co-existent and

¹*Manufacturers' Gas Co. v. Indiana Nat. Gas Co.*, 155 Ind. 461; *Lippincott Glass Co. v. Ohio Oil Co.*, 150 Ind. 695; *State v. Ohio Oil Co.*, 150 Ind. 21; *Ohio Oil Co. v. Indiana*, 177 U. S. 190.

co-extensive rights of his neighbors, in the fugitive subterranean gas, oil and water, what greater right should be recognized in him to the common fund of the sunlight, of the atmosphere, of the fugitive breezes that pass over the surface of his and his neighbor's land?"

This was not the old English common law, says Judge Baker, but the old law was sound on one point, the law of wild ducks:—

"In 1705 it was decided [*Keeble v. Hickinggill*, 11 East. 574] that if wild ducks alight in the plaintiff's decoy pond, the defendant, though he has the right to set up a rival decoy pond on his own land and by offering greater inducements persuade the wild ducks to pass by the plaintiff's pond and come to his own, and though he has the further right on his own land to shoot or shoot at the wild ducks that are on or are passing over his own land, even if the effect is to scare away the wild ducks that are on the plaintiff's land, still he has no right to shoot off guns or explode rockets on his own land when the purpose and the only possible effect is to frighten the wild ducks from the plaintiff's pond. . . .

"Through all these instances, and more can undoubtedly be found, one broad principle runs — a principle broad enough to serve as a basis for a classification of all litigation under one or the other of two heads. Under one the plaintiff complains of a harm that flows from the defendant's invasion of the plaintiff's absolute, exclusive, dominant right; under the other the plaintiff complains of a harm that flows from the manner in which the defendant exercises his co-equal, competitive right. And the principle running through all the instances I have given of the latter class is this: Wherever there is an antinomy — a conflict between co-equal and competi-

tive rights — the one party must suffer in silence the harm that is the direct and natural consequence of the other's bona fide effort to benefit himself by the exercise of his competitive right, but does not have to submit to the harm that is attributable exclusively to malevolence. Take the spite fence, for instance. The harm to you is one and the same whether your neighbor limits your access to light and air by means of a useless fence fifty feet high or a useful house fifty feet high. . . .

"I have been endeavoring to develop before you the idea that the strike is not a question that stands by itself, to be solved according to separate and unique principles, to be dealt with by processes that are applicable to it alone. . . . If the principles of truth and justice that govern all other cases of the same kind have been properly declared, then a means for measuring the rights of labor in its conflict with capital is to apply the same principles to the strike case.

"If we examine, for example, a supposititious strike of bricklayers against their employing contractor, we find that they intend to deprive him of their own labor and to prevent him from getting other labor to take their places. They knowingly inflict the harm as a means of compelling him to grant their demands. This infliction of harm is unjustifiable unless the harm comes from a truly competitive act. That is, the demands must be pending. For if there were no demands pending, the infliction of harm would properly be charged to a desire to harm for the sake of harm as the end. And further, the demands must really and substantially relate to the terms and conditions of the bricklayers' employment. For instance, a demand that the contractor somehow or other compel the theatres to employ union musicians is outside of the direct

and immediate interests of bricklayers as bricklayers; and a strike merely to enforce such a demand — a sympathetic strike — is therefore unlawful. For the sympathetic strike, like the spite fence, is not the beneficial use of a co-equal right, but is the usurpation of the power to punish.

"This infliction of harm is unjustifiable unless the harm is only the harm that naturally and directly flows from the good-faith exercise of the competitive right. That is, the loss to his business that the contractor suffers by reason of the striking bricklayers presenting their side of the controversy to other bricklayers (actual or potential) so that the other bricklayers freely and of their own judgment decline to work for the contractor, must be suffered by him without complaint. Therefore, persuasion and picketing limited to learning who the new bricklayers are to whom to present their cause, are lawful; and all judgments to the contrary are wrong, as I believe. But the use of force or intimidation to keep other bricklayers away from the contractor against their will is unjustifiable, because it deprives the contractor of his co-equal right of access to a free labor market. And it must not be forgotten that force and

intimidation are just as unlawful when exercised under the guise of persuasion or picketing. More unjustifiable than the use of force and intimidation to keep new bricklayers away is the combined assault of the striking bricklayers upon the business of outsiders for the purpose of compelling them to cut off all intercourse with the contractor. The strikers may deprive the contractor of their own society and trade, if they choose, for that is in the exercise of a co-equal right; but concerted pressure by the strikers to coerce members of society who are not directly concerned in the pending controversy with the contractor to make raids in the rear — the secondary boycott — is wrong not only because such action is not within the immediate field of competition, but because the direct, the primary attack is upon society itself.

"Without attempting to follow further this supposititious case of the bricklayers, and without considering the many difficult complications of fact that have arisen or may hereafter arise in labor cases, I venture to express my belief that a just decree can always be framed by applying to the controversy the principle of co-equal and co-existent rights in a common fund as the means of solution."

The principal witness in a case being tried before the Snyder county court, in Pennsylvania, when asked on what day of the week the specified offense was committed, said he was sure it was not on Sunday. "I always wear my gallowses on Sunday," he explained, "and I did not have any gallowses on that day."

To a County Court Brief on My Table

BY FRED R. BARLEE

LONG time has passed since you arrived
 A stranger in the land,
 Your pages clean, your ink so fresh
 How eagerly I scanned!

New was the tape that tied you round
 Near where appeared my name,
 Now soiled and twisted, dirty too,
 It scarce appears the same.

When you arrived I thought "Perhaps
 My luck at last has turned,"
 But far too sanguine were my hopes,
 A lesson since I've learned.

"One swallow won't a summer make,"
 One brief a practice build,
 But brief must follow brief before
 Your heart with hope is filled.

Some baby brothers by your side
 At intervals have lain,
 They came and went, the Probate Court
 Received them — you remain.

Some other little brothers, too,
 Were strangled in the cot,
 While others lived a week or so
 A miserable lot.

You had two grown-up brothers once,
 Two Jury cases they;
 But they have also passed, as passed
 Alas! their fees away.

How eagerly I read you through
 And "got up" all the Law,
 How through the "proofs" I searched, to find
 Perchance some fault or flaw!

Why do you still my table grace(?)
 Long time since you were brought?
 My wonted luck! Of course the case
 Was "settled out of Court."

Are you the last of all the band,
 Survivor of your race?
 I almost hate you, yes, I loathe
 Your too familiar face.

Perth, Western Australia.

Reviews of Books

DEAN BIGELOW'S "A FALSE EQUATION"

A False Equation: The Problem of the Great Trust. By Melville M. Bigelow, Dean of the Boston University School of Law. Little, Brown & Co., Boston. (\$1.50.)

THE author takes as his starting point the fiduciary responsibility of the State, which is the doctrine endorsed by the leading constitutional lawyers of the day, shows how far it has fallen short of this ideal and lays down the principle that the great problem can only be worked out by sound educational methods.

Chapter I is devoted to the weakness of the State. The author discusses this phase of the subject under two heads. He first speaks of the long train of evils consequent upon the undue ascendancy of Privilege, and shows how, in handing over to Monopoly what is inherently the people's heritage, the State, has signally failed to control the opposing forces thereby engendered, while the consumer is too often subjected to a veritable bondage. Witness the coal famine in 1902 and 1903, and the very recent extortionate advances in the price of milk. The author refers

to the extent to which the State has failed to restrain the Railways in their attempted exercise of autocratic power, and asserts that the people's battle will be but partially won so long as the Railways remain the judges of what is a fair return on their valuation. In the second place, he discusses the tendencies of modern society that constitute a menace to authority, instancing the disintegration of the family as facilitated by modern divorce laws, the failure of the criminal courts to render the punishment of crime swift and certain, the almost interminable delays in civil procedure, and the influence of a sensational press. In a word, he sees as the counterpart of the entrenchment of Privilege, a tendency toward a general relaxation of civic ideals ending in a contempt for law.

After showing the weakness, the author proceeds in Chapter II to point out the remedy. The task he finds no easy one, with the public disinclined to participation in public affairs and with the federal Constitution imposing limitations on the development of the powers needed to meet the issues raised by modern conditions. He finds the third

and great obstacle in the defects of prevailing methods of education, especially as shown in the emphasis which is laid on the mere acquisition of facts. In the freedom of choice of elective systems, and the consequent temptation to follow the path of least resistance, he sees as the inevitable result a dissipation of mental energy and an implanting of tendencies which unfortunately do not terminate with school life. As a single illustration, he quotes a distinguished educator to the effect that the Americans suffer more than any other people "and more now than at any other time" from a weakness of attention, which he directly attributes to the reaction which has swept the country in "a wave of electivism."

Having summed up the evils, the Dean presents his thesis that the remedy is to be educational, and that any education that is to be effective must be based on unity; that the brain should be persistently directed along definite and interrelated lines with a constantly increasing degree of intensity. The gist of each new idea is to be seized and put in its proper relation, while needless details are to be eliminated. That systematic and persistent effort will result in a well organized brain is axiomatic. The physiologists, as the author shows, go a step farther and tell us that the brain under such conditions undergoes a permanent change which varies in degree with the intensity of the stimulus. In support of this proposition, the author cites the most eminent authorities, and it may be noted that Dr. Maudsley and other well-known physiologists hold the same view. The principle of unity in education, it is confidently asserted, will make for the maximum realization of the powers of the individual. To the man of parts it will develop the powers of

leadership, and in general will promote the clarity of vision and the correct estimate of values so indispensable an endowment for the body of citizens at large.

The author adds by way of illustration a sketch of the reorganized course of study in the Boston University School of Law. Based on the theory that dynamics should be substituted for statics, the scheme requires that the student should do his own work, and stimulates the development of the active functions of the mind by requiring a constantly increasing intensity of effort. That energy may not be misdirected, the various subjects are treated as a coherent whole, unity being regarded as preeminently the foundation of legal education. The Master's Course, in which the work of the school culminates, is designed to give men a broad and comprehensive view which will fit them not only for a high grade of efficiency at the bar, but also for competent service in coping with the problems that confront the State. Altogether, the book is a notable educational contribution. Unity is its keynote, and a careful reading will show that the author has given the word a new and deeper significance than heretofore it has had. Dean Bigelow's book is itself an illustration of the system he so fully sets forth.

PERRY ON TRUSTS

A Treatise on the Law of Trusts and Trustees. By Jairus Ware Perry. Sixth edition, revised and enlarged by Edwin A. Howes, Jr. Little, Brown & Co., Boston. V. 1, pp. clxvii (contents and table of cases) + 774; v. 2, pp. xviii, 739 + 128 (index). (\$13 net.)

"PERRY on Trusts" has been a landmark on the shelves of every law library for a generation. Since the learned author first ventured in 1871 to present an American book on the subject of trusts, this work has earned

such a reputation in the courts and among the profession that it is an acknowledged authority everywhere in this country. It is now ten years since the last editor attempted to revise this work. The present sixth edition has added new citations and new notes with some additions and changes in the text and revised the work of former editors, so as to make the book thoroughly up-to-date. The editor appears to have done his work faithfully and well and has added much of real value to this standard work. His notes are excellent. In many instances one regrets that his modesty prevented him from boldly changing the text itself by incorporating his note as an integral part of it rather than relegating such valuable material to a mere footnote.

That the work itself has stood the test of the last forty years of constant development of the law on one of our most important subjects speaks for itself. The editorial work of this sixth edition is worthy of a great law book and gives renewed vitality to the solid learning and able presentations of intricate and difficult problems of the law of trusts that made the original author noteworthy. With this new edition, "Perry on Trusts," will keep its well merited place as the leading text-book on this subject.

BABBITT ON MOTOR VEHICLES

The Law Applied to Motor Vehicles, with a collection of all the reported cases decided during the first ten years of the use of Motor Vehicles upon the public thoroughfares. By Charles J. Babbitt of the Massachusetts Bar, author of "Index-Digest of Massachusetts Motor Vehicle Law." With an introduction by Francis Hurtubis, Jr., of the Massachusetts bar. John Byrne & Co., Washington, D. C. Pp. 75 (table of cases, etc.) + 748 + 329 (appendices) + 51 (index). (\$6.50 delivered.)

THE range of legal topics covered by this volume is surprising. Commonly one thinks of automobile litigation as being confined to questions of

negligence or criminal prosecutions growing out of violations of statutory regulations for the use of such machines.

It has been generally recognized that although the automobile itself is new yet the principles of law to be applied to it are old. It is only another example of the adaptability of our common law to new conditions. The author has adopted the sensible plan of presenting such doctrines of established law as they have long existed and showing their application to the present topic. He has covered a wide range of subjects; in a word, anything that has any relation to a motor vehicle is to be found here. Taxation, licenses, sales, warranties, agency, insurance, measure of damages, procedure and constitutional law are only some of the many points discussed.

The Massachusetts statute is thoroughly analyzed and discussed as an example of motor litigation because it is perhaps the most complete act of its class, yet at the same time the acts of every other state are fully presented and any local peculiarities pointed out.

The author has made the ambitious attempt to collect and set forth in condensed form every motor vehicle decision reported in the courts of all the United States, together with those decided in Europe thought to be of value. The usefulness of this rather extended task may be questioned, but it indicates great thoroughness and industry in trying to place within the reader's grasp the very last word on the subject. Many of the subjects of discussion, likewise, seem somewhat remote from the main topic, but everywhere is manifested the indefatigable earnestness and zeal of the author not to overlook anything that may assist the motorist or his attorney in any possible contingency.

The book everywhere indicates careful and intelligent scholarship. As a *vade mecum* to the busy lawyer, who has a case in which an automobile figures, it will prove invaluable to put into his hand without delay the law on any given topic. The arrangement of the book is convenient and sensible and the discussion is pointed and helpful. It is a thoroughly good piece of work.

TUCKER'S FEDERAL PENAL CODE

The Federal Penal Code, in force January 1, 1910; together with other Statutes having Penal Provisions in force December 1, 1908. Annotated by George F. Tucker, joint author of "Gould and Tucker's Notes on the United States Statutes," and Charles W. Blood, of the Boston bar. Little Brown & Co., Boston. Pp. lii, 301 + 168 (appendix + 35 (index)). (\$5 net.)

IN 1909 the joint committee of Congress on the Revision of the Laws performed a labor of vast national importance in collecting in the form of a code all existing penal laws of the United States. To this codification the authors of this work have added an appendix containing all laws of a general and permanent character in force December 1, 1908, which have penal provisions not properly separable from the administrative provisions, which are not contained in this Criminal Code but are embraced in the General Revision of the Laws of the United States. The result has been to put in easily accessible form all of the Criminal Federal Law.

The wide experience of Mr. Tucker as a reporter of decisions in Massachusetts, as annotator of statutes, and author of law books is a guaranty of accuracy and practical usefulness of any book for which he is sponsor.

After setting forth in full the exact wording of each section of the statute, this volume gives the previous legislation on which it is founded and calls attention to changes of phraseology, if any. All decisions of the state and

federal courts or opinions of the Attorney-General, which elucidate the section, are there collected and succinctly summarized. The reader has placed before him, clearly, tersely and intelligently the penal law of the United States, section by section with all decisions of the courts and rulings of the Attorney-General, that aid in its understanding. The book must be of real value to our federal judges and practising lawyers to enable them to put their hands on the Federal Criminal Law without waste of time and energy. The annotations are sensible and useful, and the arrangement of the material admirably practical. The only omission which we notice is the failure to include references to the Interstate Railroad Commission Reports. A complete index and table of cases and of statutes add real value to the book in giving ready access to all its contents.

THE LAW OF PAWNBROKING

A Treatise on the Law of Pawnbroking, as governed by the principles of the common law, and as modified by the statutes of the different states of the United States, and the ordinances of the municipalities regulating pawnbroking; and a Review of Pawnbroking. By Samuel W. Levine, of the New York bar. D. Halpern Co., 271 Broadway, New York. Pp. 111 + 13 (index). (\$3.50.)

THE book is divided into two parts. The first gives a review of the history of pawnbroking and discusses its economic and social aspects. The second part is an exposition of the law of pawnbroking. The work is more than a mere law book. The first part presents in a very interesting manner a sketch of a long and varied history of an ancient occupation that begins with the first days of Babylon and Egypt and is already old when Athens and Rome enact legislation to regulate its abuses. While every student has learned casually of the attitude of the mediæval church, which regarded as sinful usury

all profits made through loaning money, yet few realize the far-reaching and interesting development, commercially and historically, which resulted from this. Nowhere has its influence been greater or more lasting than on the business of the money lender. The Jews and the Pope, through his agents the Caorsini, were the only ones who dared to engage in the trade of money. In continental Europe, in the middle ages, the Church founded *montes-de-piété*, which were charitable pawn banks for the relief of the poor. These have gradually developed into government and municipal pawnshops.

By the sixteenth century laws were framed which looked upon pawnbroking as legal. By that time the value of money had come to be recognized. The profit for its use became interest and it became legal to charge a fair rate of interest. The author has given a rapid and interesting presentation of this history and of the subsequent legislation which followed it with a discussion of the charitable, economic and statistical aspects of the subject, not only in the different European countries but in the different states of the United States.

The second part is an exposition of the law of pawnbroking. First as to what a pawnbroker is, and then what are his rights and duties, and then the disposal and receiving stolen property.

A wide range of legal problems are explained and the law carefully and clearly set forth. A large number of authorities are collected from different jurisdictions and cited with discretion and discrimination.

Any one who has to deal with the daily problems of pawnbroking cannot fail to get assistance here on most of the questions which present themselves for solution. The police, the charity worker, the legislator, the lawyer, the

Court, and even the pawnbroker himself have in this volume a touchstone, which will elucidate the law of pawnbroking in all its manifold phases.

HUGHES' EQUITY IN PROCEDURE

Equity: Its Principles in Procedure, Codes and Practice Acts; the prescriptive constitution; limitations of legislative power. By William T. Hughes, author of "Contracts," "Procedure," and "Grounds and Rudiments of Law." Central Law Journal Co., St. Louis. Pp. 610 (index).

A CRITIC of Mr. Hughes' work has pungently said that he has forced the members of the legal profession into two classes, "Those who see in his writings the life, blood and spirit of the law, and those who see naught in them except the emanations of a disordered intellect." It is not difficult for any reader to choose his class. The author starts with the proposition that our law as written and taught exceeds human capacity and that our two hundred years' growth of American Law is a house founded in the sands with rains descending, floods coming and winds blowing. It is his ambitious purpose in this volume to uplift the legal profession from the ruts of blind and stupid conservatism — to guide it from the present "legal jungle" and demonstrate that "our books are wrong, that our schools are wrong, that our decisions are a 'legal jungle'; that the condition is 'deplorable,' 'appalling,' 'foreboding,' and that the 'future is calling' to those who can see and act."

Mr. Hughes offers a legal philosophy that will at least make all legal jungles broad open highways to its disciples.

The average practitioner is too busy and the law student too young to follow Mr. Hughes. Most of us will accept on faith and decline a controversy with the author that "the heart and vitals of the six subjects of law — procedure, equity, contract, crime, tort and con-

struction — are gathered and set in trilogies or three maxim groups, by which the entire body of the law is articulated. From and to these trilogies, centripetally and centrifugally, the argument proceeds; around them, as a centre, the entire body of the law is brought into review as a periphery."

Original and unique are the adjectives that best describe Mr. Hughes' effort. He has made an exhaustive collection of legal maxims by means of which he has developed and illustrated his theories. A vast number of cases and text-books are cited; common law, civil law, ancient and modern literature, seem to be at the author's command to demonstrate his point that "what ought to be of the Record must be proved by the Record and by the right of Record," and his more startling proposition that "the restoration of the Civil Law of Rome has come to the Western hemisphere and is now prevailing in American states."

SOME GOOD STORIES

Four Hundred Good Stories. Collected by Robert Rudd Whiting. Baker & Taylor Co., New York. Pp. 262 (index). (\$1.)

THIS book, made up wholly of entertaining anecdotes, may be relied on to furnish half an hour's good reading, and we know of one case where the reader was so pleased that he purchased another copy for a gift to a friend. The humor of the stories is to be classified as altogether of a wholesome and refreshing kind.

NOTES

"Legal Proceedings in England: A Short Guide to Practice and Procedure in the English Courts," is the title of a pamphlet written by J. S. Rubenstein, and issued by Rubenstein, Nash & Co., the London solicitors and correspondents. The matter of the pamphlet is

very well arranged. The booklet also includes a special cypher code admirably designed to facilitate communication regarding details of litigation.

Samuel O. Dunn, editorial director of the *Railway Age Gazette*, has published a booklet containing his views on "Current Railway Problems." The four articles deal with these subjects: "Valuation of Railways, with Especial Reference to the Physical Valuation in Minnesota"; "Shall Railway Profits be Limited?"; "Railway Rates and Railway Efficiency"; and "The New Long and Short Haul Law." The first two articles are reprinted from the *Journal of Political Economy*.

The volume containing the proceedings of the thirty-first annual meeting of the Ohio State Bar Association, held at Cedar Point, Ohio, July 6-8, 1910, contains the annual address, delivered by J. B. Burroughs, Esq., President of the Association, which dealt with general matters. Some attention was given to Workmen's Compensation at the meeting. No lengthy papers are printed. The volume mainly consists of the records of the meeting and of memorials of deceased members.

BOOKS RECEIVED

RECEIPT of the following new books is acknowledged:—

"Obscene" Literature and Constitutional Law: A Forensic Defense of Freedom of the Press. By Theodore Schroeder, legal counselor to the Medico-Legal Society of New York. Privately printed, New York. Pp. 439 (index).

Criminal Man, according to the classification of Cesare Lombroso. Briefly summarised by his daughter, Gina Lombroso Ferrero. With an introduction by Cesare Lombroso. G. P. Putnam's Sons, New York and London. Pp. 322 (appendix and index). (\$2 net.)

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.)

Legal Doctrine and Social Progress. By Frank Parsons, Ph.D., member of the Massachusetts bar, author of "Parsons' Morse on Banks and Banking," and other legal works, lecturer for many years in the Boston University Law School, author of "The Railways, the Trusts and the People," the "Heart of the Railroad Problem," "The Story of New Zealand," "The World's Best Books," etc. B. W. Huebach, New York. Pp. 219. (\$1.50 net.)

Index to Periodicals

Articles on Topics of Legal Science and Related Subjects

Administration of Justice. "The Unequal Application of the Criminal Law." By Gerard C. Brandon. 1 *Journal of Criminal Law and Criminology* 893 (Mar.).

"It is next to an impossibility to convict even upon the strongest evidence any white man of a crime of violence upon the person of a negro. Some jurors, if not the whole jury, in such cases will always be found ready to respond to that favorite plea of attorneys defending the guilty criminals, the plea that there is a 'reasonable doubt,' a plea which more often than any other produces travesties upon justice, and which for every innocent defendant protected turns loose on the public a thousand guilty criminals. I have even heard attorneys make the appeal to a jury that no white man should be punished for killing a negro. . . .

"And the converse is equally true, that it is next to an impossibility to acquit a negro of any crime of violence where a white man is concerned. In such cases in practical effect the whole theory of the law is reversed; the state does not have to prove guilt beyond a reasonable doubt; the accused has to prove his innocence beyond all doubts."

Administrative Law. "Administrative Exercise of the Police Power." By Thomas Reed Powell. 24 *Harvard Law Review* 333, 441 (Mar., Apr.).

Second and third (closing) instalments, continued from 24 *Harvard Law Review* 268 (23 *Green Bag* 198).

"The immunity of officials for acts done in enforcing the police power cannot yet be said to be established except where the interference is with personal liberty rather than with property, or where the interference with property falls short of destruction, or is not executed until the individual has been given an opportunity to take action himself and thus enabled by prompt action to secure judicial relief in some other proceeding. But it may reasonably be expected that the immunity will some day be extended to cases where the individual has been able as a matter of right to urge before the administration his claims to freedom from interference. At present, however, the courts seem still convinced that when property is destroyed in the exercise of the police power the owner must have somewhere in judicial proceedings the opportunity to offer evidence as to its condition. The Chancellor and the jury are regarded as best suited to determine finally the disputed question of fact. And thus indirectly the community is being forced to assume the burden of loss, thereby relieving both the owners who are without fault and the administra-

tive authorities who may make mistakes in the honest endeavor to perform the duties entrusted to them by law. The same solution of the vexed problem is suggested by the courts in the instances where the burden is now placed on the owner rather than on the administrative official."

See Due Process of Law.

Aliens. "The Immigration Act and Returning Resident Aliens." By Clement L. Bouvé. 59 *Univ. of Pa. Law Review* 359 (Mar.).

An analysis of decisions rendered since the Act of 1903, which have been far from uniform, bearing on the subjection of returning aliens to the immigration laws.

Children's Courts. See Juvenile Delinquency.

Citizenship. See Nationality.

Codification. "A Plea for Codification." By J. K. Tarachand. 13 *Bombay Law Reporter* 25 (Feb. 15).

"A common criticism on codes is that they get over-run with commentaries. So does the hull of a ship get over-run with barnacles; it is the duty of the master to have this seen to, when he gets into port. If codes are re-drawn at periodical intervals so as to embody the comments, they will always keep in shape. . . .

"Codification, in my opinion, should follow the Indian practice of codifying different parts of the law with relation to a general scheme and keeping constantly in view the general object of a complete code. It would doubtless need periodical revision and amendment to embody the comments. The requirements of a good code may be summed up in Macaulay's admirably formulated principle: 'Uniformity when you can have it, diversity when you must have it, but in all cases certainty.'"

See Uniformity of Law.

Compulsory Insurance. "Insurance Legislation: The Larger View." By William Harbutt Dawson. *Fortnightly Review*, v. 89, p. 534 (Mar.).

The writer considers the social benefits which have been obtained from compulsory insurance in Germany, and tries to emphasize the advantages of similar projects proposed by Mr. Lloyd George in England.

See Workmen's Compensation.

Contract. See Mistake, Tort.

Corporations. "Corporate Personality." By Arthur W. Machen, Jr. 24 *Harvard Law Review* 347 (Mar.).

Concluding instalment of an article concerned with the nature of the corporation, Mr. Machen himself favoring the entity as opposed to the fiction theory. (See 23 *Green Bag* 200.)

"In the former portion of this article, some of the leading foreign theories as to the nature of corporate personality, which in recent years have been promulgated by French, German, and Italian jurists with indefatigable industry and notable learning and brilliance, were briefly outlined; a short statement was made of the traditional doctrine of Anglo-American law upon the subject, and some of the inconsistencies of that doctrine were mentioned; and afterwards an examination of the subject on principle was begun. The result of this examination was the conclusion that a corporation, or indeed any group or succession of men — such as the Church, or an army, or a political party — is a real entity — something other than the mere sum of the members for the time being; but that this entity is actually impersonal, and is regarded as a person only by way of metaphor or by a fiction of law. We now proceed to test this theory that a corporation is a real but impersonal entity, which is personified by a legal fiction or metaphor, by applying it to various situations and questions which arise in corporation law. We shall then consider the use, if any, of the fiction of corporate personality, and certain classes of errors in its application. Lastly, the article will conclude with a practical suggestion as to the best method of treating and studying the doctrine of corporate personality. . . .

"The personification of the corporate entity serves many a useful purpose. If a code of corporation law could foresee and provide for every possible case to arise in the future, then indeed, as contended by M. de Vareilles-Sommières, it might dispense with personification of the corporate entity, and might legislate directly for every conceivable case. But, unfortunately, it is impossible thus to provide explicitly for every conceivable case. In spite of every precaution, the *casus omissus* will occur; and when it does, then the doctrine of corporate personality comes into play. For the law, recognizing its inability to provide specifically for every case that may arise, after laying down certain rules which make the personification of the corporate entity natural and almost inevitable, — limited liability, continuous succession, unified management, power to sue and be sued, and to take or convey property in the corporate name, — goes on to exact, in effect, that in all other cases, not expressly so provided for, the company shall be treated as if it were a person, or in other words shall be conceived of as a person, or shall be an imaginary or fictitious person. . . .

"Let us take an illustration of this use of the corporate fiction. The regulations of a certain company provide that the directors may exercise all the powers of the corporation except that no bonds shall be issued or mortgage executed without the prior approval of a shareholders' meeting. Nevertheless, without such approval, the directors issue bonds, and execute a mortgage to secure them. Are the bonds valid secured obligations of the company? In order to solve this problem, it is convenient to conceive of the corporation as a personality giving commands to the directors as his or its agents. We say, therefore, that we will regard

the bonds as issued by the directors as agents of the imaginary corporate personality in violation of restrictions upon their authority; and as third persons, dealing with the agents, could not justly be expected to see to compliance with such restrictions, therefore, applying the law of agency, we reach the conclusion that the bonds are valid in the hands of innocent third persons. We then drop the symbol of the corporate personality which has been useful to us in reaching our conclusion, and we express the net result in terms of the rights of actual persons by adjudging that the bondholders take the assets and the shareholders get nothing."

See Federal Incorporation, Interstate Commerce.

Criminal Procedure. "The Illinois Juror in the Trial of Criminal Cases." By Oliver A. Harker. 5 Illinois Law Review 468 (Mar.).

A singular provision of the Illinois criminal code, adopted in 1827, made juries in criminal cases judges of the law as well as of the facts. This extraordinary power, the exercise of which is fraught with great public danger, is best accounted for by certain historical reasons. It has made the judge in criminal trials in Illinois merely a presiding officer.

See Administration of Justice, Juvenile Delinquency.

Criminology. "The Need of New Criminological Classification." By A. Bullard. 1 *Journal of Criminal Law and Criminology* 907 (Mar.).

"We need at least a binominal terminology. We must distinguish the 'habitual thief' from the 'habitual counterfeiter,' the 'occasional robber' from the 'occasional murderer.' Even a tri-nominal nomenclature might be tried. The first term to indicate the motive — anger, lust, greed; the second term to give the nature of the crime — burglary, manslaughter, forgery; and the final term might describe the offender — born, habitual, occasional. Even a more complicated system would be better than our present slipshod indefiniteness.

"We must develop really distinct categories. Today we class 'seduction' as a crime against public morality. When the codes were first written, it probably was a crime of lust. In our modern city courts it more often has 'easy money' for a motive. At least half the murders which we class as crimes against the person — which are supposed to be crimes of anger — are in reality efforts to get money. Most of the assaults which take place about the polling booths at election times are on behalf of the party with the larger corruption fund. Until we recognize the intricate variety of crime, we will make little progress. It is puerile to look for the same causes back of sexual perversion and burglary. We have worked from the wrong end. We should base our categories — as every other science has done — on observed facts. We need a large body of data — a mass of recorded cases."

See Penology.

Deceit. See Tort.

Direct Government. "The Referendum vs. Representative Government." By Sir John Macdonell, C.B. *Contemporary Review*, v. 99, p. 303 (Mar.).

This eminent jurist shows that the proposal for the referendum signifies an utterly different thing in England, where there is no written Constitution, from what it would signify in a country like the United States, where it does not necessarily mean giving the electorate any power to change the fundamental law.

"The essence of the representative system, stated in simple words according with facts, is trust by the many in the worthiest available. It is this trust which gives to representative government what is best in aristocracy without its drawbacks. It is this trust, used on the whole honestly and wisely, which has so far confuted the oldest and most common accusations against democracy; and such hope as exists that the evils incident to democracy may be more and more avoided depends upon the continuance of a system under which the many repose confidence in a select few. And this element the Referendum and Initiative would weaken."

"People's Rule in Oregon, 1910." By George H. Haynes. 26 *Political Science Quarterly*, 32 (Mar.).

A review of the recent workings of the initiative and referendum in Oregon. The treatment is sympathetic, yet fair-minded. "As one of the writer's correspondents puts it: 'It is quite clear that popular legislation can be worked only by "simplifying" issues; and the further this goes, the more important becomes the real initiative of the irresponsible persons, whether patriots or schemers, who formulate the "simplified" issues.' On the whole, considering the immense complexity of the task which was set before them, it must be acknowledged that the Oregon voters stood the test remarkably well."

"Oregon, the Most Complete Democracy in the World." By Frederic C. Howe. *Hampton's*, v. 26, p. 459 (Apr.).

A sympathetic account of the initiative and referendum and other popular measures in Oregon.

"Arizona's Constitution — The Initiative, The Referendum, The Recall — Is the Constitution Republican in Form?" By D. C. Lewis. 72 *Central Law Journal* 169 (Mar.).

Discussing the question whether these features of the constitution answer to the requirements of a republican form of government, a negative solution being reached after examination of many authorities.

Due Process of Law. "The Doctrine of Due Process of Law before the Civil War." By Edward S. Corwin. 24 *Harvard Law Review* 366, 460 (Mar., Apr.).

"The most conspicuous fact about our constitutional law as it stood on the eve of the Civil

War was the practical approximation of the police power of the states to the sovereignty of the state legislatures within their respective constitutions, the purpose of which constitutions was universally held to be not to grant power, but to organize and limit powers which were otherwise plenary. But while this was the general rule, due in part to the temporary eclipse of the judiciary and in part to the dominance of the notion of States Rights, yet there survived a number of restrictive principles now in a state of suspended animation, so to speak, but easily susceptible of resuscitation. And one of these was the doctrine of 'due process of law,' whose title to continued vitality may be put upon the following grounds: First, the availability imparted to the Due Process of Law clause by the decision in *Murray v. Hoboken Land and Improvement Co.*, as a constitutional buffer in connection with summary and administrative proceedings, a function hitherto subserved almost entirely by the Trial by Jury clause; secondly, the steady extension, even among courts the most attached to the doctrine of legislative sovereignty, of the notion of 'law of the land' and 'due process of law' as equivalent to 'general law' and as therefore inhibiting 'special legislation'; thirdly, the equivalence established in *Taylor v. Porter* between 'due process of law' and 'due compensation' in questions of eminent domain; fourthly, the growing practice, for example, on the part of critics of the *Dred Scott* decision, to shift construction from the phrase 'due process of law,' to the terms 'liberty' and 'property' of the constitutional clause; fifthly, the tendency of these terms, as shown in Ormond, J.'s opinion in the *Dorsey* case and in Hubbard, J.'s opinion in the *Wynehamer* case, to take on a progressively broader signification; sixthly, the fact that the Massachusetts Supreme Court, owing to the formula by which power is vested by the Massachusetts constitution in the legislature to pass 'all manner of wholesome and reasonable' laws, had never ceased to describe the police power, even when according it the broadest possible field of operation, as a power of 'reasonable' legislation; seventhly, the fact that the courts of New York had never surrendered the notion of legislative power as inherently limited; eighthly, the fact that no court had *eo nomine* cast overboard the doctrine of vested rights; ninthly, the fact that all courts generally described the police power, though without any apparent intention as yet of making such description a judicially enforceable limitation, in terms of its historical applications; tenthly, and lastly, the fact that similarly the police power was often grounded upon the common-law maxim *sic utere tuo ut alienum non laedas*, a definition which like the historical definition bore with it the possible implication that the police power was a peculiar kind of power, exercisable constitutionally only for peculiar ends.

"But now in this enumeration we have included many, if not all, of the essential elements of the modern flexible doctrine of due process of law. True, the proper admixture of these elements had not as yet in 1860 been suggested, but that it would be in the course of time,

with the legislatures pressing upon the courts from one side and private interests from the other, who could doubt?"

See Administrative Law.

Elections. See Parliamentary Reform.

Employers' Liability. See Workmen's Compensation.

Federal and State Powers. See Interstate Commerce, Federal Incorporation.

Federal Incorporation. "Federal Incorporation; the Power of Congress to Charter Interstate Commerce Corporations." By Sidney D. Moore Hudson. 28 *Political Science Quarterly* 63 (Mar.).

A very able, and in fact authoritative argument, in support of the legality of federal incorporation, but the writer is possibly somewhat radical in maintaining that manufacturing as well as transportation companies are within the scope of the measure.

General Jurisprudence. See Corporations.

Government. "A National Constitutional Convention." By Edward L. Andrews. *Forum*, v. 45, p. 385 (Apr.).

The author proposes a convention to remodel the federal Constitution. He takes up one by one the reforms to which a new Constitution should give effect: broadening of the federal power with respect to commerce, increased power as regards banking, enlarged federal control over forests and irrigation, extended powers of Congress over copyrights and patents, the abolition of the electoral college, national supervision of education, etc.

"Original jurisdiction in the Supreme Court over constitutional questions would obviate the uncertainties and delays now incident to the progress of such controversies through the inferior courts. They are ultimately submitted to the tribunal of last resort, and indeed this result is now sought through fictitious proceedings. When John Marshall took his seat there were only twelve cases on the docket; now they are numbered by hundreds. This class of fundamental questions involves consequences too pervading to admit of the ordinary tardiness of adjudication."

See Administrative Law, Direct Government, Federal Incorporation, Interstate Commerce, Local Government, Nationality, Parliamentary Reform.

Immigration. "Needed — A Domestic Immigration Policy." By Frances A. Kellor. *North American Review*, v. 193, p. 661 (Apr.).

"It is conceivable that the time will come when a part of the immigration policy of the states will be the establishment of schools of citizenship with regular and graded courses in both English and civics not only to meet naturalization requirements, but to meet industrial requirements. There is no reason why the work of the courts should not be dignified and simplified by the acceptance of certificates from

such established schools under Boards of Education, attesting qualifications for the granting of the various papers. . . .

"The great need is that the Government representatives — federal and state — should get together and enumerate clearly the principles of a domestic policy and then set about patiently and courageously to work it out, each state according to its needs."

See Aliens.

International Peace. "The Rise of the Peace Movement." By James L. Tryon. 20 *Yale Law Journal* 358 (Mar.).

The second of a series of articles by Dr. Tryon, covering the recent history of the movement, exclusive of the work of the Hague Conferences.

Interstate Commerce. "The Exclusive Power of Congress over Interstate Commerce." By Charles W. Needham. 11 *Columbia Law Review* 251 (Mar.).

"In the great opinion of Chief Justice Marshall [*Gibbons v. Ogden*], he approaches the question with a logic which we may sincerely regret was not carried to a conclusion and applied to the solution of this problem, and

"In discussing the question, whether this power is still in the states, in the case under consideration, we may dismiss from it the inquiry, whether it is surrendered by the mere grant to Congress, or is retained until Congress has exercised the power."

"This fatal suggestion has bred a disturbing progeny of *obiter dicta* and in some instances, we believe, unsound law."

After reviewing the authorities, the writer considers that the true rule of delimitation should be the following: "If the commerce is foreign or interstate or with the Indian tribes, then the absolute and exclusive sovereignty over it is in the federal government. If the commerce is intrastate, then the state is the absolute and exclusive sovereign over it. The police power is solely in the state and may be exercised over all commerce within the state. In the exercise of these particular powers either government may reasonably burden, but not destroy, the commerce of the other. Such burdens enforced by a state in the exercise of its exclusive powers will have to be borne by interstate commerce until Congress regulates the particular matter."

See Federal Incorporation.

Jurisdiction. See Practice.

Juvenile Delinquency. "The Future of the Children's Court." By Franklin Chase Hoyt, Judge of the Court of Special Sessions, New York City. *Editorial Review*, v. 4, p. 227 (Mar.).

"The ultimate future of the Court is, as I have said, beyond our understanding. But if we may be permitted to picture to ourselves the semblance of the Court as it will exist in the years that are to come, it might resemble this: A Court of great responsibility and of many activities, which will become an institution not

only for the suppression of anti-social conduct on the part of the child, but for the study of the child's welfare as well. Its principles will be based on scientific investigation, and its methods will be such as to insure the attainment of the most effective results. Its movements will be actuated by a desire to prevent and eradicate the causes that make for sin, neglect and misery among children. At the head of it there will be a judge, who, like the trained physician or surgeon, will be able to discover the source of the trouble and prescribe the remedy. Under him there will be assistants in all branches of the work, who will make a study of conditions of child life in all its phases throughout the city. The Court will not lack for officers who will develop its probation system to a degree of excellence now unthought of, nor for experts, both medical and otherwise, to conduct the work of research in regard to the physical and mental condition of the child. Its records will contain an analytical and a comprehensive study of all the varied cases that come before it, and to them will turn the criminologists and the sociologists of the future in the first instance for information both as to the source of crime and as to the means of prevention. Then, as its work broadens, the Court can tell the world of social conditions that breed crime and misery, it can point out the individuals, be they high or low, responsible for the existence of these into the reason for the source and spread of epidemics and contagions which have wasted the human race, and are seeking to eradicate the causes that make their existence possible. The farmer, too, has discarded his old hit or miss method of trusting to a bountiful Providence for the fruition of his crops and by scientific methods is learning to protect himself against evils that formerly brought him disaster."

Labor and Capital. "The Respective Rights of Capital and Labor in Strikes." By Francis E. Baker, United States Circuit Judge for the seventh circuit. 5 *Illinois Law Review* 453 (Mar.).

There is a lot of meat in this article, one of the most suggestive of the month. See p. 243 *supra*.

Legal Classification. "The Subject Classification of Reported Cases." By Hon. Charles C. Lester. 20 *Yale Law Journal* 372 (Mar.).

"One of the first things to be noted in considering the topics to which cases are referred by digesters and indexers is that these topics cannot with strict propriety be called *legal* subjects. They are not coterminous with definite legal principles. They are concrete rather than abstract and usually comprehend the application of a multitude of legal principles to a group of human affairs more or less closely connected through some particular relation between individuals growing out of contracts, or domestic, political or public institutions. We shall find, accordingly, the various occupations, professions and employments of men treated as topics."

Legal Education. "The Relation of Eco-

nomics to the Law." By Prof. Frank J. Goodnow. *Survey*, v. 25, p. 934 (Mar. 4).

"Unfortunate as it is, it is none the less true that our ordinary legal literature as a general thing treats economic history and conditions with contempt, if it treats them at all, and is still quite generally permeated with such notions of eternal principles of justice as are exemplified by the doctrines of natural rights and social contract. There is perhaps no subject whose distinctive literature has been less influenced by the evolutionary idea than the law. Eternal principles of universal application are, as a rule, still the basis of most legal treatises and the reliance of most lawyers and judges. . . .

"It is therefore peculiarly necessary in this country, and at this time, that lawyers and judges should have an extensive knowledge of economic conditions."

Legal History. "The Judicial Reforms of the Reign of Henry II." By Richard Hudson. 9 *Michigan Law Review* 385 (Mar.).

An account of the momentous developments of this significant reign.

"Seldom, if ever, has there been a period more fertile in judicial reform than the latter half of the twelfth century, a period which witnessed the decay of the public local and of the feudal courts, the growth at their expense of the royal jurisdiction, the establishment of a central court represented periodically in the shires by justices on circuit, and the introduction of the accusing jury and of the trial jury in civil cases. In the countries of continental Europe the conflict between the laws and customs of different localities favored the reception of Roman law. Such might have been the case in England had not the concentration of justice in the king's court, the great judicial achievement of the reign of Henry II, prepared the way for the unity of English law. As a result of the development here described, English law became the common law."

See Due Process of Law.

Local Government. "The Tendency of Municipal Government in the United States." By Hon. George B. McClellan. *Atlantic*, v. 107, p. 433 (Apr.).

The cost of municipal government in the United States does not compare so unfavorably with its cost in Europe as has been supposed, says Mr. McClellan. The expense is attributable chiefly to the collectivist movement which leads cities to incur great burdens of the maintenance of numerous paternalistic undertakings. Whether this movement toward public ownership and operation of things formerly left to individual enterprise is gaining headway or is likely to be followed soon by an individualistic reaction, he thinks time alone can show.

"The German and the American City." By Frederic C. Howe. *Scribner's*, v. 49, p. 485 (Apr.).

In this interesting article Mr. Howe pays special attention to methods of government and taxation. "The German city is a part of

the traditions, the sense of the Fatherland, the universal efficiency, the far-sighted outlook, the paternalism vitalized by patriotism of the German people. The American city, on the other hand, has no traditions. There is no sense of responsibility. It is efficient only in spots." According to Mr. Howe, "Germany spends more generously than any other nation for municipal purposes."

Mandamus. "The Use of Mandamus to Compel Educational Institutions to Confer Degrees." By Dean Oliver A. Harker, College of Law, University of Illinois. 20 *Yale Law Journal* 341 (Mar.).

"I desire to emphasize the thought that in all such applications for this extraordinary writ the courts will avoid much embarrassment by standing close to the landmark, established early in the development of the remedy, that in matters requiring the exercise of official discretion the courts will only compel the official to act and not undertake to control his judgment."

Maritime Law. "For and Against the Declaration of London." I, by J. Wilson Potter. II, by Rear-Admiral Hon. V. A. Montagu. *Nineteenth Century*, v. 59, pp. 402, 414 (Mar.).

These titles are here inserted to enable interested readers to follow the discussion of this important subject.

"A Defense of the Declaration of London." By Excubitor. *Fortnightly Review*, v. 89, p. 405 (Mar.).

Why waste time on anonymous articles?

Misrepresentation. See Tort.

Mistake. "Mistake in the Formation and Performance of a Contract." By Roland R. Foulke. 11 *Columbia Law Review* 197 (Mar.).

The first instalment of a detailed discussion of the topic.

See Tort.

Nationality. "American Citizenship." By Dudley O. McGovney. 11 *Columbia Law Review* 231 (Mar.).

An exposition of the American law governing the status of citizenship. The first of two instalments.

Negotiable Instruments Act. See Uniformity of Laws.

Parliamentary Reform. "Barriers against Democracy in the British Electoral System." By Edward Porritt. 26 *Political Science Quarterly* 1 (Mar.).

A luminous discussion of the four anomalies in the British electoral system: Plural voting, university representation, non-payment of members of Parliament and the official expenses thrown upon candidates for the House of Commons. The treatment is largely historical.

Penology. "The State's Guardianship over Criminals." By Judge Stephen H. Allen. 1 *Journal of Criminal Law and Criminology* 899 (Mar.).

"The modern civilized state recognizes its duty to care for the insane, imbeciles, drunkards and paupers and by doing so to accomplish the double purpose of protecting both society from injury and the unfortunate members of these classes, themselves, from the suffering which naturally results from their defects and weaknesses. The motives of the state in caring for such persons are purely benevolent and the sole purpose is benefit to all concerned. A materially different attitude, however, is maintained toward moral defectives who are usually regarded as enemies rather than wards of the state. Is there such a radical difference between moral and physical deficiency as to warrant this difference of sentiment when dealing with criminals? . . .

"When a trial is for the purpose of enabling the court to 'adjudicate criminal cases in accord with the social and physical needs of the offender, which in the long run is directly equivalent to the best financial and moral protection of society' (report of Committee A, American Institute of Criminal Law and Criminology), we shall have started on the road to the permanent elimination of crime. When the state intelligently and in a spirit of true kindness (not weak sympathy), performs its full duty, most of those who are now criminals will become useful citizens, and the rest will be permanently restrained from following their criminal specialties."

"Setting the Criminal Straight." By Frank Marshall White. *World's Work*, v. 21, p. 14254 (Apr.).

This writer says that the history of New York's prison system is of interest as showing the general trend in prison methods, since "the United States has led the world in these reforms and New York has led the other forty-seven states." The only serious objection to the article is its brevity.

"Anglo-American Philosophies of Penal Law: III, The Ethics of Punishment," by Herbert Spencer. 1 *Journal of Criminal Law and Criminology* 862 (Mar.).

This essay, under the title, "Prison Ethics," was originally published in the British Quarterly Review, July, 1860; it is sometimes and better known by the above title. It is here reprinted from the Library Edition (London: Williams & Norgate, 1901) of Spencer's "Essays: Scientific, Political, and Speculative," v. III, p. 152. Portions describing certain prison systems have been omitted.

Personal Names. "Proper Names." By Frederick Dwight. 20 *Yale Law Journal* 387 (Mar.).

The writer does not question the soundness of the decision of Judge Vann in *Smith v. U. S. Casualty Co.* (22 *Green Bag* 282), but favors a limitation of the right to change one's name, namely:—

"First — That a man be prohibited from divesting himself of his baptismal name without making the matter one of public record..

"Secondly — That he be not allowed to assume a name already borne by others, but be compelled to coin one, by translation, as the German Schönberg was changed to the French Belmont, or by an arbitrary assemblage of letters as cable code names are devised. Possibly it would be practicable for the state to establish a table of artificial names, any one of which might be selected by an aspirant for euphony."

Police Power. See Administrative Law.

Practice. "Preserving a Special Appearance." By Edson R. Sunderland. 9 *Michigan Law Review* 396 (Mar.).

"Conceding the right of a defendant to enter a special appearance for the sole purpose of objecting to the jurisdiction of the court over his person, a most interesting and difficult question arises when the objection is overruled. What is the defendant to do in such event? How can he preserve his special appearance for review?"

"Hardly another question of practice can be found which has given rise to a more hopeless conflict of authority than this. One line of cases holds that the defendant must choose between two courses: either he must refuse to proceed further and withdraw from the case, allow judgment to go against him by default, and then attempt to have that judgment vacated on the ground of want of jurisdiction; or, abandon his special appearance entirely, appear generally and try the case on its merits. Another line of cases holds that he is forced to no such harsh choice, but may note an exception to the order overruling his objection to the jurisdiction, plead to the merits, and on appeal or error may have the benefit of his exception on the jurisdictional question, if he desires to avail himself of it. . . .

"The question is a clean-cut one. Either pleading over and going to trial is a waiver, or is *not* a waiver, of the jurisdictional objection. Reasons may be found in support of each doctrine and the authorities are quite evenly divided."

The law as declared in each state and in the federal courts is then stated.

"Viewing the question in the light of both reason and authority, it seems clear that the better rule is that which holds that after an objection to the jurisdiction of the court over the person of the defendant has been made and overruled, an exception will entitle the defendant to preserve his objection for review, notwithstanding his subsequent pleading to the merits."

See *Mandamus*.

Procedure. "Needed Reforms in Criminal Law and Procedure." By William P. Lawlor. 1 *Journal of Criminal Law and Criminology* 877 (Mar.).

Urging a number of reforms. For example, the people, equally with the accused, should be entitled to a change of venue upon the proper statutory showing, the rule precluding judges from advising the jury on questions of fact

should be abolished, jurors should not be disqualified merely for the formation or expression of opinion, lengthy instructions should be prohibited, there should be fewer statutory exemptions from jury service, attempts by newspapers to corrupt public opinion should be made criminal, etc.

"On the Bill to Make Hiram Gilbert the Pontifex Maximus of Illinois." Editorial. By John H. Wigmore. 5 *Illinois Law Review* 489 (Mar.).

In this editorial Professor Wigmore, with unusual fervor, speaks his mind regarding the proposed two-thousand-section monstrosity which it is proposed to enact into law in Illinois.

"The time has come to speak out plainly our personal views. Senate Bill No. 30 and House Bill No. 5, for an Act in relation to Courts, should not pass. The reasons are simple and few; but they all resolve themselves into this, that it is a *bill to make Hiram T. Gilbert tomorrow the Pontifex Maximus of the State of Illinois*, and that no single person, however honest and capable, should now or ever be elevated to that position."

Professor Wigmore lays down the following propositions, the soundness of which is unquestionable:—

"1. Any code of procedure for this state should be the work of many representative experts' deliberations, not the lubrication of a single mind.

"2. Any code of procedure should be fully and openly debated and published in all details before being enacted.

"3. Any code of procedure should be short, leaving details to be flexible and easily changed by rule of court as experience shows it necessary."

The following is this writer's notion of a model code of procedure—a notion which is shared by many leaders of the legal profession:—

"A short statute of fundamental principles, fully sanctioned by the legislature, guaranteeing the general course of procedure; and then a set of detailed practice rules, drafted by a commission of progressive experts, sanctioned by the Supreme Court, and by that court also amendable in any respect whenever experience shows that it can be improved."

"The Courts." By Frank J. Loesch. 5 *Illinois Law Review* 476 (Mar.).

Discussing some of the barbarities—the author does not use so strong a word—of Illinois procedure.

"Every lawyer will bear me out in my statement that business men fairly detest appearing in court in a jury case, not by reason of unwillingness to testify but by reason of the loss of time in awaiting the call of the case, the slow empanelling of the jury and the difficulty of making proof in accordance with rules of evidence which should be obsolete, and over constant technical objections of facts, accepted offhand as facts in every-day business transactions of the greatest magnitude. The business man risks his money, his business and his reputation on published statements, reports and conclusions, which are

the work of many men perhaps widely separated. The courts require the often impossible task of proving every step of such a process, with the result that an otherwise good case cannot be established in court."

"Harmless Error." By Judge Needham C. Collier. *72 Central Law Journal* 151 (Mar. 3).

Urging that the bill advocated by the American Bar Association should provide, not that all error be eliminated from consideration in an appellate court except that which "has resulted in a miscarriage of justice," but —

"That on an appeal the respondent's right to a jury trial on questions of fact should never be impaired without his consent, and, if error which militated against appellant's right to a fair jury trial is found in the record, the court should nevertheless not remand without respondent being first allowed to demand that the appellate court render the verdict it thinks the jury should have rendered."

"The Administration of Justice — Its Speeding and Cheapening." By William Howard Taft. *72 Central Law Journal* 191 (Mar. 17).

A reprint of his argument made some time ago before the Virginia Bar Association.

See Criminal Procedure.

Referendum. See Direct Government.

Tort. "Liability for Honest Misrepresentation." By Prof. Samuel Williston. *24 Harvard Law Review* 415 (Apr.).

One of the most notable articles of the month, marked by great clearness of analysis — it will repay a careful reading.

"The real issue, . . . constantly obscured by the terminology of the subject, . . . is no less than this: When a defendant has induced another to act by representations false in fact though not dishonestly made, and damage has directly resulted from the action taken, who should bear the loss?

"In considering which doctrine is the better, consideration should be given chiefly to two things. First: logical consistency with itself in all parts of the law governing misrepresentation. Secondly: the inherent justice of the rule proposed. That the law of misrepresentation as laid down in *Derry v. Peek* is hopelessly inconsistent with the law governing misrepresentation when relied on as the basis of warranty or estoppel, can hardly be denied. Adherence to what may be regarded as established English doctrine in deceit, estoppel and warranty is absolutely illogical, and with simplified pleading becomes nearly, if not quite, impossible. It is a just ground of reproach to the law if a harmonious doctrine cannot be developed.

"The inherent justice of the severer rule of liability which in some cases at least holds a speaker liable for damages for false representations, though his intentions were innocent and his statements honestly intended, is equally clear. However honest his state of mind, he has induced another to act, and damage has been thereby caused. If it be added that the plaintiff had just reason to attribute to the defendant

accurate knowledge of what he was talking about, and the statement related to a matter of business in regard to which action was to be expected, every moral reason exists for holding the defendant liable. . . .

"There seems no reason whatever for not holding a defendant for the natural consequences of his actions when the question involved relates to tort as well as when it relates to contract. In the formation of contracts the parties are rightly held to the natural meaning of what they say. It can only be the idea, induced by the words 'fraud' and 'deceit,' that conscious dishonesty is necessary which can have brought about a different result in an action of tort."

"The Rule in *Rylands v. Fletcher*." By Francis H. Bohlen. *59 Univ. of Pa. Law Review* 373 (Mar.).

In this, the second of three instalments, the rule in *Rylands v. Fletcher* is discussed particularly with reference to the subject of riparian rights, and differences between the policy of English and American jurisprudence are pointed out.

Uniformity of Law. "The Relation of Judicial Procedure to Uniformity of Law." By Thomas W. Shelton. *Editorial Review*, v. 4, p. 249 (Mar.).

"We must go further than making the laws uniform. Judicial procedure must also be uniform, simple, cheap and expeditious. . . .

"President Amasa M. Eaton, of Rhode Island, reported to the Commissioners on Uniform State Laws at Detroit in August, 1909, that though this statute [the Negotiable Instruments Act] had been adopted in thirty-eight states and territories and in the District of Columbia, some of the courts were destroying its purpose by lack of uniformity in decision. These courts had simply failed to recognize and permit to become operative the announced cooperation of thirty-eight Legislatures in enacting identical laws in matters of common interest to commerce, finance and society. . . .

"So, if it be necessary for uniformity, why can not the judges or the presiding judges, of the different state appellate courts exchange views when a new uniform statute is enacted, and if they fail to agree upon its meaning, let the majority rule? A Congress of Courts, I venture to suggest, is within the spirit of uniformity. . . .

"It is not too much to say that upon uniform judicial procedure and decision largely depends the fostering of closer political, commercial and social relations among the states. The best practitioner in Virginia today is lost in a New York or a North Carolina Court, and *vice versa*. This is as devoid of reason as it is unneighborly. There should be no more excuse than for speaking differing languages.

"But who shall perform this important work of preparing a fixed system and permanent rules for the regulation of judicial procedure? There is but one answer — the highest Appellate Court in the United States and of the several states, until all the states shall adopt the federal plan. The bar stands ready to render such practical assistance as may be found convenient

and may be requested of it. There abides in the people of this country a sublime faith in their highest tribunal, that makes of submission the noblest attribute of national character. "In reverence is the chief joy and power of life," says Ruskin. Nothing but the solemn voice of this great source of justice will subdue the belligerent cocksureness that may be expected, or solidify public opinion to the point of complete acquiescence and forceful support."

Waters. See Tort.

Workmen's Compensation. "The Compensation Commissions." By P. Tecumseh Sherman. *Survey*, v. 25, p. 949 (Mar. 4).

A valuable account of the work that has been performed in seven states by commissions which have been considering the subject of workmen's compensation, and a comparative study of their official recommendations. It should be helpful in aiding crystalization of sentiment in favor of some sound program, which might properly serve as the basis for a model uniform statute.

"The Need of Reform in our Employers' Liability Laws." By Justice Matthew J. Kane, Supreme Court of Oklahoma. *20 Yale Law Journal* 353 (Mar.).

The statement that, in Germany, "in 1884 the burden of responsibility for injuries to workmen was imposed upon all employers of labor," perhaps requires some qualification, as the German system, unlike those of England and France, is contributory, the employee bearing a small part at least of the burden.

Miscellaneous Articles of Interest to the Legal Profession

Express Monopoly. "The Great Express Monopoly." By Albert W. Atwood. *American*, v. 71, p. 758 (Apr.).

Treating of the connection of the family of the late Senator Platt with the United States Express Company and allied properties, with much attention to the influence of Kuhn, Loeb & Co. in the affair of the Wells Fargo company.

"Why Express Rates Must Come Down." By C. M. Keys. *World's Work*, v. 21, p. 14242 (Apr.).

By the elimination of waste and extravagance, Mr. Keys contends, the people of the United States could be saved about \$60,000,000 a year in express charges.

Extravagant Living. "The City of Dreadful Debt." By Roy L. McCardell. *Hampton's*, v. 26, p. 449 (Apr.).

An interesting article which is concerned with extravagance in New York city, and throws some light on the manner in which debtors avail themselves of the technicalities of the law to evade actions brought by creditors.

Industrial Co-operation. "Of Peace and Good Will." By Paul U. Kellogg. *American*, v. 71, p. 739 (Apr.).

A gift of ten millions, such as that made by Mr. Carnegie to advance the cause of international peace, could immeasurably benefit the human side of the steel industry. "Mr. Carnegie has said that it is a disgrace for a man to die rich. We would forgive him that, were he to live a month in poverty in the Monongahela mill towns."

Interpretation of Statutes. "Nullifying the Law by Judicial Interpretation." By Prof. Harrison B. Smalley, University of Michigan. *Atlantic*, v. 107, p. 452 (Apr.).

This writer considers the evils of judicial interpretation of statutes very great, the courts frequently frustrating the will of the people. The remedy he proposes is an extraordinary one. He would have some authority set up to interpret statutes immediately after their passage — and it should be an authority *outside the legal profession* — an *administrative* tribunal of some sort(!).

Italy. "The Industrial Progress of Italy." By Ernesto Nathan, Mayor of Rome. *Century*, v. 81, p. 876 (Apr.).

The writer believes Italy to be in a condition of economic vigor. It is passing through an industrial awakening that promises much for the future.

Log-rolling Appropriations. "How a Business Man would Run the Government." By Arthur Wallace Dunn. *World's Work*, v. 21, p. 14256 (Apr.).

The late Congressman Brownlow of Tennessee is made the butt of most of the criticisms in this article.

Mexico. "Underlying Causes of the Mexican Insurrection." By James Creelman. *North American Review*, v. 193, p. 596 (Apr.).

"Notwithstanding the splendid material results of President Diaz's administration and the prolonged peace which has accompanied it, the government remains practically an autocracy. The free-voting democracy contemplated by the Constitution does not exist. The elections have come to be mere formal ratifications of the President's will. The twenty-seven states, which in the eyes of the Constitution are sovereign in their own affairs, have continued to be nothing more than subdivisions of the national Government and the governors virtually deputies of the President. The national Congress is a slightly disguised dependency of the executive power. The Supreme Court of Justice itself is greatly influenced by the President's known wishes in matters involving the safety or credit of the nation, especially in its relations to foreign governments. . . .

"The result of the long stretch of absolute government in the republic has been to breed bureaucracy and to promote development at the centre of the country while its extremities are neglected. The magnificent and costly public institutions and the orderly official discipline of the Valley of Mexico offer a startling contrast

to the petty tyrannies and squalor of distant states."

Militarism. "Why not?" By Ellwood Hendrick. *Atlantic*, v. 107, p. 568 (Apr.).

The writer appears to accept at least a portion of the program of international arbitration, for he favors the neutralization of private property and an international police force. He is not, however, impelled by any perception of the evils of militarism to write as he does, for he is found the next moment advocating the international duel in its most savage form, an umpired combat between picked contestants, subject to a special code of honor, rendering the present standing armies unnecessary.

Mormonism. "The Trail of the Viper." By Alfred Henry Lewis. *Cosmopolitan*, v. 50, p. 693 (Apr.).

This second article deals with the intrusion of Mormonism into national politics, Senator Reed Smoot coming in for a large share of attention.

Party Politics. "The Problem, the Solution, and the Man." By George Harvey. *North American Review*, v. 193, p. 481 (Apr.).

"The vital problem now confronting the people of the United States, the problem involving the perpetuity of free institutions, the problem which transcends all economic, political and moral issues, is how to make equitable distribution of the combined earnings of labor and capital without rending the fabric of popular government. . . .

"That is the problem. Where lies the solution? Primarily in the spirit with which the subject is approached. Not independence, but interdependence, has become the law of life in this country. Co-operation, a drawing together in frank and unselfish tolerance of one another's opinions, is positively essential to the settlement of every great question. And this concurrence must be general, must come not only from all groups, but from all sections. Invariably and naturally the older and richer community is the more conservative, the more reluctant to accept innovation, the more obtuse in recognizing either the equities or necessities of change."

"Champ Clark vs. Joe Cannon." By Edward Marshall. "Joe Cannon vs. Champ Clark." By Henry Mann. *Columbian*, v. 4, pp. 5, 17 (Apr.).

Interviews with Mr. Clark and Mr. Cannon, showing their opposed views on leading political issues, especially the tariff.

"Mr. Roosevelt, Please Answer." By M. E. Stone, Jr. *Metropolitan*, v. 33, p. 722 (Mar.).

Seeking shortcomings in Mr. Roosevelt's record during his first term as President.

Porto Rico. "Porto Rico in Transition." By Alfred Bishop Mason. *Century*, v. 81, p. 870 (Apr.).

This description of trade conditions in "our Emerald Isle" is thoroughly readable. Porto Rico, thinks the writer, should never become a state in the Union. "It would be a negro and poor white state."

Tariff (Canadian Reciprocity). "American Affairs." By A. Maurice Low. (337) *National Review*, v. 57, p. 110 (Mar.).

"Mr. Taft offers the country reciprocity as one of the ways to reduce living expenses by drawing on the cheaper market of Canada for agricultural supplies, and immediately the Insurgents protest that reciprocity will ruin their constituents, who are chiefly engaged in agriculture, and this the country regards as confirmation of the conviction generally held that the Insurgents were not sincere and were animated by personal ambitions and jealousies when they denounced the Tariff Bill and Mr. Taft for having signed it."

Taxation. "The Things that are Cæsar's, III." By Albert Jay Nock. *American*, v. 71, p. 714 (Apr.).

Dealing in graphic language with the shifting of taxes to the consumer.

Water Rights. "The Law of the Desert Garden." By Randall R. Howard. *Metropolitan*, v. 33, p. 681 (Mar.).

Some of the states, we are told, have good laws, but the subject of water rights in the West is in a highly unsatisfactory condition.

Woman Suffrage. "The Women Did It' in Colorado." By Rheta Childe Dorr. *Hampton's*, v. 26, p. 426 (Apr.).

A sketch of the way the women voted in the last election, proving, the author thinks, that the women of Colorado do not need any help from men to show them how to make intelligent use of the franchise.

Latest Important Cases

The New York Workmen's Compensation Act Declared Unconstitutional

Workmen's Compensation. Employer Cannot be Made Liable in Absence of Fault — Due Process of Law — Limits of the Police Power N. Y.

IN *Ives v. South Buffalo Railway Company*,¹ decided March 24, the New York Court of Appeals unanimously held the compulsory workmen's compensation act of New York (article 14a of the Labor Law, being chapter 674, Laws of 1910) unconstitutional.

The statute in question applies to specified dangerous employments, and gives the employee the right to recover a fixed scale of compensation for all personal injuries, without proof of negligence on the part of the employer, which are not caused "in whole or in part by the serious and wilful misconduct of the workman."

Werner, J., who wrote the opinion, began by giving a brief review of the circumstances under which the Wainwright law came to be enacted, and of some of the arguments of the Wainwright commission. "Under our form of government, however, courts must regard all economic, philosophical and moral theories, attractive and desirable though they may be, as subordinate to the primary question whether they can be moulded into statutes without infringing upon the letter or spirit of our written constitutions."

The Court then said that an innova-

tion making the employer's fault no longer an element of the employee's right of action carried with it the abrogation of the doctrines of common employment, contributory negligence and assumption of risks. "There can be no doubt that the first two of these are subjects clearly and fully within the scope of legislative power. . . . These doctrines, for they are nothing more, may be regulated or even abolished."² This is true to a limited extent as to the assumption of risk by the employee. In the Labor Law and the Employers' Liability Act, which define the risks assumed by the employee, there are many provisions which cast upon the employer a great variety of duties and burdens unknown to the common law. These can doubtless be still further multiplied and extended to the point where they deprive the employer of rights guaranteed to him by our Constitutions, and there, of course, they must stop."

Constitutional objections to the act based on limitations of the reserved power to alter or amend corporate charters, the alleged unfair classification of employments, right to jury trial, were then considered, and brushed aside as either not tenable or not

¹ Reported in 45 *New York Law Journal* 23, 41 (Apr. 3-4), 43 *Chicago Legal News* 273 (Apr. 8).

² While the modification of the contributory negligence rule is within the legislative power, its complete abolition would carry with it such a far-reaching transformation of the law of negligence, and would so alter the situation of existing rights of action, that it may be questioned whether the Court realized the full import of this *dictum*. — *Ed.*

essential to the problem before the Court. A lengthy discussion of "due process of law" followed, the Court concluding that the Act did not meet this test, and that the question of constitutionality was completely disposed of under this head.

"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 omitted no legal duty and 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. In its final and simple analysis, that is taking the property of A and giving it to B, and that cannot be done under our Constitutions. . . .

"The state has complete control over the remedies which it offers to suitors in its courts even to the point of making them applicable to right or equities already in existence. It may change the common law and the statutes so as to create duties and liabilities which never existed before. . . . The power of the state to make such changes in methods of procedure and in substantive law is clearly recognized. (*Hurtado v. California*, 110 U. S. 516; *Hayes v. Missouri*, 120 U. S. 68; *Missouri Pac. Railway Co. v. Mackey*, 127 U. S. 205;

Hallinger v. Davis, 146 U. S. 314; *Matter of Kemmler*, 136 U. S. 436; *Duncan v. Missouri*, 152 U. S. 377.) We repeat, however, that this power must be exercised within the constitutional limitations which prescribed the law of the land. 'Due process of law' is process due according to the law of the land, and the phrase as used in the fourteenth amendment of the federal Constitution with reference to the power of the states means the general law of the several states as fixed or guaranteed by their Constitutions." *

Declaring its belief that the advocates of the act were entitled to the benefit of every possible argument adducible in their favor, the Court then proceeded to an extended discussion of the police power. To quote:—

"We cannot understand by what power the legislature can take away from the employer a constitutional guaranty of which the employee may not also be deprived. If it is beyond the power of the legislature to take from the representatives of deceased employees their rights of action under the Constitution, by what measure of power or justice may the legislature assume to take from the employer the right to have his liability determined in an action at law? Conceding, as we do, that it is within the range of proper legislative action to give a workman two remedies for a wrong, when he had but one before, we ask, by what stretch of the police power is the legislature authorized to give a remedy for no wrong? . . .

"When an industry or calling is *per se* lawful and open to all, and therefore beyond the prohibitive power

* The Court thus seems to have recorded itself in favor of the proposition that no employer can be made liable in tort for anything but his own negligent or malicious act or omission, without depriving him of "due process of law." Such a proposition will hardly command universal assent.—*Ed.*

of the legislature, the right of governmental control is subject to such reasonable enactments as are directly designed to conserve health, safety, comfort, morals, peace and order. . . . (*Lochner v. New York*, 198 U. S. 45.) For the failure of an employer to observe such regulations the legislature may unquestionably enact direct penalties or create presumptions of fault which, if not rebutted by proof, may be regarded as sufficient evidence of liability for damages. That must be the extreme limit of the police power, for just beyond is the Constitution which, in substance and effect, forbids that a citizen shall be penalized or subjected to liability unless he has violated some law or has been guilty of some fault."

Cases were then considered which had been referred to to illustrate legal liability without fault. In *Marvin v. Trout*, 199 U. S. 212, the owner was really at fault in permitting his premises to be used for gambling. In *Bertholf v. O'Reilly*, 74 N. Y. 509, he was really at fault in permitting the demised premises to be used for traffic in intoxicating liquors. In *St. Louis & San Francisco Ry. Co. v. Mathews*, 165 U. S. 1, action was brought under a Missouri statute for injury occasioned by fire spreading from the defendant's premises. But in such a case the defendant was a public service corporation subjected to special obligations. Its liability was "in reality a return to the original common-law doctrine under which every person who permitted fire started by him to escape beyond his

house or close was liable to every one who suffered loss or injury thereby. The severity of that early English rule was moderated by numerous statutes, among which are 6 Anne and 14 Geo. III. As these two last-mentioned statutes it has been held that they became by adoption a part of the common law of this state."⁴

Chief Judge Cullen rendered a separate concurring opinion, in which he said:—

"I am not prepared to deny that where the effects of the work, even though prosecuted carefully, go beyond a person's own property and injure third persons in no way connected therewith, the person for whose account the work is done may be held liable for injuries occasioned thereby. I also concede the most plenary power in the legislature to prescribe all reasonable rules for the conduct of the work which may conduce to the safety and health of persons employed therein. But I do deny that a person employed in a lawful vocation, the effects of which are confined to his own premises, can be made to indemnify another for injury received in the work unless he has been in some respect at fault."

⁴ No doubt a review of the law in different jurisdictions would afford some examples of the survival of the earlier common law principle of liability in the absence of fault. Several states, for example, have approved the rule in *Rylands v. Fletcher* and cited it as authority. In this connection Francis H. Bohlen's recent articles in the *University of Pennsylvania Law Review* are of interest. Mr. Bohlen notes the tendency of "a distinct reversion to the earlier conceptions that he who causes harm, however innocently, is, as its author, bound to make it good." (59 *Univ. of Pa. L. Rev.* 452.) — Ed.

The Editor's Bag

WORKMEN'S COMPENSATION

THE atmosphere has been clearing since the New York Court of Appeals rendered its decision declaring the compulsory workmen's compensation statute of 1910 unconstitutional. We confess to having received a shock of surprise that a law drafted upon similar principles to the English statute should be unanimously set aside by a court which in ability and prestige is at least the equal of any state tribunal in the country. Upon reflection, however, we became convinced that the New York statute was properly to be viewed as confiscatory, and that the Court reached the right result, though by a process of reasoning which might be open to criticism in some particulars. It seems, for example, as if the Court had not given due recognition to the extremely broad scope of the police power, and the common law doctrines of negligence had been treated with undue reverence. It would have been possible, however, for the Court to view these matters somewhat in the same light as the Appellate Division, whose decision it reversed, without reaching a different conclusion as to constitutionality. For the statute was so drawn as to be open to the objection of being a clear case of class legislation of a particularly unjust type.

To state the situation briefly, the injustice of the New York statute lay, in our judgment, in the fact while the

injured employee was given the right to elect of which remedy he would avail himself, whether his remedy for damages under the law of negligence or for compensation under the statute, the employer was given no corresponding right, but must accept whichever liability the workman forced upon him. It seems to us that justice requires equal rights on both sides. If workmen's compensation is to be elective as regards the employee, it should also be elective as regards the employer. If it is to be compulsory with reference to one of the parties, it should likewise be compulsory with respect to the other. Otherwise there is a discrimination inconsistent with the letter and spirit of our constitutions.

The English act, like the New York statute, unfairly discriminates in favor of the employee by permitting him to elect remedies and allowing the employer no similar advantage. As Professor Dicey has said, it "has all the earmarks of collectivism." How, then, explain the readiness with which it has been adopted into English law, and the tolerance shown toward it by the English bar? Simply by the fact that the English Constitution is not, like our own, a system of delicately contrived checks and balances, and the will of Parliament being supreme, the enactment of class legislation is sometimes inevitable, and resistance on such occasions futile. The English example affords no argument for the constitu-

tionality of class legislation in this country.

It seems probable that some advocates of workmen's compensation will demand relief from their dilemma by resorting to constitutional amendment, but such a procedure would be in the highest degree objectionable. A much simpler way out is to be found in an elective system of compensation, under which a contract is presumed to exist unless either the employee or the employer gives notice that he prefers to be governed by the older liability. This is the system which has been embodied in the New Jersey statute, which appears to be fairly on the whole conservatively drawn.

The outcome of the New Jersey experiment will be watched with interest. We believe that under an elective system a large number of industries are likely to come voluntarily under the act, on account of its reciprocal benefits. Anything tending, by proper means, to diminish the volume of personal injury litigation and to afford simpler and more certain relief to employees without injustice to the employer is strongly supported by every consideration of public policy.

THE TORRENS SYSTEM IN NEW YORK

A LETTER from Gilbert Ray Hawes, Esq., of the New York bar, which we publish this month, directs attention to an interesting decision of the New York Court of Appeals on some old land titles in the upper part of Manhattan. Mr. Hawes offers the suggestion that the result of this decision may be to cause some persons insecurity, and that the best way for them to perfect their titles and to ward off "strike" suits would be by means of the procedure provided for by the Torrens system.

The Torrens law enacted in 1908 met with some disfavor because of some provisions which were believed to be adverse to the security of rights in property, and an effort was made to strengthen the law by amendments adopted last year. These amendments seem to have been largely the result of a compromise, and not to have accomplished all that was desired by those who wished to strengthen the law. Efforts are likely to be made, therefore, to amend the law still further to remove the apprehensions of those who believe that the law affords too great opportunity for fraud and mistake on the part of examiners, and to encourage the public to make greater use of a system which has not met with a particularly hospitable reception. One speaker at the meeting of the New York State Bar Association said that under this law a man may go to Europe for six months and return to find that his title to property may have passed absolutely to another. The decision of the United States Supreme Court in *American Land Co. v. Zeiss* (23 Green Bag 155) has not increased public confidence, but has tended to create the feeling that a title may be set up without adequate notice to all interested parties.

The advantages of the Torrens system are obvious, and any reform of the law of conveyancing which can have the effect of simplifying the method of perfecting titles in land, with entire justice to all parties concerned, should be welcomed. It is no criticism of the Torrens system, however, to find the law of any one state defective, and the New York law can hardly be said to be the best in the country on the subject. It is important that the defects pointed out in the report of the committee of the New York State Bar Association headed by Mr. Charles A. Boston as

chairman be corrected at an early date. The existence of this committee was not terminated at the recent meeting of the Association, and we are hopeful that it may be instrumental in securing the adoption of further amendments that will overcome all the distrust excited by the law as it now stands.

REVISION OF THE NEW YORK CODE

THE article in this number by John McG. Goodale, Esq., of the New York bar, though written in a humorous spirit, is inspired by that serious sentiment of dissatisfaction with the New York code of civil procedure which we rejoice to see brewing among leaders of the bar of that state. A very valuable paper on the reform of civil procedure was read by Judge Adolph J. Rodenbeck of Rochester at the last annual meeting of the New York State Bar Association, and a resolution was adopted favoring the appointment of a committee to consider the question of code revision. Hon. Elihu Root, president of the Association, has appointed this committee, to consist of Judge Rodenbeck, John G. Milburn, William B. Hornblower, Adelbert Moot and Charles A. Collin. Co-operation is solicited and suggestions may be sent to Frederick E. Wadhams of Albany, secretary of the Association.

The opportunity is now offered the leading state of the Union to effect a reform of the system of procedure which will leave the enormous mass of purely formal matters to be governed by rules of court, and which will provide, as an inspiration and guide to other states, a practice act of a limited number of sections covering only the matters of substantive right proper to be embodied in a code. It is to be hoped that the conservatism of the bar will

not stand in the way of a reform which is sorely needed and which can be carried out without violence to meritorious features of the present system of procedure which ought not to be swept away. In fact, a reform of this kind to be successful must needs be constructive rather than destructive, and in making it the state has everything to gain and nothing to lose.

A DECISION IN COMMON OWNERSHIP

KASKASKIA Commons, the last of the community property held by the "Parish of the Immaculate Conception of Kaskaskia," under a grant from Louis XIV, is to be sold within a few months and the proceeds of the sale turned into a common school fund for the community.

In a decision recently handed down, the Supreme Court of Illinois approved this disposition of the holdings, by declaring valid the act of the Legislature creating the "Land Commissioners of the Commons of Kaskaskia," and reversed the finding of the Randolph County Circuit Court.

Answering various objections to the enactment, the Supreme Court declares that it was authorized by a majority of the community, and that it in no wise deprives any individual of property to which he is entitled.

"We have nothing to do with the political question, whether it is wise to sell these lands and use the interest instead of the land," says the Court. "That is a question to be determined by a majority of the inhabitants. In view of the great loss that has been sustained, in the past, through fraud and mismanagement, under the leasing system, it is not surprising that a majority of the inhabitants should

favor a sale of the common property and the investment of the proceeds in good interest-bearing securities, under the control of responsible state officials.

"Another consideration which, no doubt, had some influence in bringing about this decision to sell the lands, is the probability that when the lands are sold and become the property of individuals, the property will be improved and developed, and enhanced in value, thus promoting the general prosperity of the island, and lightening the burdens of taxation, by increasing the value of the taxable property. But, as already suggested, it is not necessary that we should agree with the majority as to the general policy of the course being pursued. The petition of the majority to the legislature, asking that this act be passed, is an assent binding on all the inhabitants of the island, and whether the course is wise, or unwise, need not be discussed."

In the making of this decision, the Court substantially removes the last trace of this communistic settlement which, early in the days of Louis XIV, was inaugurated as a practical demonstration of what could be done in the direction of common ownership. All that remains is the school fund formed from the sale of the community land.

The Kaskaskia undertaking, in connection with others of like kind, offers about as conclusive an argument against common ownership and the pooling of individual interests, as it is possible to conceive. In the days when the country was new, and the settlers were bound together by the strong bond of mutual safety from savage depredations and from hunger, the community answered a great purpose; it seemed, indeed, for a time, that it might fulfill all that it was designed to do.

When, however, conditions became such that the members of the community could separate, the most active and capable among them went out in search of larger opportunities, willingly sacrificing their holdings in the community for the better prospects that lay beyond; and the fact that the community assured them freedom from want, and provided a like inheritance for their children even failed to keep them. They refused it all for the chance of facing the world and building up their own fortunes.

Those who were faint-hearted, those who liked their ease, and those who were infirm — these remained to enjoy the security of the community. What they accomplished for it and what it accomplished for them and their descendants, are now matters of history.

If the dreamers who builded their Utopia in New France, could return to earth today and look upon the difference between the structure they reared and the structures that have risen in the same field from freedom of individual effort, they would be greatly amazed.

They would see on every hand strong, self-reliant men and women, fine houses and well cultivated farms, intelligence and independence among the people, and Kaskaskia, weak and dying from want of individual enterprise, which its indulgent care made unnecessary, giving up its shrunken heritage to the keeping of the state.

CANDID PROFESSIONAL ADVICE

A PECULIAR letterhead has been sent us by a correspondent in Iowa. The odd feature of the notice is the way in which the hands of all

the local attorneys were so securely tied that they could take no business against some local insurance companies, who thus employed the services of the local justice court in collecting delinquent premiums:—

TERM CONTINUES
UNTIL 1907

Associate Justice
Hon. J. A. Hiner

County Attorney
C. G. Watkins

JUSTICE COURT

A. M. FLOYD

Justice of the Peace

COURT ROOM—Cor. Main and Washington
Streets

LISBON, LINN CO., IOWA

LOCAL ATTORNEYS

E. A. Johnson
Mac J. Randall
Capt. C. W. Kepler
William Dennis
G. M. Wilson
William Glenn
Frank Davis

Preliminary Notice!

.....190..

.....IOWA

YOU ARE HEREBY NOTIFIED, that.....
.....of.....Iowa, claims of you the
sum of.....DOLLARS and
.....CENTS; (\$.....)

This Notice is now served upon you to give you a final opportunity of paying this amount before adding any further costs, and before issuing an Original Notice and setting the date for the proceedings to be called into court.

If you disregard this notice, and do not reply with a remittance, you must abide by the consequences, if the amount due together with all court costs, constable fees, etc., are entered against you and judgment rendered, adding costs of transcript, fees of sheriff of your county issuing an execution upon your property and the said property being sold at sheriff's sale, to satisfy the same.

The trial can be rightly held in this court and the execution sent to your county clerk and sheriff.

You will therefore herewith take notice and govern yourself accordingly.

Make your remittance to me at once and you will be relieved of any further liability in reference to this claim.

As a Justice, we advise you candidly, to pay the small amount and save yourself the annoyance that you certainly do not want.

IF YOU PAY NOW, IT WILL COST YOU ONLY \$.....

Yours Respectfully,

JUSTICE OF THE PEACE.
LISBON, IOWA.

TO JOSEPH G. ROBIN

Robin's sister wants a guardian appointed for him, claiming, in spite of the jury's verdict, that he is insane. — *News Item.*

TELL me, Robin, tell me truly,
Are you sane or are you not?
Either you are very crazy

Or the biggest knave we've got.

Do you really need a guardian

Or to prison should you go?

Jury disagrees with experts

Whether you're insane or no,

If you ask me my opinion,

I will tell you, Robin, true.

Robin, you are one big humbug

And the only thing to do

Is to put you in the stone jug

Where you'll have a legal guardian

Who will give you constant care

Lest, in mental aberration,

You should stray away from there.

There you will not have to ponder

What to eat and what to wear.

For it is a standing wonder

That they even cut your hair.

If I had my own way, Robin,

You should never want again.

I would call a whole big mob in

To escort you to the "pen."

SIRIUS SINNICUS.

A PECULIAR LAND GRANT

IT is recorded in Plac. Coron. 14 Edward I, Rot. 6 (1285), that a certain grant of land in the County of Suffolk should be held in serjeanty on the service that once each year the grantee should perform "*simul et semel, unum saltum unum sufflum, et unum bombulum,*" before the King.

The original grant is translated by Blount¹ thus: "Rowland de Sarcere held one hundred and ten acres of land, in Hemingston, in the County of Suffolk,

by serjeanty; for which on Christmas day every year before our sovereign lord, the King of England, he should perform altogether and once a leap, a puff and a fart, and because it was an indecent service, therefore, it was rented at 26sh. 8d a year at the King's Exchequer."

The original edition of Blount² translated the service to mean that he should "at one and the same time, dance, puff up his cheeks, making therewith a sound, and let a crack."

A similar grant is mentioned in the Ingoldsby Legends.³ While it is attributed to another parcel of land in a different county, it is probable that it is the same one with the facts somewhat distorted by the story-teller. The story as told by the legend runs as follows:—

"You should read Blount's Jocular Tenures, Mr. Ingoldsby," pursued Simpson. "A learned man was Blount! Why, sir, his Royal Highness, the Duke of York, once paid a silver horseshoe to Lord Ferrers —"

"I've heard of him," broke in the incorrigible Peters; "he was hanged at the Old Bailey, in a silk rope, for shooting Dr. Johnson."

The antiquary vouchsafed no notice of the interruption; but, taking a pinch of snuff, continued his harangue:—

"A silver horseshoe, sir, which is due from every scion of royalty who rides across one of his manors; and if you look into the penny county histories, now publishing by an eminent friend of mine, you will find that Langhale, in the County Norfolk, was held by one Baldwin *per saltum, sufflatum et pettum*; that is, he was to come every Christmas

¹ Blount's, *ibid.* Original Ed. p. 10.

² The Ingoldsby Legends (The Spectre of Tappington). Vol. I, 4th ed., p. 18.

³ Blount's *Fragmenta Antiquitatis*. Beckwith's Ed. p. 79.

into Westminster Hall, there to take a leap, cry hem! and —”

“Mr. Simpkinson, a glass of sherry?” cried Tom Ingoldsby, hastily. . . .

While the grant here referred to by the story teller is not to be found in “Blount’s Jocular Tenures,” it is a fact, which tends to prove that the story teller had in mind the same grant which is quoted in the first of this article, that Blount says that these same lands (*i.e.*, the grant of Hemington, in County Suffolk), were formerly held by one Baldwin, in serjeanty, by the same service, and was called by the nickname of Baldwin le Pettour, or Baldwin the Farter.⁴

If we consider the likelihood of a legend’s being mistaken as to minor details and the fact that the grantees mentioned have the same name, it would tend to establish beyond a reasonable doubt that this is all one and the same grant and that it is unique as well as absurdly ridiculous.

THE JUROR KNEW MORE LAW THAN THE JUDGE

BEFORE a Justices’ Court in the interior of California, the following incidents are said to have taken place:—

A jury trial had been demanded in a civil action. The action was one of general interest and knowledge, and when the jurors were called all but one were disqualified. No other jurors being available, it was agreed between counsel to proceed with but one juror.

The evidence being finished, the counsel for the plaintiff suggested that as the justice was not a lawyer, he would tender his services to prepare instructions for the jury, and the court gladly accepted. Upon the proposed instruc-

tions being submitted, the counsel for defendant suggested that in order to be fair, he should be permitted to prepare a like number of instructions, and the Court agreed. When the instructions were submitted, the Justice of the Peace gave all of them.

The one man jury then requested that they all retire that he might deliberate. The room was cleared by the constable, and after some two hours of waiting, the jury rapped for the Court. Court being convened, the justice said, “Have you a verdict?” To which the jury answered, “Your honor, we have not. According to the instructions given by the plaintiff’s attorney, the plaintiff is entitled to the verdict; according to the instructions given by the defendant’s attorney, the defendant is entitled to the verdict, and I am no lawyer and don’t know which is right, and for that reason I report that the jury is hung.”

The jury was discharged and a new trial ordered.

STORIES OF PARIS COURTS

[Paris Correspondence of the London Standard]

THE centenary of the Paris bar, recently celebrated at the Palais de Justice, has recalled numerous anecdotes which are going the rounds of the humors of the law courts.

Among others it is told how a well-known lawyer, M. Alem Rousseau, was pleading a rather tiresome case and noticing that the judges were paying no attention to him said: “As the president is falling asleep I suspend my speech.” But the judge had just woke up and cried, “And I suspend you from practising for six months.” Nothing daunted, the lawyer retorted, “Well, I suspend myself for ever and ever,” and gathering up his brief and cap he left the court and never appeared again.

A Paris barrister, M. Cléry, however,

⁴ *Ibid.* 1.

was more vigorous. Seeing that the president and the assessors were all asleep, he stopped and, dealing a tremendous blow on the desk in front of him that woke everybody up with a start, he cried, "Yesterday at this same hour I was saying —" and the whole bench rubbed their eyes and asked each other if they really had slept through twenty-four hours.

The same counsel was pleading at Versailles on a cold day and remarked that the judges were all turning more and more around toward a stove that gave out a welcome heat. "The tribunal behind which I have the honor of speaking" brought them all "right about face" at once.

On another occasion the judge asked him to cut his speech short, as the court had made up its mind. Assuming the air of a childlike native, M. Cléry retorted: "Me right, you good judges, him innocent," and sat down.

Though not intended humorously, the celebrated criminal advocate, Maitre Henri Robert, made a hit the other day when defending the matricide, Waché de Roo. He produced an act of renunciation signed by the prisoner of all benefit from the will of the mother he had murdered, and added to the jury: "So if you acquit him he will go forth miserable and poor, perhaps to Madagascar, to repent of an act which he may have committed in a moment of thoughtlessness!"

And the verdict of the jury was typical. They found that he had committed murder, but that he had not killed his mother, although the unfortunate lady was the only person who had been killed. This was in order to save the prisoner from ten years' penal servitude, which is the minimum penalty for parricide, whereas manslaughter with extenuating circumstances can be let off with mere confinement.

Correspondence

A NEW YORK CASE SHOWING USES OF TORRENS SYSTEM

To the Editor of the Green Bag: —

Sir: It seems strange that no mention has been made of an extremely important decision rendered by the Court of Appeals in February last, in the case of *Bradley v. Crane* (201 N. Y. 14) which affects the titles of thousands of real estate properties in the City of New York. The question involved in this litigation was whether the City acquired a fee in the soil, or merely an easement over the land taken for

the Bloomingdale road which was subsequently abandoned. The history of this old road is very interesting as set forth in the opinion of the Court of Appeals, from which a few passages may be quoted as follows: —

"June 19, 1703, a Colonial act entitled 'An act for the laying out, regulating, clearing and preserving publick highways thro'out this colony' (1 Colonial Laws, p. 532, c.131) appointed three persons commissioners of highways for each of the various counties of the colony, other than the County of New York, and three for the City and County of New York, and provided *inter alia* 'that there be laid out, preserved

and kept forever in good and sufficient repair one publick, common and general highway to extend from the scite of the City of New York thro' the City and County of West Chester of the breadth of four rod English measure at the least, to be, continue and remain forever the publick common general road, and highway from the said City of New York to the adjacent collony of Connecticut.' This act was continued in force until 1708 (1 Colonial Laws, p. 632, c. 182) by subsequent acts. The commissioners appointed by the act, by their certificate dated June 16, 1707, made a return that they had viewed and laid out the highway contemplated by the part of the act above quoted, and which was in fact that part of the Bloomingdale road, as it came to be designated, extending from the present Twenty-first street and the Bowery to the present 116th street. The stipulated case says: 'The Bloomingdale road was originally laid out under this act (of June 19, 1703) to the width of four rods. . . .'

"The road of 1707 remained unchanged until after 1751, in which year an act was passed relating thereto. (3 Colonial Laws, c. 910.) It recited that, in pursuance of the act of 1703, the commissioners therein named 'did lay out a road of the breadth of four rods from the now dwelling house of John Horne (present Twenty-first street and the Bowery) thro' Bloomingdale district or invision to the now dwelling house of Adrian Hoogellandt' (present 116th street) and the inhabitants of that district, 'who are but few in number, have been under great hardships not only by keeping the said road in repair (which is double the breadth necessary) but also by having been obliged to work on the repairing the Post road between New York and Kingsbridge,' and provided, in order to remedy the said hardships and to better keep the road in repair, for the appointment annually by the justices of the peace of a surveyor of said road, and the surveyor first to be appointed 'is hereby required to view and survey the said road or highway and lay out the same of the breadth of two rods as the same now runs.' In pursuance of this act, the legal width of the Bloomingdale road was made two rods instead of four, and the easement of the City of New York in two rods thereof was thereupon surrendered and abandoned. (Blackman v. Riley, 138 N. Y. 34 N. E. 214.)

"In May, 1793, the common council of the City of New York, proceeding under the act of March 21, 1787, ordered that the Bloomingdale road from its commencement at Horne's house

(Twenty-first street and the Bowery) to Nicholas De Peyster's barn (116th street) be immediately opened to its proper and legal width of four rods 'and thence to the Post road, at Mr. Watkins, of the same width if the proprietors will give the land;' and appointed a committee to attend the opening of the said road and confer with the proprietors of the land on the subject. From Nicholas De Peyster's barn (Adrian Hoogellandt's house) to the Post road was the laying out of a new road. On August 25, 1794, the common council ordered the road committee to inquire into and report on the expediency of continuing the Bloomingdale road until it intersects the Post road on Harlem Heights, and what the breadth of it ought to be, to the end that the proprietors of the land through which the said road will pass may be applied to as to their willingness to give the land for the purpose."

The opinion of the Court closes thus: —

"The judgment appealed from should be reversed and judgment ordered for the defendant, adjudging, that by the said deed of March 24, 1795, made by James Stryker and others, an easement of, or in that part of the premises, described in the contract of sale herein, lying in the Bloomingdale road, was conveyed to the mayor, aldermen, and commonalty of the City of New York; that the plaintiff had not a good and marketable title to said lands lying in Bloomingdale road at the time of the tendering of the deed to the defendant; that the defendant recover from the plaintiff the sum of \$500, with interest from July 25, 1907, with costs in both Courts."

This decision, that the City had only acquired an easement and not a fee, affects not only the titles to land formerly a part of the old Bloomingdale road, but also all other lands which formerly were portions of the streets and highways subsequently abandoned in whole or in part, such as the old Kingsbridge road, Hamilton street, Apthorpe Lane, Stuyvesant street, etc., etc. It also opens the way to a flood of litigation, and property owners may expect any number of blackmailing or strike suits by alleged heirs of the original owners one hundred or two hundred years ago, which will be very expensive to defend, or which will require the payment of

large sums of money to buy their peace through purchase of quit claim deeds.

A policy of title insurance affords little or no protection to the property owner when it is loaded down with "Exceptions in Schedule B" and made subject to "Conditions" printed on the back of the policy, so that it merely insures trouble and law suits. That the old title insurance companies are not infallible is well illustrated by the fact that this suit of *Bradley v. Crane* was fought between the Title Guarantee & Trust Company on the one side and the Lawyers Title Insurance Company on the other. The former declared that the title was bad, while the latter insisted as vigorously that it was perfectly good and marketable. This shows the weakness, imperfection and uncertainty of the old system.

The only remedy is to be found in the Torrens System of Land Title Registration, which is now in full operation, owing to the recent decision of the United States Supreme Court, in *American Land Co. v. Zeiss*, whereby the constitutionality of the Torrens Law was unanimously sustained, thereby removing the last possible objection on that score. Under the Torrens Law System an action is brought in the Supreme Court wherein the property owner is made plaintiff, and all mortgagees and lienors of record are made specific defendants, and in addition, to quote the words of the statute, "all other persons, having any right or interest in, or lien upon the premises, affected by this action or any part thereof." The summons and complaint are then served upon all the defendants including the People of the State of New York, and a copy of the summons and notice of object of action is posted upon the premises, and also published for

a number of weeks in a newspaper designated by the Court, and this serves as a notice to all the world and cuts off all those who do not intervene and succeed in establishing any right or interest in the premises. Furthermore, in accordance with Article 12 of the Real Property Law, when all the preliminaries have been completed, and application is made to the Court for final judgment and decree, the facts set forth in the Official Examiner's certificate must be accepted by the Court as *prima facie* and presumptive evidence, and the burden of proof is upon any contestant who may come in to oppose registration of title in plaintiff. This reverses the former rule of law as to burden of proof and enables the true owner of the land to establish his title without being subjected to technical and frivolous objections and compels the contestant to make out a clear case not only in his own behalf, but also against the party seeking registration, all of which tends to discourage those with fictitious or fraudulent claims.

As an illustration of how this works out, it may be mentioned that when the Kingsbridge road was widened and straightened, a small triangular gore was left and the same question arose as in the Bloomingdale road. The title was rejected and declared bad and unmarketable by every title insurance company, but the writer, as attorney for the true owner and plaintiff, brought an action under the Torrens Law, and succeeded in registering this supposedly defective title, as an *absolutely indefeasible title in fee simple*. This is the only way in which all of such titles can be cured. *Quod erat demonstrandum.*

GILBERT RAY HAWES.

120 Broadway, New York.

April 27, 1911.

USELESS BUT ENTERTAINING

Lawyer — "The cross-examination did not seem to worry you. Have you had any previous experience?"

Client — "Six children." — *The Truth Seeker*.

The Prisoner at the Bar — Now, I asks yer, gents of the jury, if I'd got away with all that swag, like they say I did, d'yer s'pose I'd have hired this here little \$15 lawyer t' defend me?

— *Baltimore News*.

Edward Douglass White, the new Chief Justice of the United States Supreme Court, has a double in the person of Archie M. Stevenson, a well-known Denver lawyer and politician.

Justice White spied Stevenson sitting in an obscure corner of the courtroom one day when the court was in session. "I want to meet him," said Justice White, and after the court adjourned Justice Brewer made the introduction.

"I'm very glad to meet you," said Justice White, after the formalities were finished. "I'll appreciate it very much if you will notify me hereafter when you arrive in town, and also let me know when you depart."

Justice White did not at once explain the peculiar request. After Stevenson had departed, "I want to keep off the streets while that man is in town," said the Justice. "I'm tired of people slapping me on the back and saying, 'Hello, Steve, where'n the devil did you come from?'"

The Legal World

The Burning of the New York State Capitol

The disastrous fire in the New York State capitol at Albany, March 29, destroyed many priceless books and papers in the State Library, but some of the most valuable legal documents were saved, including the following:—

Manuscript copy of the laws for the government of the Province of New York, compiled under the direction of Richard Nicolls, the first English Governor, ratified at the Hempstead meeting of March 1, 1665, and sent by Nicolls to the Duke of York for confirmation in November, 1665.

The Dongan laws of 1683–84 entitled "the Duke of York's charter of liberties and privileges to the inhabitants of New York, anno 1683, with acts of the Assembly of that year and the year 1684."

The Constitution of New York, 1777, with accompanying papers.

Constitution of 1846.

The Constitution of New York, 1821, and accompanying papers.

Proposed Constitution of 1867–9.

Constitution of 1894.

Journal of the proceedings of the convention of the State of New York to ratify the proposed Constitution of the United States, held at Poughkeepsie, June 17–July 26, 1788.

Ratification of the proposed Constitution of the United States, July 26, 1788.

Two copies Bradford's laws, printed by William Bradford in 1654, the first book printed in New York.

The Court of Appeals happily escaped damage, but the Court of Claims was not so fortunate. Theodore H. Swift, Presiding Justice of the Court of Claims, said on the day after the fire:—

"Every vestige of document and furnishings in the courtroom and consulta-

tion rooms was destroyed. There is absolutely nothing left. The records of the court are all wiped out, including the judgment book. Fortunately, during my eight years' service on the bench, I kept personal trial memoranda of all claims tried, with notations of what disposition of each claim was. From this we can make up a record of judgments."

The Assembly and Senate libraries, stored with thousands of volumes of law and code books, contained also a number of documents and manuscripts that can never be replaced.

Florida State Bar Association

The Florida State Bar Association held its annual meeting at Pensacola, Fla., Feb. 23, the annual address being delivered by the president, Jefferson B. Brown of Key West, and papers being read by George C. Bedell of Jacksonville on "The Outlook for Procedure Reform in Florida," by Lincoln Hulley of DeLand on "The Compromises of the Federal Constitution," by W. O. Hart of New Orleans on "Uniformity of State Legislation," and by F. M. Simonton of Tampa on "The Law of Conspiracy in its Relation to Labor Organization." The following officers were unanimously elected: President, W. A. Blount; vice-presidents from each judicial circuit — first, Thomas F. West, Milton; second, J. W. Henderson, Tallahassee; third, Cary Hardee, Live Oak; fifth, William Hocker, Ocala; sixth, Herbert S. Phillips, Tampa; seventh, Joseph B. Jones; eighth, E. Noble Calhoun, Palatka. Members of the executive council — W. A. MacWilliams, St. Augustine; E. P. Axtell, Jacksonville; F. M. Simonton, Tampa; W. H. Price, Marianna. The secretary, George C. Gibbs of Jacksonville, and the treasurer, John W. Burton of Arcadia, were re-elected.

Miscellaneous

At the annual meeting of the New York County Law Association, held in March at the Hotel Astor, the following officers and directors were elected: President, Alton B. Parker; vice-presidents, Joseph F. Daly, William J. Wallace and David Leventritt; secretary, Charles Strauss; treasurer, Edward M. Grout; directors (for three years), James L. Bishop, Charles A. Boston, J. Hampden Dougherty, William A. Keener, Edward Lauterbach, Benno Lewinson, Morgan J. O'Brien and Charles E. Rushmore.

The Government filed suit at Cleveland, March 3, against the General Electric Company of New York, the Westinghouse Electric & Manufacturing Company of Pennsylvania, the National Electric Lamp Company of New Jersey and thirty-two other defendants, alleging a combination and conspiracy in the manufacture and sale of incandescent electric bulbs. The Government's investigation dates back to May, 1908, when the Navy Department invited bids for furnishing 340,000 incandescent lamps. Fourteen bids were received and thirteen of them were identical to a penny — \$50,631.23. Whether other actions against the "electric trust" will be brought will depend on the outcome of the present suit.

Steps initial to beginning its active work in furtherance of international peace were made by the Carnegie Endowment for International Peace at the first meeting of trustees at Washington, March 9.

Senator Elihu Root was chosen president of the endowment, Joseph H. Choate, vice-president, James Brown Scott, secretary, and Walter M. Gilbert, treasurer.

The executive committee consists of Senator Root; Nicholas Murray Butler, president of Columbia University; John W. Foster, former secretary of state; Andrew J. Montague, Henry S. Pritchett and Charlemagne Tower. The finance committee includes George W. Perkins, Robert A. Franks and Samuel Mather.

By-laws were adopted stating the purposes of the endowment to be such as were provided for in the bill passed by the last session of Congress, incorporating the movement.

Obituary

Judge William H. West. — Judge William H. West, who died March 14, in his eighty-eighth year, was one of the founders of the Republican party in Ohio. He was a leader in the Ohio constitutional convention and became Attorney-General and Supreme Court judge. He was a delegate to the national convention of 1860 and cast his vote for Abraham Lincoln. In the national convention of 1884 he presented the name of James G. Blaine for President.

Former Chief Justice Lore. — Chief Justice Charles Brown Lore of Delaware is dead, at the age of eighty years. He was a country-bred boy of a Methodist family, and for a short time he held a place in the Methodist ministry. Leaving the church for the law, he built up a profitable practice, and nearly forty-five years ago became Attorney-General of the state. Later he served in Congress as a Democrat, and when Thomas F. Bayard left the United States Senate to enter Cleveland's cabinet Mr. Lore was barely defeated for the vacant seat by George Gray, now of the United States circuit court of appeals. Mr.

Lore served fifteen years as Chief Justice of the state, retiring in 1909. For many years Judge Lore had been president of the board of trustees of the State College and extremely active in the interests of the institution,

Augusto Pierantoni. — Augusto Pierantoni, Professor of International Law and a delegate to the last parliamentary conference at Washington, died recently in Rome. Among his translators was David Dudley Field, who made available for the English public his "Code of International Law." He was born at Chieti, Italy, on June 24, 1840. He served as a volunteer in Garibaldi's army, and later served in the war with Austria. He was called to the chair of international law at the University of Naples, and was later promoted to the University of Rome. He was chosen senator in 1883 and served through four legislative sessions. He was the arbitrator for Italy at the Paris conference of 1885 concerning shipping in the Suez Canal. He was a founder of the International Law Institute at Geneva.

Justice Peabody. — Henry Clay Peabody, Associate Justice of the Supreme Court of Maine, died at Portland, March 29. He was a native of Gilead, Me., and was educated at Dartmouth College, reading law in the office of Gen. Samuel Fessenden of Portland. He was admitted to the bar in 1862, his partner being the late Hon. Aaron B. Holden. In 1879 he was elected judge of the court of probate of Cumberland county. He was elevated to the Supreme Court bench by the late Gov. Llewellyn Powers in 1900 as the successor of the late Judge Haskell. He was a past Grand Chancellor of the grand lodge of Maine, Knights of Pythias.



MR. CHIEF JUSTICE WHITE

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The Standard Oil Decision

BY THE EDITOR

IN *United States v. E. C. Knight Co.*,¹ Mr. Justice Harlan recognized, in a dissenting opinion prepared with much care, the propriety of a reasonable partial restraint of trade. It is common for judges who have rendered dissenting opinions to adapt their views in accordance with the prevailing authority and to recede from positions previously assumed. Such a practice, while it may have its drawbacks, undoubtedly makes for the unity and continuity of judicial interpretation. If Mr. Justice Harlan has partly modified his original views he has subjected himself to no reproach thereby.

Chief Justice White, however, in the *Standard Oil* case, not yet reported, adheres, roughly speaking, to the general position taken in his dissenting opinion in *United States v. Trans-Missouri Freight Association*,² in which, referring to the majority contention that the Sherman act embraced reasonable as well as unreasonable restraints of trade, he said that this construction would be "tantamount to an assertion that the act of Congress is itself unreasonable."

Chief Justice White's opinion divides its attention between two main subjects of discussion, the conclusions reached with reference both to the law and to

the facts being equally important. In construing the law the Court reached a conservative result by emphasizing the principle that the statute must be interpreted in the light of reason. The decision may readily be misinterpreted by those who too readily jump to the conclusion that the Court has attached a meaning to the statute permitting combinations and contracts in reasonable restraint of trade. As a correct statement of the Court's view of this important phase of the subject calls for careful analysis, we shall revert to it later. The outcome of the new interpretation of the statute is practically, however, to confine its scope of application within bounds of reasonable moderation. The Court was very careful not to subject itself to the imputation, expressed in Mr. Justice Harlan's dissenting opinion, of an attempt to frustrate the legislative will; it gave full effect to the prohibition of monopolistic contracts and combinations. At the same time its language was imbued with a sober purpose to safeguard the rights of combinations not to be treated as unlawful by reason of their mere bigness.

The other effect of the decision is to include such acts as those specified in the bill of complaint as embraced in the definition of "unlawful mo-

¹ 156 U. S. 1.

² 166 U. S. 290.

nopoly." The Court did not discuss in detail the legal aspect of these various acts, but rested its conclusion on the broad ground that a power dangerous to the public welfare had been built up by other than normal methods of business competition. The ruling on the facts is evidently not less important than that on the statute itself. It is really a ruling on the law. The seemingly liberal attitude taken by the Court in saying that the prohibitions of the statute must be construed in the light of reason, tends to suggest that many monopolistic transactions may be lawful, but in the latter half of the opinion the considerations offered on the merits of the actual controversy have the effect of narrowing any such implied broad definition of lawful monopoly. The unlawful acts of the appellant not being particularized, the basis of the opinion is that its general conduct has been unlawful. If such methods as those employed by the Standard Oil Company, in building up its vast power, are unlawfully monopolistic purely with reference to their general character, without any examination of the essential nature of unfair trade and of the rights of free competition, something is subtracted from the liberal construction given to the statute. If the former part of the opinion affords any ground for supposing that a reasonable monopoly may be lawful, the second part makes it clear that such a reasonable monopoly must meet certain further tests to escape the ban of the statute. While the Court has provided a loophole by means of which certain great corporations may escape prosecution, still the loophole is not so large as might appear at first glance. There will continue to exist a great many instances in which powerful corporations come perilously near the danger line and will be unable

to feel secure from prosecution for violations of the act.

It is important, however, to consider whether this decision can fairly be interpreted as setting up the principle that the Sherman act prohibits only unreasonable restraints of trade. A careful study of the opinion shows that it cannot receive that interpretation unqualifiedly.

To read into the statute the word "unreasonable" would seem to have a different effect from that actually given by this decision. It would give the Court the power to determine whether given facts constitute an "unreasonable" restraint of trade or not. In reaching such a determination, the Court would be governed solely by its own views as to public policy and social justice. If it be contended that the Supreme Court has formulated certain rules relating to the test of reasonableness, by which it is bound, the obvious reply is that it may overrule its own decisions relating to such a test, in its effort to reach a fair and accurate interpretation of the statute, and that there can be no fixed rule of reasonableness which the Court, in its effort to be guided by the just demands of sound public policy, is not at liberty to cast aside whenever a better one may be substituted.

But the decision took a somewhat different position. It did hold that the statute was to be read in the light of reason. The term "undue restraint" is freely used, and it is evident from the context that it is employed in a sense synonymous with "unreasonable restraint." The English case of *Mogul Steamship Co. v. McGregor* (A. C. 25) is referred to as showing reflexly the exact state of the law in England at the time the Sherman act was adopted, and as indicating the scope of the freedom to contract and "to exercise every reason-

able right thereto," wholly apart "from the want of power in an individual to voluntarily and unreasonably restrain his right to carry on his trade or business and outside of the want of right to restrain the free course of trade." And in this country the law "followed the line of the law of England," leading "as a matter of public policy to the prohibition treating as illegal all contracts or acts which were unreasonably restrictive of competitive conditions." In the light of the law as it then existed, the Sherman act was drawn, evidencing the intent "to protect [interstate or foreign] commerce from being restrained by methods, whether old or new, which would constitute an interference that is an undue restraint." The Court thus recognized the reasonableness test as the one to be applied in construing the Sherman act.

Nevertheless, proceeding with the observation that some standard of judgment was required for the purpose of determining what constitutes a violation of the act, the Court said: "It becomes obvious that the criterion to be resorted to in any given case for the purpose of ascertaining whether violations of the section have been committed is the rule of the reason guided by the established law and by the plain duty to enforce the prohibition of the act and thus the public policy which its restrictions were obviously enacted to subserve." Furthermore, the statute was expressly designed "to leave it to be determined by the light of reason guided by the principles of law and the duty to apply and enforce the public policy embodied in the statute, in every given case, whether any particular act or contract was within the contemplation of the statute."

Thus it is evident that the test applied by the Court is that of reasonableness

guided by the established law and the duty to enforce the public policy underlying the statute. And the implication seems to be that whether the established law relating to restraints of trade be reasonable or unreasonable, or the public policy underlying the statute be reasonable or unreasonable, are irrelevant matters, as the application of the test is guided by the law and by the public policy sought to be enforced. That this inference is properly to be drawn seems deducible from the *dictum* that in deciding the previous cases arising under the Sherman act, the Court was not at liberty to substitute "a judicial appreciation of what the law ought to be for the plain judicial duty of enforcing the law as it was made." It is likewise deducible from the remark that "in every case where it is claimed that an act or acts are in violation of the statute the rule of reason in the light of the principles of law and the public policy which the act embodies, must be made."

It seems to the writer that the Court thus subjected the reasonableness test to a very real qualification, for it pursued a line of thought which tends to stereotype the conception of legal reasonableness in the form which it possessed at the time of the passage of the act. Otherwise why need the Court have argued that the reasonableness test and that of direct or indirect restraint come to the same thing, and that the latter test is sound solely because in harmony with the principle adopted?

The reasonableness test of a combination alleged to be in restraint of trade thus being qualified, if this view of the decision is sound, by the state of the law not as it may be today but as it was at the time of the passage of the statute, it remains to be seen whether

this is the only important qualification of the test. It would appear that it is not, but that the Court is also bound to accept the public policy underlying the statute, and that a combination which viewed without reference to the act might be considered perfectly reasonable may, when the policy of the act is considered, have to be treated as unreasonable in order to give due recognition to the duty to enforce the statute.

This last consideration, in fact, makes it easier to understand the readiness of the Court, in deciding upon the facts, to declare the Standard Oil Company an illegal combination. If the statute prohibits all acts clearly monopolistic, permitting no inquiry into their reasonableness or unreasonableness, and leaves the reasonableness test applicable only within very narrow limits, to acts the monopolistic nature of which may be in doubt, and which do not clearly come under the ban of the statute, obviously the way is open for declaring unlawful any act showing an "intent and purpose to maintain the dominancy over the oil industry," and "to drive others from the field and to exclude them from the right to trade and thus accomplish the mastery which was the end in view."

If the foregoing reasoning is sound, it was not necessary for the Court to say that the power of the monopoly had been built up otherwise than would have arisen "had normal methods been followed," and that "new means of combination" were resorted to, "wholly inconsistent with the theory that they were made with the single conception of advancing the development of business power by usual methods." In this view of the decision, all that was said about normal and usual methods not having been followed was mere *obiter dicta*.

If, on the other hand, the decision

really turns on the abnormal methods pursued by the appellant, and the Court treated these methods as unlawful because unreasonable in themselves rather than because forbidden by the statute which it was its duty to enforce, the Court begged the question when it assumed that the underselling of competitors and other devices to stifle competition are not the usual and normal methods of monopoly. It is also chargeable with vagueness in not making clear wherein the practices complained of are unreasonable. Consequently, if the scope of the statute is not rendered very broad by the determination to be bound by the legislative mandate, it is broadened by a vague, general notion of abnormal and unreasonable monopolistic practices. In any event, the notion of reasonable and lawful monopoly is so narrowed that any great corporation dominating its market may have much to fear from the invocation of doctrines which leave little room for the application of the reasonableness test.

It is somewhat surprising, therefore, that the decision has been treated in many quarters as erring on the side of undue leniency to the corporations, as it is merely an initial step in the direction of an unqualified test of reasonableness, which may come to be more fully adopted in subsequent decisions, and as it apparently leaves any potent corporation which effectually dominates its market subject to the danger of prosecution. Any such corporation which seeks to avail itself of the defense that while it may have committed acts tending to stifle competition by unusual or abnormal methods, such methods have not been typical of its history, may readily find itself in the same position as the Standard Oil Company.

The uneasiness which may later arise among some great corporations will o

course be much less than that existing before the decision was rendered, and the legitimate business of the country may well have experienced a sense of comparative relief. Such uneasiness as will continue to exist will come from the vagueness of the doctrine enunciated rather than from any radical interpretation of the law. If the letter of the statute continues unchanged, much will depend upon the policy of the Administration. A "trust-busting" radical Administration can still find plenty of opportunity for prosecutions of corporations perilously near the border line of legitimate business but not clearly outside its bounds. The future course of judicial decision, however, cannot fail to remove much of the vagueness to which we refer, and more specific definitions of the wrongdoing involved in abnormal and unusual methods of suppressing competition will doubtless be forthcoming.

The decision, because of its very caution, can hardly satisfy partisans of the radical school, but whatever objection is raised, the objection that it shows an attempt to frustrate the will of Congress is of the flimsiest sort imaginable. The effect of the decision is to give the term "monopoly" a very broad scope, so as to embrace all the offenses which Congress can intelligently be supposed to have had in view. In fact not only does the Court free itself from any suspicion of a desire to innovate upon the statute, but it actually goes a long way toward perfunctorily and uncritically sustaining the legislative policy of extirpation of monopoly. As to this point, however, it is Congress and not the Supreme Court which is to be found fault with. The Sherman law was actually based upon an economic theory which is being outgrown, and

it must naturally come about in the course of time that, if it remains upon our statute books, its purport will gradually be modified by judicial interpretation. But the Supreme Court cannot be reproached for its present attitude toward this statute. While it is true that the Court might have adopted a more liberal construction in the earlier cases arising under it, and the orderly development of this branch of the law would have been accelerated by such a procedure, still the decision in the present case, following the line of precedents which the Court had to consider, could not well have been dissimilar from that announced.

The Court must defer to public opinion, and the public opinion of today, if not the enlightened public opinion, seems to favor the extirpation of monopoly. It is difficult to lay this down as an incontestable fact, since public opinion is so variable, and new solutions of public questions have of late years been so rapidly popularized. It is safe, however, to assert that the trend of the times is in the direction of the regulation rather than the suppression of monopoly, and toward the prohibition not of the mere fact of combination but of business practices injurious to the public welfare which are found closely associated with monopoly. As soon as we have an adequate system of regulation of monopoly, and adequate legislation preserving the rights of freedom of competition and prohibiting unfair trade in the broadest sense of the word, the Sherman act will have outgrown its usefulness.

The futility of seeking to maintain freedom of competition by legislative and judicial action, when the forces of society are actively at work to unite rather than dissociate our large industrial plants, must become more

apparent from year to year while the enforcement of the Sherman act goes on. The dissolution of the Standard Oil Company, in literal compliance with the terms of the decree, can have the effect of re-establishing no real freedom of competition. The law cannot itself create freedom of competition, which is an economic and not a legal status, without resorting to more drastic artifices than any yet employed. It is even possible that the conscientious enforcement by the Supreme Court of the remedies afforded by the Sherman act may have the result of showing more clearly than could be proved in any other way, the fruitless character of our anti-monopoly legislation.

If the remedies now available must

prove abortive and cannot accomplish what is aimed at, the demand for an adequate statute and for adequate remedies must come to be recognized. As soon as Congress adopted a really sound anti-monopoly law, conservatively, comprehensively and effectively drawn, it could proceed much further in the direction of drastic relief without really departing from the path of safety. It is difficult to see how an effective remedy can be found until much heavier fines than any yet attempted are imposed on corporations which have accumulated, by illegal means, property illegally in their possession and not to be considered enjoying the immunities and safeguards granted by the Constitution.

Effective Government¹

BY HON. GEORGE W. WICKERSHAM

ATTORNEY-GENERAL OF THE UNITED STATES

MR. CHAIRMAN and Gentlemen of the Daily Princetonian:—

I assume that when you invited me to be your guest this evening you expected me to talk to you about the relations of college men to public questions. As one busied in the tremendously important and equally absorbing business of government, I am greatly interested in meeting you who are coming out into the work-a-day world to assume your share of the duty and the privilege of making efficient the conduct of our

public affairs, municipal, state and national.

To be truly efficient, a government must be administered honestly and wisely. How these results shall be accomplished, you and men like you should in large measure determine. If you do not play an important part in the solution of this problem, then whatever proficiency you may have attained here in your studies, whatever prowess you may have displayed in athletic sports, you will have failed to realize the highest aim of university education.

I congratulate you on coming out into the world at this particular time in its history. Within your grasp is life, and life abundantly. In the words

¹Written for delivery at the annual dinner of the *Daily Princetonian*, at Princeton, N. J., May 1, 1911. In his actual address, Mr. Wickersham followed more or less this text, but without having it before him and without adhering rigidly to it. — Ed.

of the Psalmist, your feet are planted in a large room. The world is all before you, where to choose. When your fathers were graduated at the University thirty odd years ago, the thoughts of the people were centred principally upon industrial and business activity. The railroads were opening up the great western country for development, mining and manufacture were being stimulated by new inventions and increased facilities of transportation, leading to cheapened production and improved product; and the rapid progress in facilities of inter-communication of thought was bringing the ends of the earth into closer touch with each other. The surplus population of Europe poured into our country, and brawny arms from many lands developed our mines and carried on the work of our factories. Plenty was scattered over a smiling land. The way was open for everyone. If the older communities were too crowded, there was room for all in the great West. Industry and enterprise and intelligence found ample scope, wealth was garnered in many fields. The power of co-operation and organization in the conduct of business was applied during the past thirty years to an extent never before dreamed of. Men learned then how far-reaching a control over industry and commerce could be effected through organization. Commercial empires were formed. Great fortunes were amassed in the hands of a few, but prosperity came also to many. What wonder that materialism became rampant, and that the golden calf was erected for worship in the market places!

But the vision of truth and justice has never wholly failed before the eyes of the American people, and in the full flush of their highest prosperity they heard the voice of the national conscience reminding them that Righteous-

ness alone exalteth a nation. In the period of their greatest material progress they paused to consider whether their institutions were securing justice between man and man.

The laws of state and nation alike during this period of great industrial progress were moulded to facilitate the conduct of business on a colossal scale. There was nothing more natural. They met the needs of the hour. True, they went beyond those needs, and, in so doing, they aroused the people to a recognition of the fact that they had gone too far. In the triumphal progress of expanding industry and accumulating wealth the rights of individuals and of classes of individuals who had but an humble share in it, were not always considered. Here and there occasional peaks of garnered riches rose high above the plain, and like the robber barons of the Rhineland, great masters of capital sat enthroned upon them. But their very height lifted them up where all men could see and begin to question how they came there, and whether it was for the common weal, that such inequalities of condition should exist.

So today the great question confronting you as you enter upon the drama of matured life is to find the means of maintaining the true balance between the freedom which the individual citizen must enjoy in order that he may justly prosper, and the protection of the mass of the people from unjust discrimination in favor of the few.

In a country whose government is based on manhood suffrage, any abuse can continue only until a majority of the people are convinced that it is wrong. Then there is bound to be a change. But whether or not the change proposed to remedy the evil is a wise one and will not result merely in jumping out of the frying pan into the fire,

depends upon whether or not the remedy is sufficiently discussed to be thoroughly understood. The first popular impulse to right a wrong often results in committing another wrong. It is in putting clearly before the people the nature of civic ills and the character and effect of proposed remedies that men who have had the benefit of systematic university training may best justify their advantages.

Public attention has been and is now focussed on these wrong tendencies. Recognizing the existence of evils, two classes of remedies are presented. One class deals with forms of government and new rules of conduct; another class addresses itself to a consideration of the character of the men who make our laws and carry on our public affairs. It is characteristic of our race that we are more prone, in the face of civic ills, to the making of new laws than to securing a better class of public servants. We pass laws very much as the Chinese buy a paper prayer and hang it up to placate their gods. A common expression on many lips is "there ought to be a law about that." We are in truth a law-ridden people; and this tendency is encouraged and stimulated by those who seek popular favor by pointing to easy remedies for obvious ills. Not satisfied with the ever swelling volume of statute laws, we are now urged to tinker with our Constitutions. There is nothing new in this kind of demagoguery. Mommsen, writing of the Rome of Cato's time, says:—

In reality these demagogues were the worst enemies of reform. While the reformers insisted above all things and in every direction on moral amendment, demagogism preferred to insist on the limitations of the powers of the government, and the extension of those of the burghesses.

So in our own day there is much

clamorous advocacy of measures to limit the powers of those charged with the administration of our highly complicated government, and to increase the direct intervention of the public in the conduct of its operations.

The idea that a busy, prosperous, commercial people will, or can, make or administer laws better than representatives chosen from among the people for the purpose, is one that is almost as old as recorded history, and all recorded history proves its fallacy. But it is said that in the workings of representative government representatives do not represent the people. I believe that to be a superficial comment. Representatives have and, being human, always will, from time to time fail in their duty; but in the long run our representative bodies must and do give expression to precisely what the matured thought of the majority of the people demands. They may not yield at once to a spasmodic and artificially stimulated emotion induced by one particular class of society for its own ends as against all other classes. God forbid that they should! But they are inevitably controlled by the deliberate thought-out will of the people. Impatient reformers, desirous of securing the prestige of immediate success in the advocacy of their nostrums, may chafe at delays. But you who have had the advantage of learning the lessons of the past will, I am confident, lend your influence to the maintenance of a system of government which protects the legitimate interests of a commercial people from destruction by the sudden gusts of popular passion. You will carefully examine existing laws and institutions before lending your aid to their overthrow. No system of law can be devised that will automatically work good. All laws must be administered by human agen-

cies. The best human agencies can only be secured by attaching confidence and honor and dignity to the office. A few laws easily understood are of more value than a thousand laws impossible of comprehension. Remember the advice that Don Quixote gave to Sancho Panza for his guidance in the government of the island of Barateria:—

Make not many proclamations; but those thou makest take care that they be good ones, and above all that they be observed and carried out; for proclamations that are not observed are the same as if they did not exist; nay, they encourage the idea that the prince who had the wisdom and authority to make them had not the power to enforce them; and laws that threaten and are not enforced come to be like the log, the king of the frogs, that frightened them at first, but that in time they despised and mounted upon.

It will be many a day before our people as a body can lay aside their business occupations and meet in the marketplaces, like the Athenians, to debate on matters of public concern,

and to enact into law or executive order the result of their deliberations. Industry and commerce will long continue to engross the attention of the majority. As education continues to be widespread, the people will continue to take an active, intelligent interest in public affairs. But the business of governing a highly complex modern civilization, to be conducted with the best results to the greatest number of the people, will always require the absolute devotion and entire attention of an increasing number of men. Temporary abuses may be corrected, but effective government cannot be conducted through the spasmodic intervention of popular uprisings. You cannot expect to secure competent men for the conduct of public affairs if they are to be commissioned as untrustworthy, subjected to constant hackling and misrepresentation, and turned out branded as unfaithful servants at a moment's notice for temporarily unpopular acts.

The Trial of Leisler for High Treason

BY ARTHUR WAKELING

[With appropriate exercises conducted by the United German Societies of New York, two oaks were planted in City Hall Park, New York City, on March 23, 1911, not far from the spot where Jacob Leisler was put to death on the charge of having usurped the powers of the British Governor. The saplings were sent over as a gift from Frankfort-am-Main, the native city of Leisler. Timeliness is therefore given to the following account of the trial of this brave and law-abiding man whose name has since been cleared of all disgrace. — *Ed.*]

THE culmination of a period of New York history that for dramatic intrigue and sheer romance rivaled the most thrilling novel of Dumas, was fought out in a court room not far from Pine and Wall streets, in what is now the very centre of the New York law offices.

On the 17th of March, 1691, New York resembled a warlike camp. Three hundred armed men under Jacob Leisler were holding the blockhouse and fort against five hundred "country soldiers," two hundred regulars and other militia.

The streets leading to the fort were blocked with infantry and cumbered

with artillery. Big guns were trained on the fort and a pitched battle seemed imminent.

The dull, heavy atmosphere was rent by the detonation of a single shot. Who fired it was never determined. But a general engagement followed in which several men were killed and more wounded.

Leisler, during the uncertain months in which William and Mary were settling themselves on the English throne in place of James II, had put himself at the head of the totally disorganized government of New York and by sheer force of his own personality had held the exciting and disrupting elements in hand pending the determination of his authority by the Crown.

Finally the King appointed Col. Henry Sloughter Governor of New York. And it boded ill for Leisler that Major Ingholdsby, the Governor's subordinate, who had reached the colony before Sloughter himself, immediately invested Leisler's own stronghold in an out and out siege.

When Sloughter himself appeared in New York, Jacob Leisler immediately surrendered his authority as, indeed, he maintained he had always intended to do upon the arrival of a duly accredited representative of the King.

He and his three hundred adherents laid down their arms and left the fort. This was followed by a scene of peculiar violence, according to an old account.

"The men thus coming out in their side-arms were at once attacked by the out-standing crowd, scolded as being villains and traitors, and robbed of everything, and that with such fury as if they wanted to kill them, the officers meanwhile shouting and screaming — 'Rob them! Rob them, and take their guns away from these rascals; they will otherwise murder our wives and children! . . .' Commander Leisler was

immediately afterwards brought before the Governor who allowed (having spoken but a very few words to him) that he was spit in the face, and that he was robbed of his wig, sword and sash, and of a portion of his clothes which were torn from him, and that they abused him like raging furies, putting irons on his legs and throwing him into a dark hole underground full of stench and filth. His council and burghers were treated in the same way."

Highly colored and partisan this may be; but it conveys something of the spirit which put Leisler, who had struggled so hard to keep some vestige of government in the almost disrupted colony during the long months it seemed to have been entirely forgotten by the home authorities, on trial for his life, accused of high treason.

The trial of Leisler and his companions was one of the most peculiar combinations of the just and the unjust, of the legal and the farcical, of the trivial and the tragic in recorded law cases.

The grand jurors were sworn on March 31, 1691. They immediately brought two indictments against Leisler and his associates, Milborne, Delanoy, Gouverneur and Beekman. The first count was for treason and felony, mentioning specifically the conflict on the 17th of March. The second part of the indictment against these men was for murder and felony. A second group of Leislerians, Coerten, Williams, Vermilye and Brasier, were indicted for treason alone.

Immediately afterward Leisler was taken before a hostile court, presided over by Joseph Dudley, to stand trial for his life. Well realizing the nature of political trials and the determination of his enemies to secure his conviction at any cost, Leisler refused to acknowledge the jurisdiction of the court.

"Gentlemen," he commenced, "I humbly conceive I am not holden to make my plea on the indictment until the power be determined whereby such things have been acted. My own power was valid until the arrival of Governor Sloughter, and he has proclaimed his power merely to govern — not to determine concerning the power exercised by us before him."

He ended his desperate and hopeless argument against the right of the court to try him for treason with the words: —

"The King would accuse me for giving away my right, and I cannot complain of an act of my own, for by pleading I empower the jury to make them judges of fact; and how can twelve men of one county judge the government of the whole province?"

The Court, of course, immediately overruled Leisler's objections and stated that what he had said amounted "to no plea in law or fact."

A motion for judgment was made by the King's counsel, but this was denied and the Court offered Leisler the privilege of having counsel. This was as unusual as it was puzzling. Prisoners accused of political crimes in England were allowed no counsel, nor could they compel the attendance of witnesses. Therefore this concession of the Court in the Leisler trial was entirely inexplicable.

The cases were rushed through, the ten prisoners each having a separate trial and being either acquitted or condemned in thirteen half-day sessions. One after another Leisler's associates were found guilty of treason or murder or else acquitted.

A queer part of the proceeding was the acquittal of Leisler's two chief supporters, Edsall and Delanoy, when coupled with the fact that these two men had considerably more wealth than

their fellow-prisoners. In fact, there was no little indication that Governor Sloughter could be bribed even in so serious a matter as a state trial for high treason.

Leisler persisted in refusing to plead guilty or not guilty. He was put in irons in the court room and remanded to await his trial.

The case was reached for its final determination on April 17. A few months before Leisler had been the supreme power in the colony. Of his own authority he had summoned a congress of representatives of New York, Massachusetts, Plymouth, Connecticut and Maryland — a forerunner of the Continental Congress.

The court crier called loudly for silence; the justices filed solemnly to their places; and a tense, strained stillness rested over the court room. The attorney for Leisler, Mr. Tudor, was sitting near the prisoners; but there was nothing to suggest the possibility of a defense.

The King's counsel arose.

"If it please your honors, I move that judgment be passed upon the prisoners at the bar, accused according to all due form of law, of the crimes of high treason, felony and murder."

"Have you anything to say," demanded Dudley, addressing Leisler and Milborne, "why the sentence of death should not pass upon you?"

Leisler, the man who had held firm the governmental authority in New York when it seemed most on the point of collapsing, arose slowly and faced the chief justice.

"We conceive, your Honor," he said, speaking with measured emphasis and significant intensity, "that until the King determine the power by which we acted, we will not answer!"

Sentence of death was passed upon

them, and it was ordered in the words of the old record that they be "carried to the place from whence they came and from thence to the place of execution, that they be severally hanged by the neck and, being alive, their bodies be cut down to the earth, that their bowels be taken out and, they being alive, burnt before their faces, that their heads shall be severed from their bodies and their bodies cut into four parts which shall be disposed of as their Majesties shall assign."

Hanged, beheaded, drawn and quartered — that was the sentence passed in the sombre court room of the colonial city hall. It was the punishment for high treason.

There had been no evidence introduced, no witnesses, no defense in the case of Leisler and Milborne. Even Sloughter, mercenary and heartless as he was, seemed appalled by the severity of the sentence. He at first refused to sign the death-warrant for the two leaders; he took under consideration the pardoning of the other prisoners; and he allowed an appeal to be made to the Crown.

Tradition says that the enemies of Leisler, Bayard, Nicolls, Van Cortlandt, Philipse and Minvielle, all of whom were members of the Governor's council, planned a sumptuous banquet for Sloughter. Here he was dutifully plied with wine until he was in that pliant state of drivelling good nature that allowed them to cajole him into signing the death-warrant.

At any rate, on the evening of Thursday, May 14, Governor Sloughter affixed his signature to the death-warrant. He softened the terrible sentence in one respect, crossing out the clause relating to the condemned being drawn and quartered.

So brutal and heartless were Leisler's

enemies that they dispatched Domine Selyns, before the ink had dried on the death-warrant, to inform the prisoners of their speedy execution. The prisoners were at supper when the messenger entered and in a diabolically ingenious manner made the ill news seem worse than it was.

"I have come to bring you good news, gentlemen!" he announced, as the two condemned men started to their feet with exclamations of surprise. "Not all of you are to die. But Commander Leisler and Secretary Milborne, you both are to die next Saturday, and you have to prepare yourselves thereto."

The gallows were erected on Leisler's own property, within sight of his country home. The spot was later to become Frankfort street, named for the birthplace of the man who was executed there. It is now known as "Newspaper Alley," and is crowded between the great newspaper buildings of Park Row.

The 16th of May was a wet, dreary, foreboding day. The driving rain soaked the gaunt bare timbers of the scaffold and wet the crowd that gathered in the open around.

The essential tragedy of it all to Leisler was the fact that his son-in-law was to die with him. But nothing in the bearing of either of them suggested one thought of weakness or of fear.

"What I have done," said Leisler earnestly, "has been but in the service of my King and Queen, for the Protestant cause, and for the good of my country — and for this I must die. Some errors I have committed; for these I ask pardon. I forgive my enemies as I hope to be forgiven, and I entreat my children to do the same."

Just back of what is the Tribune Building today, the two men, who had been the leaders in one of the most peculiarly uncertain and precarious

periods of New York history, were buried. Leisler had called the first congress of colonies, and he had gained the first victory of democracy in New York.

By act of Parliament obtained by Leisler's son in 1698, the judgments of the New York courts were canceled, Leisler's action throughout his leadership was completely exonerated

and his memory was freed from all stigma.

Three years later, in the very City Hall in which they had been condemned, the bodies of Leisler and Milborne, taken up from their resting-place, were laid in state. With full and impressive ceremony they were again buried — these men who had lived a life of romance and who had died as traitors.

The Act Codifying the Laws Relating to the Federal Judiciary

AN outline of the important act of March 3, 1911, codifying the laws relating to the federal judiciary and abolishing the Circuit Courts of the United States, is given by William H. Loyd in the *University of Pennsylvania Law Review*.¹

"The principal results accomplished by the new code are a systematic re-statement of the laws relating to federal court practice and the administrative machinery of the courts; the abolition of the Circuit Courts; and a re-distribution of jurisdiction, original and appellate, between the remaining courts. The Court of Customs Appeals and the Commerce Court are also welded into the system. To describe adequately the technical features of the code would require a discussion of many acts and decisions and will no doubt occupy the attention of text writers on federal practice for some time to come. . . .

"The United States is divided into seventy-seven judicial districts, each state comprising one district at least. In some states there is more than one

district, in New York and Texas, four; in other states there are two districts with but one judge, as in South Carolina; in still other districts there are additional judges; in the southern district of New York, four, the maximum number. There is no uniformity in this matter. The salary of the district judges is six thousand dollars a year. When a district judge is prevented from holding court by any disability, the circuit judge, or, in his absence, the circuit justice, may appoint another district judge in the same circuit to hold court, or, if for sufficient reason that is impracticable, the chief justice of the United States may designate the judge of a district in another circuit to discharge the duties of the judge so disabled. Special assignments may be made also to meet an accumulation of business, and, when the public interests require, the senior circuit judge, the circuit justice or the chief justice may appoint a circuit judge to hold the district court. The district courts have original jurisdiction as follows: —

¹The Federal Courts: A Brief Outline of their Organization and Jurisdiction under the new "Judicial Code." 59 *Univ. of Pa. L. Rev.* 454 (Apr.).

1. Of all suits of a civil nature, at common law or in equity, brought by the United States, or by any officer thereof authorized by law to sue, or between citizens of the same state claim-

ing lands under grants from different states; or where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of *three thousand dollars*, and (a) arises under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, or (b) is between citizens of different states, or (c) is between citizens of a state and foreign states, citizens or subjects.

2. Of all crimes and offenses cognizable under authority of the United States.

3. Civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common law remedy where the common law is competent to give it; of all seizures on land or waters not within admiralty and maritime jurisdiction; of all prizes brought into the United States; and of all proceedings for the condemnation of property taken as prize.

4. Suits arising under any law relating to the slave trade.

5. Cases arising under any law providing for internal revenue, or from revenue from imports or tonnage, except where jurisdiction has been conferred on the Court of Customs Appeals.

6. Cases arising under the postal laws.

7. Suits at law or in equity arising under the patent, the copyright and the trademark laws.

8. Suits and proceedings arising under any law regulating commerce, except those suits and proceedings exclusive jurisdiction of which has been conferred upon the Commerce Court.

9. Suits and proceedings for the enforcement of penalties and forfeitures under laws of the United States.

10. Suits by assignee of debentures for drawback of duties.

11. Suits by any person to recover damages for injuries to person or property on account of acts done under laws of the United States for the protection or collection of the revenue, or to enforce the right of citizens to vote.

12, 13, 14, 15. Certain suits to enforce the civil rights acts and the fifteenth amendment to the Constitution.

16. Cases commenced by the United States or by direction of any officer thereof against national banking associations and for winding up the affairs of any such bank, and suits by national banks in the district for which the court is held to enjoin action by the Comptroller of the Currency or a receiver. For the purpose of all other suits national banks are deemed citizens of the states in which they are located.

17. Suits brought by an alien for a tort only, in violation of the laws of nations or of a treaty of the United States.

18. Suits against consuls and vice consuls.

19. All matters and proceedings in bankruptcy.

20. Claims against the United States, not exceeding ten thousand dollars, founded upon the Constitution, laws or any regulation of an executive department, or upon a contract express or implied with the government, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect to which the party would be entitled to redress if the United States were suable.

21. Proceedings by injunction to restrain the unlawful enclosure of public lands.

22. Suits arising under any law regulating the immigration of aliens, or under the contract labor laws.

23. Suits and proceedings arising under any law to protect trade and commerce against restraints and monopolies.

24. Suits involving rights to Indian allotments of land.

25. Suits for partition of land where the United States is a tenant in common or joint tenant. . . .

“There are nine judicial circuits of the United States, each including specific districts, thus, the second circuit includes the districts of Vermont, Connecticut and New York, the third circuit, the districts of Pennsylvania, New Jersey and Delaware. In each circuit is a Circuit Court of Appeals consisting, normally, of three judges, of whom two constitute a quorum. Each judge shall receive a salary of seven thousand dollars and must reside within his circuit. The Chief Justice and Associate Justices of the Supreme Court of the United States are allotted among the circuits by order of the court, but temporary assignments may be made by the Chief Justice. . . .

“The Circuit Courts of Appeals shall exercise appellate jurisdiction to review final decisions in the District Courts in all cases other than those in which

appeals and writs of error may be taken direct to the Supreme Court; and, except as provided in sections 239 and 240 of the code, the judgments and decrees of the Circuit Courts of Appeals shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy being aliens and citizens of the United States, or citizens of different states; also in all cases arising under the patent laws, copyright laws, revenue laws, criminal laws and in admiralty cases.

"Appeals may be taken to the Circuit Courts of Appeals from orders or decrees of a District Court granting, continuing, refusing, dissolving or refusing to dissolve an injunction, or appointing a receiver in equity proceedings, notwithstanding an appeal in such case might, upon final decree, be taken directly to the Supreme Court. The Circuit Courts of Appeals have also the appellate and supervisory jurisdiction conferred by the bankruptcy act and its amendments."

After describing the Court of Claims and the Court of Customs Appeals and their jurisdiction, Mr. Loyd thus summarizes the jurisdiction of the Commerce Court:—

"The Commerce Court has jurisdiction over all cases of the following kinds: (1) All cases for the enforcement, otherwise than by adjudication and collection of a forfeiture or penalty or by infliction of criminal punishment, of any order of the Interstate Commerce Commission other than for the payment of money. (2) Cases brought to enjoin, set aside, annul or suspend in whole or in part any order of the Interstate Commerce Commission. (3) Cases authorized to be maintained in the circuit courts by section 3 of the Act of February 19, 1903, regulating commerce with foreign nations

and among the states. (4) All such mandamus proceedings as are authorized to be maintained by the circuit courts under section 20 or 23 of the Act of February 4, 1887, regulating commerce.

"The jurisdiction of the Commerce Court over cases of the foregoing classes is exclusive. Suits to enjoin, set aside or suspend an order of the Interstate Commerce Commission shall be brought in the Commerce Court against the United States and the Attorney-General shall have charge of the interests of the government: but the Commission and any party in interest to the proceeding before the Commission may appear of their own motion, and as of right, and be represented by counsel.

"A final judgment or decree of the Commerce Court may be reviewed by the Supreme Court if an appeal is taken within sixty days of final judgment. Appeals shall not supersede or stay judgment of the Commerce Court unless the Supreme Court, or a justice thereof, shall so direct and the appellant gives bond in such amount as shall be required. Appeals may also be taken to the Supreme Court from interlocutory decrees of the Commerce Court, granting or continuing injunctions restraining the enforcement of orders of the Interstate Commerce Commission. These appeals are given priority in hearing over all other causes in the Supreme Court except criminal cases."

The powers of the Supreme Court are thus stated:—

"The Supreme Court has exclusive jurisdiction of all controversies of a civil nature where a state is a party, except between a state and its citizens, or between a state and citizens of other states, or aliens, in which latter cases it shall have original, but not exclusive, jurisdiction. And it has exclusively all such jurisdiction of suits or proceedings

against Ambassadors or other public ministers, or their domestics or domestic servants, as a court of law can have consistently with the law of nations; and original, but not exclusive, jurisdiction of all suits brought by ambassadors, or other public ministers, or in which a consul or vice consul is a party.

"The Supreme Court has power to issue writs of prohibition to district courts in admiralty cases, and writs of mandamus in cases warranted by the principles and usages of law, to courts appointed under authority of the United States, or to persons holding office under authority of the United States, where a state or an ambassador or other public minister or consul or vice consul is a party.

"The Supreme Court has authority to review on writ of error the final judgment or decree in any suit in the highest court of a state in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute or an authority exercised under the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under any state, on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of their validity; or where any title, right, privilege or immunity is claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under the United States and the decision is against such right. The Supreme Court may reverse, modify or affirm the judgment or decree, and may at their discretion award execution or remand the same to the court from which the case was removed.

"Appeals and writs of error may be taken from a District Court *direct* to

the Supreme Court in the following cases:

"In any case in which the jurisdiction of the court is in issue, in which case the question of jurisdiction alone shall be certified to the Supreme Court for decision;

"From the final sentences and decrees in prize cases;

"In any case that involves the construction or application of the Constitution of the United States;

"In any case in which the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority is drawn in question;

"And in any case in which the Constitution or law of a state is claimed to be in contravention of the Constitution of the United States.

"In cases within the appellate jurisdiction of a circuit court of appeals, that court may certify to the Supreme Court questions of law upon which it desires instruction, and, in any case, civil or criminal, in which the jurisdiction of a circuit court of appeals is made final, the Supreme Court may, by *certiorari* or otherwise, cause the case to be certified to it for review. In any case where the judgment of a circuit court of appeals is not made final, there is a right of appeal to the Supreme Court where the matter in controversy exceeds one thousand dollars."

"It augurs well for the future that we have at present in our national legislature some members who are willing to devote their time to the orderly arrangement and unification of the statute law. Excepting, however, the abolition of the Circuit Court, the code cannot be said to include any radical departures from the existing system. Law is still law; and equity is still the equity of Lord Eldon's day. It would be unjust to the

codifiers to blame them for refraining from attempting reforms that might have aroused a spirit of controversy and have jeopardized their whole work; neither must they be blamed if some expectations are disappointed and proceedings are still technical, slow and expensive. The distinctive feature of Federal Procedure, the complete separation of law from equity, is archaic; and chancery practice, with its expensive references, a

luxury for the rich or the insolvent. But many of our most distinguished lawyers and jurists, whether from reasons of sentiment or from solid conviction it is difficult to ascertain, prefer, it would seem, to practice as their fathers did one hundred years ago, ignoring what has been accomplished by Lord Eldon's successors in the chancellorship, through the Judicature Act of 1873."

The Commission on Uniform State Laws

THE Conference of Commissioners on Uniform State Laws is apparently disposed to yield to the demand that it take up the subjects of model Child Labor and Workmen's Compensation acts. Of this action Col. Nathan W. MacChesney says:—¹

"There was an attack made on the floor of the Conference at the last meeting against the consideration of either of these topics, on the ground that it represented a departure of the Conference from the field of uniformity of state laws to that of reform, and that if they were taken up the Conference would lose sight of its real object, the correcting of the differences between laws which have already been passed and tried in the various jurisdictions. However, the pressure is so strong for the consideration of these topics that I doubt if such a protest will have any weight."

If the only function of the Conference were to pare away the differences between state laws and to secure unity by confining its attention to topics the doctrines of which are widely settled, it

would soon lose all its vitality as a powerful agency at work for uniformity in legislation. Obviously it should seek to promote its own effectiveness by every means in its power.

The attitude which conceives the Conference as holding aloof from every project which involves reform of the law is really a false one, inasmuch as the law is a progressive science, and uniform statutes cannot possibly answer to the requirements of model laws, or have a favorable chance of being generally adopted, if they are drawn upon a theory of the stability of law and society.

The Conference should not be viewed simply as a body which may be called upon to thresh out new schemes of legislation. It is in no sense equipped for propagandic work. When, however, it becomes unmistakably evident that there is to be a large amount of state legislation on some new subject, such as workmen's compensation, for instance, the Conference should be ready to place its ability at the service of the community, and to aid states only too willing to agree to some sound uniform program, before they have enacted legislation which may prove permanently injurious to the cause of uniformity.

¹Uniform State Laws. A paper read before the Law Club of Chicago, and at the College of Law, University of Illinois. By Nathan William MacChesney. 5 *Illinois Law Review* 521 (Apr.).

For these reasons we would like to see the Conference shrink from no undertaking, however formidable, which is closely allied to the movement for uniformity of legislation, and there is really no reason why it should not distribute its labors over a broader field, and exercise a greater influence in shaping state legislation, than it has thus far.

A history of the useful work of the Conference is given in Col. MacChesney's interesting paper, the material of which we will endeavor to condense for our readers. The methods of the Conference have rendered it, as he says, an ideal legislative body:—

"The Annual Conference of Commissioners has from almost the beginning pursued a uniform plan of work. A resolution has been introduced in the conference providing for the appointment of a committee to report upon the advisability of taking up some specific topic. Such committee has then made a report to the conference, sometimes with a preliminary draft of a bill attached. An expert draughtsman is then usually retained, one who has a wide knowledge of the existing law on the subject, and the decisions thereon in this country and abroad, together with a knowledge of the history of the principles and doctrines involved. After a draft has been prepared by someone so equipped, in conjunction with a committee, it is usually sent out to the commissioners as the first tentative draft, and discussed at the next annual meeting, section by section. It has then been universally re-committed, and there have usually been three or four tentative drafts before final adoption. The final vote on an act is always taken by states, and though the meeting at Chattanooga in August was the twentieth Annual Conference, no act has been finally approved which has not received the

unanimous vote of all the states represented. This requires painstaking work of the most exhaustive kind, and it has never been my pleasure to be associated with a body of men who have given such careful and conscientious attention to the subjects before them as the Annual Conference of Commissioners on Uniform State Laws. It is an ideal legislative body, the equal of which it would be hard to find in this country, and its work more nearly approaches the work of the Public Commissions abroad than anything that we have so far developed in this country."

The Negotiable Instruments Act, drafted by John J. Crawford, Esq., of the New York bar in 1895, is now the law in thirty-eight states.

The Warehouse Receipts Act, drafted by Professor Samuel Williston and Barry Mohum, Esq., has been enacted in eighteen states. "The passage of this act in the various states is already bringing about such a condition that the warehouse receipts are received practically as negotiable paper with very beneficial results, enabling the manufacturers and producers in slack times to continue to operate their plants, thus maintaining at the proper degree of efficiency machinery and equipment which otherwise would have to stand idle, with great resultant benefit to the community in which the factories are located and to the labor which is employed."

The Uniform Sales Act, drafted by Professor Williston, has been passed in eight states.

The Uniform Partnership Act, drafted by the late James Barr Ames, was re-committed in 1909, at his request, for further consideration. Since his death Dean William Draper Lewis and James B. Lichtenberger have been at work on the draft. They "have now proposed two tentative drafts, one based on the

collective or aggregate theory of partnership, the theory on which the English act is based, and the other on the entity or legal person theory of partnership, the theory on which the Conference authorized Dean Ames to proceed." Those drafts will be considered at the next conference.

The Uniform Certificates of Stock Act, drafted by Professor Williston, and finally approved in 1909, has been passed in Maryland and Massachusetts. Col. MacChesney disapproves of one section as giving full negotiability to certificates of stock, "going beyond the existing law, as under it a thief can convey title, even though the unauthorized dealing with the endorsed certificate was in no sense due to the owner's negligence. While this is an entirely proper and safe enough rule for short-time paper, such as promissory notes, bills of lading, warehouse receipts, etc., I do not regard it as a desirable one when applied to certificates of stock."

The Uniform Bills of Lading Act, drafted by Professor Williston, and approved in 1909, "is perhaps one of the most important that has ever been given consideration by the Commissioners, and it is absolutely essential that there should be general agreement upon the subject. It is believed bills of lading, which are used so largely as mediums of exchange or substitutes for money, above all other forms of commercial paper should be given the fullest negotiability possible, as has been done in this act, and that no modification of the act should be made which shall impair its efficiency in this respect."

A Uniform Food and Drugs Act has been urged upon the Conference for consideration, but the Conference recommends merely that state laws on this subject be practically uniform with the federal law.

A short Uniform Act on the Uniformity of Execution of Wills was adopted by the Conference in 1892 and re-endorsed in 1910.

A short Uniform Act relative to the probate in any one state of foreign wills was adopted in 1892, being again considered and referred back to committee for redrafting in 1910.

The Uniform Divorce Act "is believed to be as near an ideal act on the subject as can be framed at the present time." It provides six causes for divorce: adultery; bigamy; conviction of certain crimes; extreme cruelty; wilful desertion for two years; habitual drunkenness for two years. "As has been pointed out, however, the desirability of the law depends, not upon its number of causes, but upon its jurisdictional features, and if these could be adopted, much of the scandal attendant upon present divorce decrees would be done away with."

The Family Desertion and Non-Support Act proceeds on the theory that the offense should be treated as a crime. "At present it is not an extraditable offense in Iowa, Minnesota, Nevada, Oregon, Tennessee and Texas."

The Act on Marriages and Licenses to Marry, which approaches the problem of divorce from the marriage standpoint, "throws safeguards around the forming of the marriage contract, and the common law marriage is abolished, a step which Illinois took in 1905. Most of the discussion in the Conference during the first two sessions which considered the proposed act centered on the abolition of the common law marriage, and only at the Conference last year was that principle adopted, and then by a close vote, practically every Southern state voting against its abolition, largely, presumably, because of the negro problem in those states."

The Uniform Incorporation Act, upon

which "there will probably be several years of discussion before final agreement is reached," had its origin in a tentative draft presented by Charles Thaddeus Terry, Esq., in 1909. This act is now in charge of a committee of which Hon. John C. Richberg of Chicago, Chairman of the Illinois Commission, is chairman, and to whose indefatigable efforts much of the practical progress made in this field has been due. The discussion of the act was not completed at the last annual meeting, as all the sections were not reached for discussion, and the entire subject was re-committed to the committee, with instructions to report at the next annual meeting.

Col. MacChesney is of the belief that the Conference will leave the work of drawing acts relating to criminal law and procedure to the American Institute of Criminal Law and Criminology. He offers the following summary of the record of the Conference thus far:—

"I. The National Conference of Commissioners on Uniform State Laws is filling a useful and necessary legislative function in an admirable manner.

"II. That the bar of the country

owes it as a professional duty to call attention to the work of the Conference wherever possible, and secure the support of commercial and other interests which may lead to the adoption of the acts.

"III. That the Illinois Commissioners on Uniform State Laws are entitled to the professional support of their brethren in the work which they are undertaking, without compensation, to forward this great movement.

"IV. That the Illinois legislature should make an appropriation adequate to enable the Illinois Commission to send out properly annotated editions of these acts to the bar of this state, or provide for their printing as public documents, as is done in many of the other states of the Union.

"V. That in view of the methods pursued, the character of the work accomplished, and what has been undertaken, not only the National Conference of Commissioners, but the Illinois Commission itself, is entitled, in its efforts to secure the passage of these acts in this state, to the hearty support of the members of our profession."



The Points

BY ALBERT B. CHANDLER
OF THE ST. LOUIS BAR

HEAR the lawyers with their points,
Doubtful points;
What a world of litigants their wrangling disappoints!
In the changing day and night,
Through whiles of grim delight,
And more in sorry plight,
While the scales of Justice tip, up or down,
Without heed!
In the courts —
What a wealth of happiness their turbulence unjoins;
Appealing higher, higher, higher,
With a desperate desire
To prevail.
New points in lieu of old
Better taken, one is told,
In a clamorous appealing to the wisdom of the gown,
In a mad expostulation with the conscience of the gown,
When judges cannot hear and will not read;
While the purse-string only knows
By the hitching,
And the twitching,
How the fortune ebbs and flows
Without fail,
From the bosom of the palpitating client,
Becoming less and less reliant
In the points, points, points,
In the seeming subtle points,
In the points, points, points,
In the ringing of the changes on the points.

Ancient Criminal Punishment in Korea

BY MAURICE E. ALLEN

IT MAY have been chance, or Dame Fortune, or plainly and simply my usual good luck, which some years ago, during the course of a winter spent in Geneva, led me to frequent the microscopic secondhand book-stores which line the narrow and precipitous streets in the old quarter of the city, in the shadow of St. Pierre.

These little shops, many of which occupy the basements of what were at one time the residences of the most aristocratic families, all retain a certain unique and characteristic atmosphere, which seems to make the dead past live again within their doors. Much of their store of soiled and musty volumes and dingy engravings may at first sight appear trash; but there is gold in the dross for the finding, and what appears worthless to one may prove a very treasure trove to another. The great age of many of the books, while nothing uncommon in one of the oldest of European cities, may well fascinate the visitor from a land where the early fifties indicates a respectable antiquity, and where national history has been written largely in a single century.

While fingering over a pile of old leather bound books, all somewhat the worse for wear, I came across one little brown volume, rich in red and gold, which bore the impressive title, "Histoire Générale des Voyages." It was one of a number comprised in the same series and was printed in the old French of the middle eighteenth century, with its quaint long stemmed s's and rounded verbs. The leather cover was chafed and rubbed as if by constant handling,

while sundry gouges on the smooth and polished surfaces testified to the careless finger nails of a past generation. On the inside, after a long and minutely subdivided title in which the merits of the work were set forth with a wealth of adjectives, one learned that the book had been published in Paris, in the year 1749, "chez Didot, Libraire, Quai des Augustins, à la Bible d'or." Royalist patriotism was further satisfied by the qualifying clause: "Avec Approbation et Privilège du Roi."

What interested me especially, however, was the fact that this particular volume was largely devoted to a description of Korea, a circumstance which excited in me a more than passing interest, because of the fact that that country was my birthplace and had been my home until the call of school and college brought me back over the Pacific.

The demand for ancient histories of the "Hermit Kingdom" must have been at a low ebb, for I was able to get the book at a very reasonable figure, the proprietor seeming quite elated at being enabled to dispose of what he evidently regarded as a diminutive white elephant.

The narrative proved to be based principally on the accounts of two men: Henry Hamel, secretary of the ship *Sparrow Hawk*, which was wrecked off the southern coast of Korea in the year 1653; and Father Regis, a French missionary who was employed in making a map of China in the years 1709-1711.

Father Regis was one of that fearless and devoted band of early Jesuit missionaries against whose intrepid bravery and Christian courage not even tortures

and bloody edicts could prove a barrier. His work did not permit him to attempt the exploration of the interior of the peninsula, but he did succeed in finding out a great deal from those who had already visited what was then a little known land. "This geographical missionary," so runs the editor's preface, "had not travelled through Korea; but he had followed, from one sea to the other, the northern boundary of this kingdom. Korea is surrounded by water on three sides, an observation which verifies the fact that we have long been deceived in mistaking it for an island. Regis obtained his information about the interior of the country from a Tartar lord sent by the Emperor Kang-hi to the King of Korea."

Hamel was a Dutch navigator and was cast away with thirty-five companions on the island of Quelpart, near the Korean coast, from which place they were soon taken to the mainland and conveyed to Seoul (Sior), which was then, as now, the national capital. The Hollanders remained in the country for thirteen years, meeting for the most part with very kind treatment, but not allowed under any circumstances to leave the country. Many of the men took native wives and, giving up all thought of escape, elected to spend the rest of their days in the land of their adoption.

I have occasionally seen Koreans in the streets of Seoul whose thick and curly red beards, in striking contrast to the black and somewhat scantier adornment of their brethren, marked them as the descendants of those rugged Dutch sailors.

In the year 1666, when but sixteen of the original thirty-six were living, Hamel and seven others of the more adventurous secretly bought a junk of a native and succeeded in making their

escape to the Japanese island of Goto and thence to Nagasaki. They were warmly received there by the commandant of the Dutch trading station and ultimately returned to Amsterdam in a Dutch frigate.

Hamel's account, which is based on his own observations, was verified in every detail by the testimony of those companions who returned with him to Holland. Regis, however, obtained his information at second hand, from a Tartar lord who, confined within prescribed limits, would naturally lack the opportunity of close observation. The Frenchman practically admits as much in speaking of the visits of the envoys of the two countries. "Korean ambassadors . . . in China," he writes, "are shut up at first in their dwellings; and when they are (at last) set free they are surrounded with spies in the guise of a cortege. The Tartar lord, according to the missionaries, had not been much freer in Korea. Spies kept constant watch over him; and every word that escaped his lips was immediately communicated to the Court by means of a certain number of men placed at intervals along the streets."

The Koreans certainly taxed their ingenuity in devising punishments for parricide and other particularly revolting crimes. "A woman who kills her husband," writes Hamel, whose account now lies before me, "is buried alive up to the shoulders in the middle of a highway, and near her is placed a hatchet. Every passerby, below the order of nobility, is required to strike her on the head with it, until death finally ensues."

The usual penalty for murder, from the account of the same writer, must have been even more horribly revolting, though not devoid of a certain gruesome fitness. "The punishment of murder is singular. After the feet of the criminal

have been beaten for a long time he is forced by means of a funnel to swallow vinegar, in which has been washed the rotten corpse of his victim, and when he is well filled with it he is beaten on the abdomen until he dies."

This may seem incredibly barbarous, but what should be said of the English criminal laws of that day? Coin sweaters were boiled in lead or hot water; perpetrators of brutal murders were half hanged and then, while still living, disemboweled. It was an age of brutal punishments the world over; and Korean justice was no more fiendish than that of other more civilized countries.

The severity of the sentence imposed in the case of adultery depended on whether the culprit were married or single. "A married man . . .," our narrator says, ". . . is by law condemned to death, especially when the offence involves persons of distinction. The father of the criminal or his next of kin is compelled to act as executioner. The criminal is allowed to choose the mode of death: usually, however, men ask to be stabbed in the back, and women to have the throat cut." In the case of a single man "his face is smeared with lime, each ear pierced with an arrow, and a bell hung on his back; this is rung at all the cross-roads where he is exposed and this punishment is usually completed by forty or fifty blows of a stick on the buttocks."

The lives of the miserable slaves, unprotected from the rapine and cruelty of their masters, must have been wretched in the extreme. "Slaves who kill their masters are delivered over to cruel tortures; but a master has the right to take the life of his slave on the slightest pretext."

The payment of debts was enforced in so harsh a manner as to make the infamous debtors' prison of our English

ancestors seem even mild by comparison. "Those who do not pay their creditors," writes Hamel, "within the required time, are beaten on the shins two or three times a month, until they find the means of discharging their debts. If they die without having fulfilled their duty their next of kin have to pay for them or else undergo the same chastisement." This method must have been extremely efficacious, for our informant then naively remarks, "Thus no one is in danger of losing what is due him."

Death seems also to have been the penalty inflicted even for some of the lesser crimes. "Robbers," Hamel says, "undergo the torture of being beaten on the feet until dead." Those hardy men must have proven more obdurate than did the delinquent debtors for, "Such a terrible chastisement," he adds, "does not hinder the Koreans from being much addicted to larceny."

It appears from his observations that in those days even the mildest official remedy was of a nature well calculated to secure obedience to the laws. "The lightest punishment in Korea," he writes, "is the bastinado on the buttocks or on the calf of the leg. It is not even regarded as a disgrace, because it is very common there, and a word spoken out of place is sometimes sufficient to merit it."

It will be observed that the bastinado was so often the instrument of justice, that it might be interesting to note our author's rather minute description of the four ways in which it was usually applied.

"The manner in which the bastinado is applied to the shins is as strange as the torture itself. The criminal's feet are bound to a little bench, about four inches broad. Another bench is placed under the calves, which are attached

to it as firmly as possible. In this position the shins are beaten with a lath made of oak or alder wood, as long as one's arm, a little rounded on one side and flat on the other, about two inches wide, and as thick as a crown. Not more than thirty blows may be given at one time. Two or three hours afterward, however, the process is repeated, until the sentence has been fully executed."

This form of punishment was still in use in recent years. The writer's father, who, in the early eighties, opened up the first foreign hospital in the country, often had natives brought in for treatment after the shins had been beaten. The pain must have been excruciating, for he tells me that the flesh was usually reduced to a pulp, necrosis of the exposed bone being one of the results.

"When a criminal is condemned to receive the bastinado on the soles of the feet," writes Hamel, "he is made to sit on the ground, his feet bound together by thick saplings, and placed on the end of a piece of wood, the rest of which is thrust between his legs. In this position the soles are beaten with a club as thick as one's arm and two or three feet long. As many blows are given as the judge has ordered.

"In applying the bastinado to the buttocks, the culprit is stripped and stretched on the ground, face downward . . . and in this position he is struck with a lath, longer and wider than that first described. . . . One hundred blows are equivalent to death, and even fifty have sometimes produced the same result.

"The bastinado on the calves of the legs is applied with rods about as thick as one's finger. It is the usual punishment of women and apprentices. In these performances the criminal utters such lamentable cries that compassion

renders the spectators fellow-sufferers in his torture."

Public enemies, in Hamel's day, suffered death and forfeiture of estate, quite after the manner of the old English law. "Justice," he remarks, "is severely administered there. A rebel is exterminated with all his race. His house is demolished, and no one dare rebuild it. All his goods are confiscated and sometimes abandoned to some faithful subject. Anyone who utters the least objection to the sentence is certain to undergo a rigorous punishment."

There were certain restrictions to hold in check the tyranny of lesser officials; at least, to prevent the infliction of capital punishment at the mere caprice of a local magistrate. "Inferior Governors and subordinate judges are allowed to condemn no one to death without informing the Governor of the province about it, nor can persons of state be tried without the participation of the court."

Those, however, who incurred the special ill-will of the reigning sovereign, might expect the most summary and barbarous punishment, as the following incident related by Hamel well shows. "On one occasion, when the King had asked his brother's wife to embroider a robe for him, because she excelled in needlework, this princess, who cherished a mortal hatred toward him, sewed between the stuff and the lining some charm of so potent a nature that he could experience no pleasure, nor enjoy the least repose, as long as he wore his robe. Finally, having suspected the truth, he had the garment ripped apart, and they were not long in finding the cause of the trouble. His resentment was so keen that he ordered his sister shut up in a room paved with copper, beneath which a great fire had been lighted. She died there in the agony

of intense heat. The news of this sentence naturally spread in the provinces, and a near relative of the princess, who was the governor of a town and greatly esteemed at court, had the temerity to write to the King informing him that a woman who had been honored by marriage with the brother of his majesty should be treated less cruelly, and that her sex deserved more favor. The King, offended at this indiscretion, had the author of the letter recalled immediately and his head cut off, he having first received twenty blows on the shins."

Regis has much less to say regarding crime and punishment and does not go into such minute details as did his predecessor. From what little he does tell us it would appear, if we may credit his statements, that there had been a considerable lessening in the rigors of the law in the fifty years which had elapsed since Hamel's visit.

Banishment had now largely taken the place of the death penalty. "Chastisements," he writes, "are not very severe in Korea. Crimes which are considered capital in other countries are here punished only by abandonment to some neighboring island."

This was still a common method of punishment when I was in the country, and was certainly a most desirable substitute for the death penalty. Also, to judge by the remarks of a recent writer, the sentence was not as formidable as the name might imply. In his recent book, "Things Korean," in describing the punishment of a native official, Dr. Allen tells us that "the returned minister was banished. That is, he went out of the city walls to his country place for the space of three days."

Offenders were executed, in some in-

stances, even in the days of which Regis writes, and for an offence which may seem shockingly trivial to our views. We must bear in mind, though, that it was a land of ancestral worship, a land where filial respect and reverence are a man's highest duty. "A son," he says, "who scolds his father or mother, is condemned to lose his head."

Beheading continued to be the mode of execution until about fifteen years ago, when the Koreans, at the suggestion of an American adviser, adopted hanging as being more in accordance with occidental ideas.

The dreaded bastinado was still vigorously serving the ends of justice in Regis' day, but there is evidence of a little more regard now being paid to the feelings of the wretched victim. "Light faults," he says, "incur the penalty of the bastinado. A sack extending to the feet is thrown over the head of the person compelled to undergo some punishment, as much to assuage his humiliation as to allow more freedom in administering the chastisement."

With the exception of such distinctive national punishments as that last mentioned, which long survived more humane and modern ideas, Korea has kept well abreast of the wave of humanitarian sentiment which swept over Europe during the closing years of the eighteenth century and caused the repeal of so much of the harsh and bloody criminal legislation of that day.

Most of the punishments which have been described are as much a curious manifestation of the perverted justice of earlier ages as were the tortures of the stake and the Inquisition; or the whipping post and the ducking stool of our Puritan forefathers.

Ann Arbor, Mich.

The Advice

By LURANA W. SHELDON

I 'VE come here, Mr. Lawyer, tew ask your kind advice
Upon a leetle matter that I 'low ain't over nice;
A man ain't got no bizness, or so I've allus sed,
Tew peddle fam'ly secrets till he's plumb out on his head!

But — waal — I may be loony! Tain't s'prisin' ef I am!
This thing has bin a-ranklin' till I can't keep cool or ca'm!
It's kep' my eyes wide open every night fer nigh a year
An' that thar's jest ther reason why, at last, I'm skulkin' here.

“What mout be all ther trouble?” I'm comin' tew it now!
This here's a tough old furrer an' it's mighty hard tew plough!
Tain't likely, Mr. Lawyer, you'll feel ther same as me —
But mebbe that is better, fer not feelin', yew kin see!

There's some as has ther vision tew look intew any knot
An' see ther very fing'rin' that will pick it like er shot!
I 'low 'twon't be no bother fer a lawyer chap like yew
Tew see what's on my conshuns an' tew tell me what tew dew!

Yes! Yes! I know you're hurried! I'm a-comin' tew it quick!
No, tain't about no critter — this here bone I've got ter pick!
It's somethin' wuss, a durn sight, an' it makes me mad, by gum,
Tew think I've got tew stand it—mebbe till ther kingdom come!

But come tew think it over I've a notion tew go back
An' face ther gol-dinged trouble an' jest take another hack
At ther snarl that's got me addled — mebbe that's you're own advice —
Not tew peddle fam'ly secrets when they ain't jest over nice!

Reviews of Books

WYMAN'S PUBLIC SERVICE CORPORATIONS

The Special Law Governing Public Service Corporations and all others engaged in public employment. By Bruce Wyman, Professor of Law in Harvard University. Baker, Voorhis & Company, New York. 2 v. (\$12.50 delivered.)

THE most striking characteristic of these volumes at first glance is that although most of the decisions cited have been rendered within the last ten years, the fundamental cases date back to the Year Books. A turn in the cycle of economic conditions has reproduced old necessities of legal limitations on individual liberty and has brought to light the nearly forgotten law that grew up in an age when business monopoly was the rule and competition the exception, and has developed it to deal with modern business methods. The theory of public obligation of the monopolist at its birth had its basis in the fact of virtual monopoly, and from this come possibilities of important expansion to deal with modern virtual monopolies, and so the law of the mediæval innkeeper and carrier has become the law governing the greatest and most powerful of modern corporations.

The purpose of this treatise is to show the fundamental unity of the law of all the great public services which hitherto have been treated separately with cross citations only by way of analogy. Its thesis is that public calling is in the nature of a status voluntarily assumed,

to which the law attaches certain obligations delictual in character just as it does to agency or partnership. It is not dependent upon contract, although it has certain incidents misleadingly like contract. These obligations are not to the entire public, but to those within the scope of the calling undertaken who apply for service. Within certain broad limitations reasonable regulations may be enforced by the corporation as conditions precedent to further service. There is legislative power to regulate the service within limitations not confiscatory. And the latter part of the book is devoted to an elaborate analysis of the new and rapidly multiplying decisions on rate regulation. In the newer and less familiar part of the subject full citation of cases is made. In the better settled part, largely relating to carriers, only characteristic cases are cited. There is a scholarly historical introduction, an illuminating chapter analysis and a very full index.

The book has a double interest for lawyers. It collects and analyzes authorities on questions of constant recurrence in practice large or small. It deals in a broad way with one of the most vitally interesting problems of public policy. The author says: "No one can carefully study the authorities on this subject without feeling that we are just entering upon a great and important development of the common law. What branches of industry will eventually be

of such public importance as to be included in the category of public callings, and to what extent the control of the courts will be carried in the effort to solve by law the modern economic problems, it would be rash to predict. Enormous business combinations, virtual monopolization of the necessities of life, the strife of labor and capital, now the concern of the economist and the statesman, may prove susceptible of legal control through the doctrines of the law of public callings. These doctrines are not yet clearly defined. General rules, to be sure, have been established, but details have not been worked out by the courts; and upon the successful working out of these details depends to a large extent the future economic organization of the country. Only if the courts can adequately control the public service companies in all contingencies may the business of these companies be left in private hands."

The conservative method of control is now on trial and upon the intelligent development of this by the lawyers depends the chance of escaping ultimate public ownership. In guiding us in the solution of this problem Professor Wyman's book is itself in public service.

PARSONS' LEGAL DOCTRINE AND SOCIAL PROGRESS

Legal Doctrine and Social Progress. By Frank Parsons, Ph.D., member of the Massachusetts bar, author of "Parsons' Morse on Banks and Banking," and other legal works, lecturer for many years in the Boston University Law School, author of "The Railways, the Trusts and the People," the "Heart of the Railroad Problem," "The Story of New Zealand," "The World's Best Books," etc. B. W. Huebsch, New York. Pp. 219. (\$1.50 net.)

IN "Legal Doctrine and Social Progress," the author allows himself to roam over a very considerable area. He first considers the theory of law, dealing with it as a form of control by which the minority element of society

is held to the standards of the times as typified in the average man; and dealing with it also as an expression of the interests of the governing authority, whether that authority be monarch, masses or some limited classes. In either of these aspects the law must change from age to age either by statutory changes or by the decisions of the courts.

We are next given about twenty-five pages upon some of the great problems of the time such as trusts, industrial changes of today and co-operation. With some vagueness and brevity the author suggests that co-operation must supplant competition, and with this change must go all our legal doctrines that support or are based upon the competitive system in industry — such as laws forbidding combinations, and all legal doctrines tending to treat the laboring man as a chattel whose price is to be fixed by the law of supply and demand.

Then the author refers to many reform movements which he seems to favor, among which we might mention the referendum, direct popular nominations, home rule for cities, right to be born well, the Gothenburg system of dealing with liquor traffic and so forth. These are only a few of the many and widely differing reform movements that we are told are demanding and making changes in the law. Just what these changes are, and how they are to be accomplished, does not appear, and in treating of law or legal doctrine the book does not sufficiently distinguish between statute law and that laid down by courts.

When we finish a book we like to say, "*Hæc fabula docet*," etc., but in the present instance we confess to some uncertainty. But the thesis of the writer would seem to be that law is a steadier or a conservative element in society.

It must progress and must reflect social changes, but still it is based on the past, and on the average man, and on the governing powers, and so cannot be lightly done away with or altered by the reformers. The standards of the average man must be changed, or the governing power must be convinced before the law can properly be made to give up the past and recognize the new order. Legal doctrine and social progress will always go hand in hand, but the legal doctrine will always lag a little, and in doing this will perform the valuable function of holding back the social progress from radical or too rapid advance.

MASSACHUSETTS TRIAL EVIDENCE

Massachusetts Trial Evidence. By Edwin Gates Norman and Arthur Stillman Houghton, of the Worcester bar. Baker, Voorhis & Company, New York. Pp. nearly 1200. (\$7.50 delivered.)

THERE are two types of legal mind. One is analytic and sees principles first and thence reaches conclusions as to specific cases. The other sees facts first and reasons by analogy. The latter is more common. It is not for reviewers to say which is better. We need books for both. This book is a revival of a type that has been neglected of late, the trial lawyer's handy book covering the whole field of law looked at from the point of view of admissible evidence and arranged so that you can find things. It apparently contains all the Massachusetts cases on admissibility of evidence to and including volume 205. As there is no attempt at analysis the arrangement is alphabetical. The reviewer has tested the book in practice, and has found its citations complete and accurate. It will be gratefully welcomed by every busy trial lawyer in Massachusetts. It is unfortunate that

the publishers did not appreciate that the book would have been twice as valuable if reduced in bulk so that it could be carried into court, although it is not printed as wastefully and cumbrously as many of the recent textbooks.

SHORT BALLOT CHARTERS

Loose Leaf Digest of Short Ballot Charters: A Documentary History of the Commission Form of Municipal Government. Edited by Charles A. Beard, Ph.D., Associate Professor of Politics in Columbia University. Short Ballot Organization, 383 Fourth Avenue, New York. (\$5 net.)

PROFESSOR BEARD originally hoped that the work of preparing a digest of short ballot charters would be undertaken by a new bureau of research to be established by the Department of Politics in Columbia University. The foundation of this bureau, however, was deferred, and the Short Ballot Organization having placed its facilities and funds at the editor's command, the work appears under the auspices of this body.

A short ballot charter is defined as one conforming to the following general principles:—

First: That only those offices should be elective which are important enough to attract (and deserve) public examination.

Second: That very few offices should be filled by election at any one time, so as to permit adequate and unconfused public examination of the candidates.

From the diffusion of power and responsibility among a small number of conspicuous offices, it follows that the hard and fast division between legislative and executive functions is obliterated. The short ballot system is thus practically synonymous with "government by commission," as the phrase is popularly understood. No attempt

is made to formulate a concise definition of commission government. The forms of charters examined, however, though they have minor differences, are all of one same general type which fairly answers to the description of government by commission.

The principal part of the work consists of digests of short ballot charters, grouped by states. One hundred and twenty-five or more cities are thus treated. The statement is offered that the work is not and never can be complete, but that it is desired to make the office of the organization a natural clearing house for information and to reflect changes in the movement from year to year in the Digest.

To preclude the omission of any cities in view of the definition of commission government adopted, there is a department containing notes on "quasi-short ballot" cities. Another division, entitled Chapters on Commission Government, includes articles by Charles W. Eliot, Richard S. Childs, Robert Tyson, John MacVicar, Elliot H. Goodwin and Delos F. Wilcox, to which other papers related to the general movement will be added from time to time. Other features are Tabulations showing the main features of short ballot charters, Texts of Short Ballot Charters, Texts of Proposed Charters, and a Bibliography.

The three hundred pages of the original edition, with the additions shortly to be made, will ensure the indispensableness of the work to all who are concerned with the theoretical or practical problems of progressive municipal charters. Professor Beard and the Short Ballot Organization have performed a public service by establishing a permanent mechanism for the collection and dissemination of information about a national movement of constantly growing importance.

NOTES

The first annual report of the Massachusetts Bar Association has been issued, recording the proceedings of the meeting held in Boston December 17, 1910. The report of the membership committee showed that at the end of its first year of existence the Association had a membership of 12 per cent of the 4,700 lawyers of the state, but it is expected that the membership will be increased in consequence of the interest that will be awakened next August when the Association entertains the American Bar Association in Boston. Hon. Richard Olney, Secretary of State in Cleveland's administration, was the first president of the Association, being succeeded by Alfred Hemenway, Esq. Mr. Olney in his annual address referred to the fact that the various committees had performed their duties "with a zeal which promises well for the future," and laid stress upon the work to be done by this Association "of the most vital character, in connection with the administration of justice." The question of the improvement of civil procedure in the state courts was the chief subject discussed at the meeting. The Committee on Legislation rendered a report on the recommendations of a legislative commission which had proposed a lengthy bill covering this subject. The report was not unanimous, and it precipitated lively discussion, but while it was not entirely adopted, and several matters were recommitted for further consideration, an important preliminary step has been taken in the direction of an enlightened solution of the most pressing problems of court administration and procedure by an organized bar. The volume, which is not a large one, is mainly taken up with documents relating to this important subject which is now engrossing the attention of the Massachusetts bar.

"American Ballot Laws, 1888-1910," compiled by Arthur C. Ludington (Legislation 40, New York State Library), gives a historical summary of American ballot laws for twenty years in all the states and territories. Part I is a Chronological Survey outline of all laws enacted and every constitutional amendment proposed. Part II, "Classification and Summary," presents in tabular arrangement the principal changes in the form of ballot in the several states. Part III gives a digest for each state of the principal features of the ballot laws as they stood on November 8, 1910, arranged under four headings.

The Lawyers Co-Operative Publishing Company will have ready this month "Dill on New Jersey Corporations," enlarged and brought down to date by Frank White, author of "White on Corporations," and Frank C. McKinney, former associate of Judge Dill. The new edition represents years of careful work by the author up to the time of his death in December, 1910.

The West Publishing Company of St. Paul, Minn., have issued a new illustrated law book catalogue, which is so arranged as to be of value as a book of reference. Copies will be furnished without charge on request.

BOOKS RECEIVED

RECEIPT of the following new books is acknowledged:—

Ancient, Curious and Famous Wills. By Virgil M. Harris, member of the St. Louis bar, lecturer on Wills in the St. Louis University Institute of Law, trust officer of the Mercantile Trust Company of St. Louis and author of "The Trust Company of To-day," etc. Little, Brown & Co., Boston. Pp. 454 + 18 (index). (\$4 net.)

The Law of Fraudulent Conveyances. By Melville Madison Bigelow, Ph.D., Dean of the Boston

University School of Law, author of "The Law of Bills, Notes and Cheques," "Elements of Equity," "The Law of Torts," etc. With editorial notes by Kent Knowlton of the Boston bar. Little, Brown & Co., Boston. Pp. lxxix, 731 + 30 (index). (\$6.50 net.)

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.)

A Practical Treatise on the Law and Procedure involved in the Preparation and Trial of Cases of Ejectment and other Actions at Law respecting Titles to Land. Treating particularly of the pleading, practice and evidence, and in a general way also of the principles of the substantive law involved in such actions. By Arthur Gray Powell, Judge of the Court of Appeals of Georgia. The Harrison Co., Atlanta. Pp. 583 + 47 (table of cases) + 121 (index). (\$7.50.)

Crime: Its Causes and Remedies. By Cesare Lombroso, M.D., Professor of Psychiatry and Criminal Anthropology in the University of Turin. Translated by Henry P. Horton, M.A. With an introduction by Maurice Parmelee, Ph.D., Assistant Professor of Sociology in the University of Missouri, author of "Principles of Criminal Anthropology," etc. Modern Criminal Science Series, No. 3. Little, Brown & Co., Boston. Pp. xlvi, 451 + bibliography and index 27. (\$4.50 net.)

Index to Periodicals

Articles on Topics of Legal Science and Related Subjects

Admiralty. See Extra-territoriality.

Armaments. "Armaments and Arbitration." By Rear-Admiral A. T. Mahan, U.S.N. *North American Review*, v. 193, p. 641 (May).

"I think, and have always thought, that the possession of force, of power to effect ends, is a responsibility—a talent, to use the Christian expression—which cannot by the individual man or state be devolved upon another, except when certain that the result cannot violate the individual or the national conscience. A general arbitration arrangement between Great Britain and the United States approaches this condition, because it is as certain as anything human can be that the two states will never again go to war; that their difficulties will always be settled peaceably. If there were no other reason, the interests and consequent sympathies of the British colonies except perhaps those of Canada, would insure this. . . .

"But in questions of policy, like the Monroe Doctrine, or the fortification of the Panama Canal before the Zone became United States

territory, or the position of Great Britain in Egypt, or of Japan in Manchuria, determination does not concern lawyers as such, but men of affairs; because, there being no law applicable, what is needed is a workable arrangement based upon recognized conditions. Such arrangement becomes a law for the period of its duration.

"This is precisely the situation in which Germany finds herself, and has found herself. The questions pressing upon her, though conditioned by law, have been and are questions of national policy and imminent national interests. The unification of the Empire, the determination of its limits, the securing of conditions which should assure her weight in the councils of Europe, the extension of the sphere of German interests in the outside world, have been and are achievements of policy, accomplished against adverse conditions such as the United States and Great Britain have never known. To the effecting of them national power organized as military force has been and continues essential."

"America's Naval Policy." By Harry D. Brandyce. *Forum*, v. 45, p. 529 (May).

"If America is to maintain, and if necessary

enforce, her avowed principles, a strong navy is as indispensable to her as to England."

Banking and Currency. "Financial Feudalism and a Central Bank." By Edmund D. Fisher. *Forum*, v. 45, p. 539 (May).

An analysis of Mr. Aldrich's "Suggested Plan for Monetary Legislation."

"The country has been long fearful of a centralized banking power. Such a power exists today, but in the inefficient archaic and feudal form. Why not then accept the principle of centralization as expressed by the central bank, but applied under a control based upon a fair representation of the commercial and financial interests of the entire country?"

"The Aldrich Plan for Monetary Reform." By Maurice L. Muhleman, author of "Monetary and Banking Systems." *The Trend*, v. 1, p. 1 (Apr.).

The writer, who is an acknowledged expert in the subject, expounds the Aldrich plan very clearly.

"When it shall have been revised to meet such criticisms as may prove well founded, the plan will unquestionably give the country a system under which its demands, by way of currency and credit facilities, will be as adequately provided for as is done by the systems of other leading nations; a sound currency, adjustable in volume to every legitimate need; a credit system under which interest rates will be more nearly uniform, and lower, allowing for special circumstances; both the currency and the credit system will be under the influence of commercial and not of speculative conditions.

"No legitimate need for credit or cash will be unsatisfied, when the system, perfected and adopted, is in practical operation."

"Masters of Capital in America — Wall Street, The City Bank, the Federation of the Great Merchants." By John Moody and George Kibbe Turner. *McClure's*, v. 37, p. 73 (May).

This article contains a history and description of the powerful City Bank, "the great central temple of American money."

Citizenship. "American] Citizenship, II." By Dudley O. McGovney. 11 *Columbia Law Review* 326 (Apr.).

This final installment deals with the status of unincorporated peoples and peoples incorporated with less than full privileges, considering the rights of citizenship of the American tribal Indian and of the native inhabitants of Porto Rico and the Philippines.

Civil Service. "Federal Expenditures under Modern Conditions." By William S. Rossiter. *Atlantic*, v. 107, p. 625 (May).

"There should be in each department an important official who can be described as a permanent under-secretary. This man should be selected with as much care as would be the manager of the United States Steel Company."

Codification. See Uniformity of Law.

Comparative Jurisprudence. "United States of America — State Legislation." By R. Newton Crane. *Journal of Comparative Legislation*, no. 24 n. s., p. 333 (Mar.).

On the state legislation of 1909, Mr. Crane offers the prefatory comment: —

"An effort is discernible to improve the character of the electorate, and to centralize the power and authority of executive officers of all municipalities in order to lessen the opportunities for 'graft' and other forms of corruption. A number of states adopted Corrupt Practices Acts, and two notable statutes were enacted providing for the government of cities by commissions, instead of by an elected mayor and legislative council. Laws were passed in certain of the states to elevate the judiciary, and in other ways to prevent the delays of litigation. The most popular topic of legislation, however, was that which relates to the subject of temperance, and of what may properly be described as Eugenics, if this word may be considered to embrace tentative measures for the prevention of disease, not only by providing for inspection of food and sanitary appliances, but by the establishment of homes and hospitals for the isolation of tubercular patients and the organization of bureaus of research and the administration of preventive measures in all cases of communicable disease."

"Review of Legislation, 1909." With introduction by Sir Courtenay Ilbert. 11 *Journal of Comparative Legislation*, no. 24 n. s., p. 308 (Mar.).

Referring to Mr. R. Newton Crane's section on the United States, Sir Courtenay Ilbert observes that "The United States can no longer be described, if they ever were justly described, as the chosen home of rampant and unrestrained individualism."

See Presumption of Death, Negotiable Instruments.

Conflict of Laws. "The Validity of Wills, Deeds and Contracts as Regards Form in the Conflict of Laws." By Ernest G. Lorenzen. 20 *Yale Law Journal* 427 (Apr.).

"1. The rule of the English and American courts that the Statute of Frauds applies to foreign contracts should be modified, because it is unjust and is not required by paramount considerations of policy.

"2. The view sustained by the English and American cases that the law otherwise determining the existence of a legal act should control also its formal requirements is correct upon principle.

"3. Practical considerations, based upon the requirements of international intercourse, suggest a modification of this rule to the end that compliance with the *lex loci* shall be regarded as sufficient. The reasons advanced for the non-application of the *lex loci* to acts affecting immovables are insufficient. For the sake of security in dealings relating to commercial paper, compliance with the requirements of form of the place of issue should be obligatory,

subject to the qualifications suggested by the English Bills of Exchange Act.

"4. Inasmuch as the law should be liberal in matters relating to mere form, contracts which do not comply with either of the above rules should be regarded as valid if they satisfy the *lex fori* and wills disposing of personal property if they satisfy the *lex fori* or the law of the domicile of the testator at the time of the execution of the will.

"5. All of the preceding rules must be understood as referring to the formal requirements prescribed for the act in question by the territorial law of the state or foreign country referred to, and not to their law as a whole inclusive of the rules governing the Conflict of Laws."

See Extra-territoriality.

Conservation of Natural Resources. See Waters.

Contempt. "Contempt of Court." By R. M. Theobald. *Westminster Review*, v. 175, p. 390 (Apr.).

"*Reform it altogether; let committal for contempt of court be forever and entirely abolished. Treat all crime in the same way; and let there be nothing abnormal or exceptional in the treatment of criminals.*"

Contracts. See Conflict of Laws, Mistake.

Copyright. "A Chapter in the History of Literary Property: The Booksellers' Fight for Perpetual Copyright." By Edward S. Rogers. 5 *Illinois Law Review* 551 (Apr.).

A most interesting chapter of legal history, showing how the modern doctrines of copyright came into existence, and the scant protection afforded authors by the old common law.

Corporations. "Have the Corporations Been Law-Abiding?" By H. St. George Tucker. 16 *Virginia Law Register* 881 (Apr.).

A reply to Hon. Alfred P. Thom's paper entitled "Have the States been Law-Abiding?" read before the Virginia State Bar Association last year. Mr. Tucker seeks to show, by pursuing Mr. Thom's own line of argument, that it is not the states, but the corporations, which have not been law-abiding. Applying to the latter "the same argument which was applied to the states by Mr. Thom, and based upon the same premises, the conclusion is inevitable that the corporations of the country have not been law-abiding in their persistent attempts to have the constitutional laws of the states declared unconstitutional by the Supreme Court of the United States."

See Public Service Corporations.

Criminal Law. "Crimes in Hindu Law." 15 *Calcutta Weekly Notes*, no. 7, p. xlii (Jan. 9) and succeeding issues.

This is a scholarly essay on Hindu criminal law by a writer not only well qualified to trace the history of its development but schooled in Western legal thought. The general theories of

crime and punishment underlying Hindu law are intelligently set forth, and specific crimes are then taken up and treated one after another.

"We have seen that Hindu criminal law is distinguished from other archaic systems by the theory of the function of the state in respect of crimes. Another notable point of distinction is the absence of almost all traces of the *lex talionis* in it. . . . In Hindu law there is nothing similar to these provisions of archaic law nor anything in the theory of punishment to indicate that it was a substitute for private revenge. The sentences in certain offences, such as arson in respect of dwelling houses and granaries for which death by slow fire is provided, no doubt seems to indicate an attempt to make the punishment commensurate with the wrong done. But even in these provisions as we have them in the codes, and in others, so far back as we can trace the Hindu law, punishment has been based on culpability or moral turpitude and not to any extent determined by the feelings of the party injured. . . .

"Indeed, the complainant can in no case claim compensation for the injury to himself, but if his property is affected he is entitled to recover it or in other cases to be reimbursed the actual loss suffered. If he is hurt the accused has to pay the costs of his medical treatment [Yajnavalkya II, 225] but just as the gist of a crime is the offence to *dharma* and not private injury, so the essence of the remedy is the sentence which the state has to inflict to satisfy outraged *dharma*. In every case the sentence is to be commensurate not with the sentiment of vengeance roused but with the amount of culpability, judged with regard to the time and place of the occurrence and the manner of committing the offence. It is to be deterrent and not vindictive, and so it is necessary, having regard to the age, wealth and power of the accused, to determine the exact sentence which will act as a deterrent [Yajnavalkya I, 368]. . . .

"It will thus be seen that the Hindu theory of crimes and their punishment bear evidence of an advanced stage of civilization. The institutions to which Hindu law refers, the state of industries, trade and commerce which they indicate, the preponderance of civil law over crimes in their system of laws, the greater attention paid to offences against property than to violence to person, all point to the same conclusion. Considering that Hindu law as laid down in the *Smritis* as they have come down to us date back to several centuries before the advent of Christ and that even the *Mitakshara* must be placed in the very early centuries of the Christian era, the evolution to this stage must have been the result of civilizing forces and culture that had been in operation amongst the Hindus thousands of years earlier." (No. 8, pp. li-liii (Jan. 16.))

Criminal Procedure. "Criminal Procedure in England." 45 *American Law Review* 161 (Mar.-Apr.).

A summary of the report of the committee sent abroad by the American Institute of Criminal Law and Criminology to investigate and report on criminal law and procedure in England.

Criminology. See Sterilization of Criminals.

Detection of Crime. "Great Cases of Detectable Burns: Ulrich, A Soldier of Fortune." By Dana Gatlin. *McClure's*, v. 37, p. 51 (May).

This is a valuable human document, which will interest criminologists. Burns' story of the career of Charles F. Ulrich, the counterfeiter, is of intense dramatic interest.

Direct Government. "The People's Power in Oregon." By W. G. Eggleston. *World's Work*, v. 22, p. 14353 (May).

A very sanguine account of the benefits secured by the initiative and referendum in Oregon.

See Recall of Judges.

Equity Practice. See Procedure.

Estoppel. "Pleading Estoppel." By Gordon Stoner. *9 Michigan Law Review* 484 (Apr.).

The greater portion of this first installment is occupied with an examination of common law principles of pleading estoppel, many old English cases being dealt with; the extent to which these rules have been adopted in our own state jurisdictions is then discussed.

Extra-Territoriality. "Jurisdiction Against Foreign States." By Julius Hirschfeld. *11 Journal of Comparative Legislation*, no. 24 n. s., p. 300 (Mar.).

A study of the recent German case of *von Hellfeld*, a German subject who was sued by Russia for the re-delivery of a steamer used in the Russo-Japanese war. The views of Kohler and other eminent German jurists on the issues presented by this case are summarized.

"Conflicting Jurisdiction in Admiralty over Foreign Vessels." By James D. Dewell, Jr. *20 Yale Law Journal* 486 (Apr.).

Discussing a case recently before the United States Circuit Court, "where a woman, a subject of Austria-Hungary, filed a libel against two steamers, one an English vessel, the other a German vessel (she being a passenger on the German vessel), because of injuries she received when the vessels were in collision in the harbor of Cherbourg, in the Republic of France. Exceptions to the jurisdiction were raised by the owners of the German vessel because the libellant was not a citizen of the United States and because both vessels were foreign. The Court entertained jurisdiction, as obviously it should have."

Federal Incorporation. "Federal Regulation of Railway Capitalization." By Arthur W. Spencer. *The Trend*, v. 1, p. 83 (Apr.).

Favoring national incorporation of companies engaged in interstate commerce, and liberal but just regulation of their finances.

General Jurisprudence. "Austin, Korkunov and Mr. Hastings—A Reply." By W. Jethro Brown, University of Adelaide. *11 Columbia Law Review* 348 (Apr.).

A reply to Mr. Hastings' article on "Law and Force," *10 Columbia Law Review* 740 (23 Green Bag 93).

"Korkunov is maintaining that 'constraint is neither a fundamental, nor even a general, attribute of juridical phenomena.' He urges in defence of this conclusion that we can conceive of law without constraint. 'If society were composed only of perfect men, constraint would be superfluous and unknown.' No doubt; but in the meantime it would be wise to recognize that man is not perfect; and that his imperfections have to be taken into account in determining the real significance of existing institutions.

"In conclusion, I return to my starting point. There has been for some time so much sneering at Austin's work that it appears to me timely to utter a word of protest. No doubt Austin's analysis is inadequate. He does not grasp, for example, the significance of the fact that the Ruler is an organ of an organized society, and that the Ruler's will is therefore an expression of a general will. We need, as T. H. Green pointed out, to combine the analysis of Austin with that of Rousseau. It remains nevertheless true that Austin's *Province of Jurisprudence Determined* is an enduring contribution to the literature of the subject. For clearness of thought, for vigor of analysis, for the power to stimulate the thinking power of a student, Austin's work is unsurpassed by that of any English jurist. It is true that in his analysis the element of force assumes an undue importance; but we shall learn to do better than Austin, not by discarding the results of his labors, but by correcting those results. Beyond Austin, no doubt, but through Austin, lies the way of progress in the near future."

"The Ancient Hindu and the Modern European Ideas of Sovereignty." *15 Calcutta Weekly Notes*, no. 3, p. xiv, no. 4, p. xxii (Dec. 5, 12).

"The laws that were recorded in the *dharma shastras* being, in the eyes of the Hindus, of divine origin, they were believed to be immutable. According to Hindu theology Divinity itself was not above law, far less the King. The King had to apply the laws as he found them. His sole function was to preserve the *dharma*. *Dharma* included the rules of conduct in all spheres of life. *Dharma* is eternal (*sanatana*). Legislation in the modern sense of the term was thus out of question in a Hindu state. The King could neither make nor unmake laws.

"The laws being essentially unalterable, the Brahmins appreciated the advantages of the concentration of all executive power in a single individual for the purpose of putting those laws into operation. It is clear from the great epics as well as from the *Smritis* that the only form of government which they could conceive of was the monarchy. (See *Sukra I*, 340-344.) Yet, as is apparent from their conception of the Sovereign's functions, nothing could be farther from their thought than that he should be an autocrat and exercise his powers arbitrarily."

Government. "The Federal Courts: A Brief Outline of their Organization and Jurisdiction Under the New 'Judicial Code.'" By

William H. Loyd. 59 *Univ. of Pa. Law Review* 454 (Apr.).

See p. 291 *supra*.

Australia. "The Legal Interpretation of the Constitution of the Commonwealth." By A. Berriedale Keith. 11 *Journal of Comparative Legislation*, no. 24 n. s., p. 220 (Mar.).

First part of a study of the distribution of powers in the Constitution, the purpose being to throw light on the issue presented by a fundamental difference of opinion between the Judicial Committee of the Privy Council and the Commonwealth High Court, regarding principles of interpretation.

See Direct Government, General Jurisprudence, Legislative Procedure, Local Government, Recall of Judges.

Hindu Law. See Criminal Law, General Jurisprudence.

International Arbitration. Special Number. *Editorial Review*, v. 4, pp. 329-374 (Apr.).

This issue contains a number of messages and short papers written on behalf of the cause of international peace and arbitration, by Henry Van Dyke, President Taft, Ambassador Bryce, Prof. Samuel T. Dutton, Theodore Marburg, Henry C. Phillips, William L. Hull, James Brown Scott, John A. Stewart, Edwin Ginn, James A. Macdonald and Madeleine Black. President Taft says:—

"If now we can negotiate and put through a positive agreement with some great nation to abide by the adjudication of an international arbitral court in every issue which can not be settled by negotiation, no matter what it involves, whether honor, or territory, or money, we shall have made a long step forward by demonstrating that it is possible for two nations at least to establish as between them the same system of due process of law that exists between individuals under a government."

"The Hague Conferences." By James L. Tryon. 20 *Yale Law Journal* 470 (Apr.).

"The Hague peace system in a word is now important. The Hague conventions represent previously accepted or now generally agreed upon rules of International Law. The central feature of these conventions is that relating to the Pacific Settlement of International Disputes. By its terms, if war threatens, mediation, commissions of inquiry, or arbitration may be employed to prevent its occurrence. If war breaks out, mediation may stop it. But while it lasts its severities upon enemies and infringements upon neutrals are restricted. The fact that the Conferences have become periodic, that their program will be more carefully arranged in the future than in the past, and that their procedure will be elaborated indicates their probable development into a real Parliament of Nations.

"A Congress of Nations, when it comes, should be competent to deal with the most serious questions that arise between states and with the International Court ought to be a strong safeguard of international peace."

See Armaments, Legal Education.

International Law. See Extra-Territoriality, Legal Education.

Legal Education. "A School of International Law." By W. R. Bisschop, LL.D. 11 *Journal of Comparative Legislation*, no. 24 n. s., p. 288 (Mar.).

The writer is an earnest advocate of international arbitration, which no longer is a mere dream, but "has become a fact," and it is gratifying to see that he does not confuse it with international peace. The Hague Conferences have been misnamed Peace Conferences, "for strife will never be ended between nations, and eternal peace there shall be only in death." The proposed school of international law, he says, would be a natural corollary for the Hague court, in the same way that the Inns of Court were the corollary of the King's Courts of Justice in England.

Legal History. See Copyright, Criminal Law.

Legislative Procedure. "Leadership in the House of Representatives." By Hon. George B. McClellan. *Scribner's*, v. 49, p. 594 (May).

"It is perfectly possible that the House may shift its leadership from the Chair to the floor, by depriving the Speaker of the political powers now connected with the office. If the House shall so decree, the impartial presiding officer, so much desired by many, may come to life, but the powers once centred in the Chair will naturally focus in the floor leader. Were the House to be led from the floor the same outcry that is made today against the Speaker would be raised against the tyrant at the head of rules or whatever chairmanship might carry the leadership, and were the leadership to be in commission, the steering committee would be abused with equal fervor. Those who object to any leadership whatever, and they are many, would only be satisfied under a condition of legislative lawlessness horrible of contemplation and impossible of realization."

Local Government. "Self-Rule in the Cities." By James Schouler, LL.D. 20 *Yale Law Journal* 463 (Apr.).

"In short, our fundamental law in America does not guarantee to the people of political divisions in a state any implied right of local self-government to assert against the state itself. 'We have held,' observes the Court in one of our latest cases, 'in common with all the courts of this country, that municipal corporations, in the absence of constitutional restrictions, are the creatures of the legislative will, and are subject to its control, the sole object being the common good, and that rests in legislative discretion.' (*Lutterlow v. Fayetteville*, 149 N. C. 65 (1908-09)) And, upon this fundamental principle judges now rest, even when doubting, as they sometimes do, whether some of the experimental changes lately put in operation are likely to give to the local inhabitants a beneficent and well-ordered government. (See *per curiam. Graham v. Roberts*, 200 Mass. 152.)"

Marriage and Divorce. "The Evidence of Divorce." By William Marston Weeks. 4 *Maine Law Review* 179 (Apr.).

The third installment of a comprehensive treatment of the law of evidence with respect to actions for divorce.

Mistake. "Mistake in the Formation and Performance of a Contract, II." By Roland R. Foulke. 11 *Columbia Law Review* 299 (Apr.).

"Relief from mistake is exceptional, and therefore depends more on the particular principles governing the case in which the mistake occurs than it does on general principles relating to the subject as a whole. Failure to adopt this view has caused a large part of the difficulty in the subject.

"The distinction between mistake of law and mistake of fact originated in the year 1802, in the notion that the maxim that everyone is presumed to know the law is of general application, and the distinction is still generally observed by the courts. Although some of the greatest lawyers have studied the matter attentively, no one of them has been able either to draw the distinction between a mistake of fact and a mistake of law, or to discover the principle upon which relief will be withheld in case of mistake of law. There are, therefore, good reasons for disregarding the distinction as a mere notion originating in a *dictum* incomprehensible to the greatest minds, having no support in reason, producing hopeless confusion, and incapable of practical application. It has therefore been assumed in the discussion that there is no reason, at least so far as the law of contract is concerned, for distinguishing between a mistake of law and a mistake of fact."

The principles involved in awarding the relief which the law affords in the case of mistake in the formation and performance of a contract are minutely summarized in this last installment.

Motor Vehicles. "The Violation of Laws Limiting Speed as Negligence." William P. Malburn. 45 *American Law Review* 214 (Mar.-Apr.).

"It is believed the only strictly defensible position to take is that violation of speed laws in which a right of action is not expressly provided, is punishable only by the penalty stated and cannot be made the basis of a civil action, cannot alone sustain a verdict in an action for negligence, and is in fact no evidence of negligence; and that even if a statute providing a penalty for its violation can be regarded as creating a duty between individuals, this rule cannot be extended to ordinances on which most of the cases are based. It is evident, however, that the courts have deliberately turned their backs on this position, and it is further evident that they are likely to continue as heretofore in hopelessly divided ranks."

Negligence. See Motor Vehicles, Tort.

Negotiable Instruments. "The Hague Conference on Bills of Exchange." By Sir Mackenzie Chalmers, K.C.B. 11 *Journal of Comparative Legislation*, no. 24 n.s., p. 278 (Mar.).

The Hague conference last summer marked a new departure in private international law, and the benefits will be far-reaching. For, says the author, while England and the United States cannot become parties to the Uniform Law, it will greatly simplify matters, as its adoption will mean that there are to be only two great systems, the Continental and the Anglo-American.

See Uniformity of Law.

Penology. See Criminal Law.

Pleading. See Estoppel, Procedure.

Postal Service. "Rate-Regulating Bodies and the Postal Service." By Nathan B. Williams 45 *American Law Review* 248 (Mar.-Apr.).

"I cannot believe that Congress ever intended to give to the Interstate Commerce Commission any authority to enquire into or make rates on mailable matter carried interstate by express companies or other carriers. To permit the Interstate Commerce Commission or any other rate-making or rate-regulating body to make rates upon mail matter is to supersede and set aside the work of Congress on the same subject; it is in effect to repeal the laws of Congress, an unheard of proceeding. The effect of such action is to make havoc and create chaos or worse in the administration of the laws governing the postal service."

Presumption of Death. "Notes on the Presumptions of Death and Survivorship in England and Elsewhere." By H. A. De Colyar, K.C. 11 *Journal of Comparative Legislation*, no. 24 n. s., p. 255 (Mar.).

Dealing by the comparative method, briefly, but not exhaustively, with the law as it exists in England, and many other countries, including the United States.

Procedure. "The Federal Equity Practice." By Ralph W. Breckenridge. 5 *Illinois Law Review* 545 (Apr.).

"The federal equity practice ought to be changed in at least the particulars herein pointed out. The changes can be accomplished by a revision of the equity rules. The Supreme Court of the United States has power to make the revision. An appeal to the wisdom and judgment of that tribunal to bring about such procedural reforms as can be achieved in that way will doubtless meet with due consideration."

See Pleading.

Public Service Corporations. "The Politics of American Business." By Sidney Brooks. *North American Review*, v. 193, p. 708 (May).

"As an example of the advance that has been made and that is still going on toward an understanding between the corporations and the public, the language used in the middle of March by Mr. Theodore Vail in submitting his annual report to the stockholders of the American Telephone and Telegraph Company seems to me highly significant and auspicious. I have come across nothing, not even in the sane and luminous speeches and articles that one has grown

used to expecting from Mr. James J. Hill, that struck me as more indicative of the growing enlightenment of the business world than this report of Mr. Vail's. It is a document such as a dozen years ago no American in his position, no 'captain of industry' or 'Trust magnate,' would or could have penned."

Railway Rates. "The Railroad Rate Decision." By J. Shirley Eaton. *North American Review*, v. 193, p. 694 (May).

An able analysis of the decision of the Interstate Commerce Commission in the Western Traffic Association and Eastern Classification cases.

"The rate case was nominally an issue between two groups of railroads, on the one hand, and opposing shippers on the other hand, but the stability of American railroad credit, the character of public investment, the flexibility of capital as an agent of economic expansion, the nature and potency of competition to evolve the economic efficiencies, have all received an impress which for good or for bad will greatly influence our affairs for a long time to come."

See Postal Service, Public Service Corporations.

Recall of Judges. "The Recall of Judges." By Albert Fink of the San Francisco and Alaska bar. *North American Review*, v. 193, p. 672 (May).

"It is one of the peculiar functions of a judge in a state governed by laws and not by men to protect the minority or the individual, as the case may be. Though chosen by the majority or by some person or persons to whom the power of selection has been delegated, they cease, upon induction into office, to become the mere servants at will of those by whom they were selected, nay, they never were their servants. The right of selection in no sense carries with it such right of domination as was attempted by Charles I. Upon selection the judges become the servants of the whole people, not of the majority or class by whom they may have been chosen. They represent the minority, the weakest class in society: the humblest individual, just as much as the dominant political party, the laboring or moneyed classes, or the most potent members of the community. During their term of office they are justly answerable to no one."

Social Justice. "The Spencerian Formula of Justice." By H. S. Shelton. 21 *International Journal of Ethics* 298 (Apr.).

"Powerful as were his reasonings, and his advocacy of the cause of liberty, yet the eccentricities of his special conclusions, and the way in which these appeared to be bound up with his main principles, render it unlikely that his arguments would carry conviction to those not previously inclined to favor his school of thought. So far as this part of his work is concerned, he appears to have left no successors."

Sterilization of Criminals. "Sterilization of Habitual Criminals and Feeble-Minded

Persons." Editorial. By E. R. K[eedy]. 5 *Illinois Law Review* 578 (Apr.).

"The theory on which the bill [House Bill 49, Illinois] is based is questionable. The view of the Italian criminologists that criminal traits are transmissible by heredity is strongly combated in many quarters, notably in England. The enactment of House Bill 49 would embody in a proposition of law this theory that criminality is inheritable. This is a proceeding the physicians might reasonably be expected to oppose. They criticize with great vehemence the legal test of insanity, which test, when it arose seventy years ago, was but the crystallization of the then prevailing medical theory of insanity."

Tort. "The Rule in *Rylands v. Fletcher*." By Francis H. Bohlen. 59 *Univ. of Pa. Law Review* 423 (Apr.).

The third and final installment of a paper marked by an unusual capacity for acute analysis and clear statement.

"An entirely new system of jurisprudence might well contain, as a fundamental principle, the conception that liability to repair harm done is only to be imposed as a species of punishment for misconduct, moral or social. But this was not the original conception of the English law — on the contrary, it was an innovation, though an innovation now some four hundred years old. It came in gradually as a defense rebutting the liability attacking under the older conception that he who breaks, must, because he breaks, pay. The defendant was allowed to escape a liability, under which he *prima facie* lay, because it was considered unjust to transfer the loss from one innocent person to another equally innocent. The absence of fault, therefore, originally served as a defense which relieved an innocent cause of harm from liability to make good the loss he had occasioned. And while in new actions fault was regarded as essential to recovery, it was still required because it was thought more just to leave the loss where it had fallen than to single out the innocent defendant as the victim simply because he was the author of the loss. The fact that the plaintiff's harm is caused by some one's fault is no good reason why one innocent thereof should pay for it. Whether the fault is important because liability is only imposed as a punishment, or because innocence is a defense to the *prima facie* liability of the author of harm, because of the injustice of the transferring the burden from the shoulders of one innocent person to those of another equally guiltless — the fault of one other than the defendant can logically make no difference to the plaintiff's right to recover. It is certainly unjust to punish one man for the fault of another, especially for that of one for whose acts he is not legally responsible, nor should the guilt of a stranger invalidate his defense of innocence when offered in bar of the liability *prima facie* answering from his authorship of the harm. That the work is ill done may show that the one injured thereby should recover against the person in fault; it does not show that he should recover against one innocent of all misconduct.

"These cases show a distinct revulsion from the conception that fault is essential to liability. The defendant, himself innocent, is held liable because, by causing, for his own purposes, dangerous work to be done, he is the author of the harm caused by its performance without the precautions necessary to secure the safety of others. This is a distinct reversion to the earlier conceptions that he who causes harm, however innocently, is, as its author, bound to make it good. They seem to be the result of one of those illogical compromises between conflicting conceptions which are inevitable where the public sense of justice, having changed with a change in economic and social opinion, leads the court to feel its way to the abandonment of some long accepted conception, now felt, though perhaps only vaguely, to be no longer tenable or satisfactory. Such compromises are the usual indication of a transition period in the development of the law, in which it is seeking to adapt itself to new conditions and to accommodate itself to a changed public sense of what is just and desirable. It cannot be expected, nor in the writer's opinion is it desirable, that the principles announced therein should find a permanent place in the law: they seem rather to be a bridge between the old conception and some new solution of the problem of the proper distribution of the loss necessarily caused by the individual activities of civilized mankind, each in pursuit of his own interests. And as no one indefinitely remains upon a bridge, but either passes over it upon his way or returns to the shore he has left, so it is to be expected that the courts, which have in these cases parted company with the idea that no person need make good the loss he innocently causes, will either return to that principle, abandoning the position they now occupy, or that they will go on in the path on which they have started and will work out some new principle for the distribution of the loss, which will satisfy the more highly socialized modern sense of justice."

Uniformity of Law. "The Uniform Negotiable Instruments Law: Is it Producing Uniformity and Certainty in the Law Merchant?" By Crawford D. Hening. 59 *Univ. of Pa. Law Review* 471 (Apr.).

Section 14 of the Act, relating to the title of the holder of paper executed in blank and filled up by an agent of the maker in violation of his authority, has been variously interpreted, the Supreme Court of Iowa interpreting in exactly the opposite way from the English Court of Appeals' interpretation of the same clause in the English Act. This episode "exemplifies one of the constant dangers of codification. If rights are limited by a code to a certain class of persons and that class is defined in a code-definition there is constant danger lest the makers of the code have made the code-definition too restricted and thereby have excluded from the class those who previously had enjoyed the rights thereafter limited to the code-defined class."

Other sections of the Act which have been variously construed are discussed.

The writer does not reach in this first install-

ment the central problem of his inquiry, which aims to settle the following questions:—

"*First:* The purpose is to show the present situation with respect to uniformity of interpretation of the same sections of the Act by different state courts.

"*Second:* The purpose is to discuss the question whether, if uniformity is being accomplished, the resulting rule of law is desirable.

"*Third:* To point out some of the variations between the Act as originally recommended and the Act as adopted in several states, or modified by subsequent legislation.

"*Fourth:* The general utility of codification (apart from the possibility of uniformity of interpretation) in the light of the interpretation of the Act.

"*Fifth:* Those changes in the Act by amendment or repeal of certain sections now needed in the interest of uniformity."

"A Plea Against Playing a Lone Hand in Workmen's Compensation Legislation in Illinois." Editorial. By J. H. W[igmore]. 5 *Illinois Law Review* 571 (Apr.).

"Senate Bill No. 283, for a workmen's compensation system in Illinois, has been reported out favorably from committee. . . . It is one of the good bills among many such now pending in many states. But it ought not to pass now. And the very reason is that there are so many other good bills now pending in other states. Massachusetts, Minnesota, Indiana, Ohio, Wisconsin and a few other great industrial states are all now considering such bills. They all differ, however, in vital provisions and in details of phrasing which affect the scope of the risk covered. This wide variation is their great defect, and a dangerous one. Uniformity is the most desirable single feature in such legislation. And *no two of them* are identical in a single one of the dozen essential principles involved.

"The danger is—yes, the *certainty* is— that confusion will be 'worse confounded' if these bills pass now. Industry is now on a basis of uniform conditions. The same market, the same machinery, the same wage scales, the same unions, the same employers' associations, the same insurance companies, affect the liability under present law in all these states. There are no state lines; the cleavage goes on entirely different lines. The industries compete on conditions which have nothing to do with state lines. To change the basis of liability on state lines alone is merely to add new burdens without removing the present ones, and to offer to employees a vain relief from present inequities. The whole purpose of the progressive legislation is to substitute a basis of unqualified industrial risk instead of a basis of qualified damage-liability for fault. The two cannot co-exist; they would cripple the industry, and the present crude system of injury-litigation would remain unabated. Until several leading states can go on the new basis together and with fair uniformity, it is useless to expect any real alleviation.

"This uniformity is bound to come, in a short year or two. Give the states a chance to get together. The first time they ever got together

was last October, here in Chicago. Progress was made, but no final results were reached. Since then, the Civic Federation has drafted a Uniform Bill, and the Committee of the National Conference on Uniform State Laws has drafted a Uniform Bill. These three Uniform Bills have not yet been considered in conference. Give the country a chance to get together on one of them. A lone hand in such a game is a dangerous thing. Nothing substantial is lost by waiting. The legislation is sure to come — coming as fast and as surely as spring weather. A little delay will bring it in workable and healthy form, which will place Illinois industries on the same footing as its great neighbors and competitors. To give this proposed law a place on the books now is to fasten on the state of Illinois a series of judicial interpretations and a scale of insurance rates which will isolate Illinois from the general movement and hold it apart for years to come."

"Uniform State Laws." By Nathan William MacCheaney. 5 *Illinois Law Review* 521 (Apr.).

See p. 295 *supra*.

See Negotiable Instruments.

Waters. "Public Regulation of Water Power in the United States and Europe." By Prof. John A. Fairlie. 9 *Michigan Law Review* 463 (Apr.).

Valuable as a succinct summary of the legislation regulating water power rights, as it exists in the federal and state jurisdictions, and in the chief countries of the Continent of Europe.

Wills. See Conflict of Laws.

Workmen's Compensation. "The Awakening of the American Business Men; III, Industrial Indemnity." By Will Irwin. *Century*, v. 82, p. 118 (May).

Mr. Irwin has summarized pregnant information with the ability of an accomplished journalist, and his paper offers a vigorous, yet dispassionate layman's argument for compulsory workmen's compensation.

See Uniformity of Laws.

Miscellaneous Articles of Interest to the Legal Profession

Biography. *Grotius.* "Grotius and the Movement for International Peace." By R. Walton Moore. 45 *American Law Review* 194 (Mar.-Apr.).

Lammasch. "Professor Heinrich Lammasch." By Professor Redlich. 11 *Journal of Comparative Legislation*, No. 24 n. s., p. 209 (Mar.).

Morgan. "The Life Story of J. Pierpont Morgan." By Carl Hovey. *Metropolitan*, v. 34, p. 245 (May).

This installment deals with the United States Steel Corporation, and dramatically recounts the story of Mr. Morgan's greatest financial and industrial achievement in successfully organizing and establishing this great corporation.

Wilson. "Woodrow Wilson: Possible President." By William Bayard Hale. *World's Work*, v. 22, p. 14339 (May).

A fascinating portrayal of a potent and attractive personality.

Esperanto. "The International Society of Esperantist Jurists." By William E. Baff. 45 *American Law Review* 235 (Mar.-Apr.).

"The unification of the excellencies of the common law and the Corpus Juris Civilis will be brought about by Esperanto in the course of time. Neither system will be supplanted — both will become harmonized and invigorated thereby. There must follow legal changes as soon as the advocates of one country, looking for needed legislation in other countries, find the need anticipated in a foreign country and avail themselves through Esperanto to receive the information required. In this way, it is to be noted, it will be possible for lawyers using Esperanto to receive information on all legal topics of interest directly from the original foreign sources. Private reports will be exchanged between the lawyers of the various countries."

Expansion of Trade. "German and American Methods of Production." By W. H. Dooley. *Atlantic*, v. 107, p. 649 (May).

"Every trade and district of Europe has its own knives, and they are constantly making new patterns for new societies or districts. In some cases one firm will average two new patterns a week for two years. This is a trade which will not be standardized, and that is one reason why America has failed to compete. Herein lies an important difference between the European and American manufacturers: the former is always anxious to meet the needs of the market, while the latter standardizes certain brands and offers nothing else."

"The Industrial Future of China." By Prof. E. A. Ross. *Century*, v. 82, p. 34 (May).

"It is not likely . . . that the march of industrialism in China will be so rapid and triumphant as many have anticipated. Jealousy of the foreigner, dearth of capital, ignorant labor, official 'squeeze,' graft, nepotism, lack of experts, and inefficient management will long delay the harnessing of the cheap labor power of China."

Fiction. "Things that are Cæsar's." By Elizabeth Moorhead. *Scribner's*, v. 49, p. 600 (May).

The story of a woman who told the truth in court and gave up a fortune legally hers.

History. "The Women of the Cæsars: Woman and Marriage in Ancient Rome." By Guglielmo Ferrero. *Century*, v. 82, p. 3 (May).

Among ancient societies the Roman was probably that in which, at least among the better classes, woman enjoyed the greatest social liberty and the greatest legal and economic autonomy. There she most nearly approached that condition of moral and civil equality with

man which makes her his comrade, and not his slave — that equality in which modern civilization sees one of the supreme ends of moral progress.

Money-Lending. "American Unthrift." By Charles T. Rogers. *Atlantic*, v. 107, p. 693 (May).

Throwing much light on the extensive business of money-lending, as it is actually conducted in typical cities of the country.

Party Politics. "The Meaning of Insurgency." By Ray Stannard Baker. *American Magazine*, v. 72, p. 59 (May).

"There is too much bitter history connected with both of the old party names; too much prejudice in the South, too much partisanship in the North. What is needed is a new progressive party which shall unite all the progressives of the country."

"The Biggest Boss of Them All." By Frank Parker Stockridge. *Hampton's Magazine*, v. 26, p. 616 (May).

"Cox is the last of the old-time city bosses who ruled by sheer might — the last, and the greatest. No power more absolute than that of Cox has ever been exercised in the United States; no other boss in the days of the great bosses ever controlled a more closely knit, perfectly organized and well-lubricated political machine, no other man since the days of Tweed has ever held a city by the throat with so firm a grip as has Cox."

Tariff. "The A B C of the Tariff Question." By Andrew Carnegie. *Century*, v. 82, p. 143 (May).

"Duties should not be levied upon art treasures imported, because these tend to gravitate to public galleries and thus become the priceless

possessions of the people. Although held for a time by their owners a generation comes when an owner bereft of family, perhaps, or for other reasons, bequeaths them to the city. They are not 'consumed' as luxuries are."

"The Reciprocity Agreement, from a Canadian Standpoint." By Hon. George E. Foster, M.P. *North American Review*, v. 193, p. 663 (May).

"We have at great cost opened our vast prairies and established an industrial system for the purpose of attracting population and capital and developing our rich natural resources. For thirty years we have been expending money lavishly in perfecting our east and west transport, to develop our interprovincial trade, and facilitate exchanges with the mother country.

"The reciprocity pact cuts straight across this development and this ideal, disconnects our provinces, attacks our industries, taps our east and west connections by north and south lines, and menaces our national solidarity."

"Blasting at the Tariff Wall." By Arthur Wallace Dunn. *Metropolitan*, v. 34, p. 131 (May).

Treating of the Canadian reciprocity bill, and particularly of the attitude of insurgent Republicans in Congress toward it.

Taxation. "The Things that are Cæsar's; IV, Taxes two Sides of the Line." By Albert Jay Nock. *American Magazine*, v. 72, p. 76 (May).

"There is no such thing in Canada as a general-property tax. . . . Absolutely nothing can be done as long as the general-property tax remains in our constitutions, or as long as the taxing power of the Legislature remains under constitutional restraint of any kind." The taxing systems of this country and Canada are compared, greatly to the advantage of the latter.

Latest Important Cases

"Commodities Clause." *Hepburn Act — Stock Ownership in Sham Corporation.* U. S.

The commodities clause of the Hepburn rate law, interpreted two years ago by the Supreme Court of the United States (21 *Green Bag* 301) into what was commonly supposed to be an impotent group of words, was given new life April 3 by that same tribunal in *U. S. v. Lehigh Valley R. R. Co.* (L. ed. adv. sheets p. 387). The "commodities"

clause made it unlawful for a railroad to transport in interstate commerce any commodity produced by it, or in which it might own or have any interest, with certain exceptions. The government sought to reach under the law a number of railroads carrying anthracite from Pennsylvania.

In ruling that the bill in the government's suit might be amended Mr. Chief Justice White said:—

"While that decision [the former deci-

sion of the Supreme Court] expressly held that stock ownership by a railroad company in a *bona fide* corporation, irrespective of the extent of such ownership, did not preclude a railroad company from transporting the commodities manufactured, mined, produced or owned by such corporation, nothing in that conclusion foreclosed the right of the government to question the power of a railroad company to transport in interstate commerce a commodity manufactured, mined, owned or produced by a corporation in which the railroad held stock, and where the power of the railroad company as a stockholder was used to obliterate all distinctions between the two corporations. That is to say, where the power was exerted in such a manner as to so commingle the affairs of both as by necessary effect to make such affairs practically indistinguishable, and therefore to cause both corporations to be one for all purposes. . . .

"Our duty is to enforce the statute, and not to exclude from its prohibitions things which are properly embraced within them. Coming to discharge this duty it follows, in view of the express prohibitions of the commodities clause, it must be held that while the right of a railroad company as a stockholder to use its stock ownership for the purpose of a *bona fide* separate administration of the affairs of a corporation in which it has a stock interest may not be denied, the use of such stock ownership in substance for the purpose of destroying the entity of a producing, etc., corporation, and of commingling its affairs in administration with the affairs of the railroad company, so as to make the two corporations virtually one, brings the railroad company so voluntarily acting as to such producing, etc., corporation within the prohibitions of the commodities clause."

Direct Government. Initiative and Referendum Unconstitutional. Texas.

The Texas Court of Appeals unanimously decided March 9 that the initiative and referendum are unconstitutional. The case arose upon the violation of an ordinance regulating telephone rates in Dallas. The charter of Dallas both gives the usual officials the usual powers to regulate public facilities, and adds that when such regulations are adopted by the method of the initiative and referendum they cannot be altered except by a similar submission to the popular vote. The defendant violated such an ordinance, and its validity was essential to the punishment of the telephone official who disregarded its terms.

The Court said: —

"Under our Constitution the principle of making laws is that the laws are made by the people, not directly, but by and through their chosen representatives. By the act under consideration this principle is subverted, and the law is proposed to be made at the last by the vote of the people, leading inevitably to what was intended to be avoided — confusion and great popular excitement in the enactment of the laws."

Employers' Liability. Waiver of Remedies at Law by Contract of Accident Insurance or Benefit — Freedom of Contract may be Limited by Legislation Depriving such Contracts of Force — Legislative Powers. U. S.

An important point of employers' liability and workmen's compensation legislation was disposed of in *Chicago, Burlington & Quincy R. R. Co. v. McGuire*, 219 U. S. 549, decided by the United States Supreme Court Feb. 20. The question arose under section 2071 of the Iowa code, as amended in 1898, which in substance provides that no contract restricting the liability of the employer

to his employees for damages for negligence shall be legal or binding, even though such contract be a contract between employer and employee providing for insurance relief, benefit or indemnity in case of the employee's injury or death.

The Court upheld the statute, Mr. Justice Hughes basing his decision on the general ground that such a limitation of the employee's freedom of contract is within the legislative power to regulate the relations of employer and employee, and competent in order to make such liability as may be legally imposed on the employer effective.

Hence there seems to be nothing in this decision inconsistent with the view that the legislature, in regulating labor conditions, has power to validate, as well as to disallow, contracts relieving the employer from liability for damages at law. There therefore seems to be nothing in the decision irreconcilable with the principles of a system of elective workmen's compensation.

Interstate Commerce. *State Statute Relating to Train Crews Does not Burden Interstate Commerce.* U. S.

Last year's decisions of the Supreme Court in *International Text-Book Co. v. Pigg*, 217 U. S. 91, *Western Union Tel. Co. v. Kansas*, 216 U. S. 1, and *Pullman Co. v. Kansas*, 216 U. S. 56, were important as prohibiting to the states the passage of legislation applicable to foreign corporations of such a form as to burden interstate commerce. That this doctrine will not be carried beyond certain limits is evident from the decision rendered Feb. 20 in *Chicago, Rock Island & Pac. Ry. Co. v. Arkansas*, 219 U. S. 453. In this case Mr. Justice Harlan held that a state statute prescribing a minimum of three brakemen for freight trains of more than twenty-five cars,

operated in the state, does not amount to an unconstitutional regulation of interstate commerce when applied to a foreign railway company engaged in such commerce. The Court said:—

"Beyond doubt, passengers on interstate carriers while within Arkansas are as fully entitled to the benefits of valid local laws enacted for the public safety as are citizens of the state. Local statutes directed to such an end have their source in the power of the state, never surrendered, of caring for the public safety of all within its jurisdiction; and the validity under the Constitution of the United States of such statutes is not to be questioned in a federal court unless they are clearly inconsistent with some power granted to the general government, or with some right secured by that instrument, or unless they are purely arbitrary in their nature."

Transportation Can be Issued only for Money—Annual Passes for Life Unlawful—Acceptance of Advertising in Payment. U. S.

A carrier engaged in interstate commerce cannot lawfully charge, collect or receive anything but money for transportation on its road since the enactment of the act of June 29, 1906 (34 Stat. at L. 584, chap. 3591, U. S. Comp. Stat. Supp. 1909, p. 1149), § 6, prohibiting any carrier from demanding, collecting, or receiving "a greater or less or different compensation" for the transportation of persons or property, or for any service in connection therewith, than that specified in its published schedule of rates. Such was the holding of the United States Supreme Court in *Louisville & Nashville R. R. Co. v. Motley*, 219 U. S. 467, decided Feb. 20. And it was held that the prohibition of the same section made unenforcible an agreement by an

interstate carrier to issue annual passes for life in consideration of a release of a claim for damages, though entered into prior to the act of June 29, 1906.

A similar result was reached in *Chicago Indianapolis & Louisville Ry. Co. v. U. S.*, 219 U. S. 486, decided at the same time. It was held in this case that advertising may not be accepted in payment for transportation without violating the provisions of the act of Feb. 4, 1887 (24 Stat. at L. 379, chap. 104, U. S. Comp. Stat. 1901, p. 3154), and the acts amendatory thereof; and also that a state statute authorizing such transactions must give way in so far as conflicting with the provisions of the federal act.

See "Commodities Clause."

Monopolies. *Sherman Anti-Trust Law* — "Rule of Reason" — *Undue Restraint of Trade* — *Court must be Guided by Established Law and Duty to Enforce Public Policy Embodied in the Statute.*
U. S.

For *U. S. v. Standard Oil Co.* see p. 279 *supra*.

Contracts Giving Manufacturer Control of Retail Price — *Restraint of Trade.*
U. S.

The question of the right of a manufacturer to control the price of his article to the consumer was dealt with in *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, decided by the United States Supreme Court April 3 (L. ed. advance sheets, p. 376). The manufacturer sought to enjoin the Cincinnati firm from inducing dealers who had procured medicines from the manufacturer to sell to it in violation of a contract with the manufacturer and from selling medicines procured in this way at "cut rates." Mr. Justice Hughes said that the medical company had made the mistake of considering its monopoly of

manufacture to be a monopoly of sale. "With respect to contracts in restraint of trade, the earlier doctrine of the common law has been substantially modified in adaptation to modern conditions. But the public interest is still the first consideration. To sustain the restraint it must be found to be reasonable both with respect to the public and to the parties, and that it is limited to what is fairly necessary, in the circumstances of the particular case, for the protection of the covenantee." The Court cited with approval the words of Lord Macnaghten in *Nordenfelt v. Maxim Nordenfelt Guns & Ammunition Co.* (A. C. 565, 6 Eng. Rul. Cas. 413), and said: "But agreements or combinations between dealers, having for their sole purpose the destruction of competition and the fixing of prices, are injurious to the public interest and void. They are not saved by the advantages which the participants expect to derive from the enhanced price to the consumer. [Citations omitted.] The complainant's plan falls within the principle which condemns contracts of this class."

Mr. Justice Holmes, dissenting, said: "There is no statute covering the case; there is no body of precedent that, by ineluctable logic, requires the conclusion to which the court has come. The conclusion is reached by extending a certain conception of public policy to a new sphere. On such matters we are in perilous country. 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."

Taxation. *Federal Corporation Tax* — *Excise or Direct Tax* — *Taxation of State Agencies.*
U. S.

A far-reaching decision sustaining the federal corporation tax law was rendered

by the Supreme Court of the United States March 13 (*Flint v. Stone Tracy Co.* and other cases, L. ed. adv. sheets, p. 342). The gist of the opinion, which was written by Mr. Justice Day, none of the Justices dissenting, was to the effect that an excise tax may be imposed upon "the actual doing of business in a certain way." Considering the point that the tax is a direct tax and hence could not be levied by Congress unless apportioned, the Court said:—

"Within the category of indirect taxation, as we shall have further occasion to show, is embraced a tax upon business done in a corporate capacity, which is the subject-matter of the tax imposed in the act under consideration. The *Pollock* case construed the tax there levied as direct, because it was imposed upon property simply because of its ownership. In the present case the tax is not payable unless there be a carrying on or doing of business in the designated capacity, and this is made the occasion for the tax, measured by the standard prescribed. The difference between the acts is not merely nominal, but rests upon substantial differences between the mere ownership of property and the actual doing of business in a certain way.

"It is unnecessary to enter upon an extended consideration of the technical meaning of the term 'excise.' It has been the subject-matter of considerable discussion—the terms duties, imposts and excises are generally treated as embracing the indirect forms of taxation contemplated by the Constitution. . . .

"Duties and imposts are terms commonly applied to levies made by governments on the importation or exportation

of commodities. Excises are 'taxes laid upon the manufacture, sale or consumption of commodities within the country, upon licenses to pursue certain occupations, and upon corporate privileges.' Cooley, Const. Lim. 7th ed. 680.

"The tax under consideration, as we have construed the statute, may be described as an excise upon the particular privilege of doing business in a corporate capacity, *i. e.*, with the advantages which arise from corporate or quasi corporate organization; or, when applied to insurance companies, for doing the business of such companies."

With reference to the argument that the tax constituted an infringement by the federal Government of the sovereign powers of the states, inasmuch as it taxed privileges conferred by the state governments, the Court said:—

"It is no part of the essential governmental functions of a state to provide means of transportation, supply artificial light, water and the like. These objects are often accomplished through the medium of private corporations, and, though the public may derive a benefit from such operations, the companies carrying on such enterprises are, nevertheless, private companies, whose business is prosecuted for private emolument and advantage. For the purpose of taxation they stand upon the same footing as other private corporations upon which special franchises have been conferred."

Other questions, such as those of uniformity and discrimination, were also considered.

Workmen's Compensation. See Employers' Liability.

The Editor's Bag

OVERCROWDING OF THE LEGAL PROFESSION

IT is estimated that there are 16,000 lawyers in New York City alone, and that not more than half of them succeed in making a fair living. A similar situation doubtless prevails in all the large cities of the country. The pressure to which the other half that is unable to earn a fair livelihood is subject must give rise to innumerable temptations, and it is surprising that the ethical standards of the profession are not much lower than they are.

Such a condition of things readily tends to the production of unnecessary litigation, and to the prolongation of suits at the client's expense by resort to chicanery and subterfuge. The abuse of the contingent fee, ambulance-chasing, and overzealous employment of technicalities, while of course not attributable to any one cause, certainly owe much of their prominence to the powerful inducement constantly offered to sacrifice the higher ideals of the profession to selfish greed. There is much talk about the evils of the defective administration of justice, and a very important factor in the present situation is too often overlooked. A large part of the profession is constantly subject to a terrible pressure to sacrifice honor to expediency, and whatever may be accomplished by the numerous beneficent reforms which are being pressed forward on every hand with admirable determination, the evils of

our present legal procedure cannot be entirely extirpated so long as sordid and selfish considerations constantly interfere, in a large proportion of cases, with the profession's practising what it preaches.

It is neither feasible nor desirable to limit the size of the profession by legislative enactment, so it would be a mere waste of time to discuss a remedy which would be efficacious but is not available. It is possible, however, for professional associations to organize more effectively for the suppression of practices injurious to the public weal. If the impecunious lawyer who succumbs to temptation is subjected to the certainty of condign punishment from which there is no possible escape, his example will be an object-lesson to others not to imitate him. Fines, suspension or disbarment should follow upon wrongdoing so surely that no one can be in a position to profit by infractions of the code.

A certain amount of poverty and hardship in a crowded profession is inevitable, and it would be useless to try to suppress it, but the legal profession can aim at securing justice to its members, and at the encouragement of those who prefer to get business honestly and to conduct it by fair and honorable means. So soon, therefore, as objectionable practices are promptly visited with the requisite penalties, and evil ambitions are thwarted, the rewards of the profession will be distributed in a more equitable manner and poverty will

be less apt to be encountered where it is undeserved and is not the consequence of lax standards of professional conduct.

A circumstance which undoubtedly menaces the well-being of the profession as a whole, and of the entire community, is the concentration of legal business in the hands of a small proportion of practitioners. Petty actions which might often with advantage to the client be entrusted to the younger struggling members of the profession, are snapped up by large firms which have not the facilities for giving them proper attention. When one of these cases is called in court the lawyer having it in charge often has a more important case which demands his attention elsewhere, and the result is that requests for adjournments are so frequent as to be an intolerable nuisance and to furnish one of the chief factors in the law's delays. The courts have formed the habit of too frequently, without proper excuse, yielding to these requests. Were our judges to refuse to grant adjournments except for adequate cause, and to compel the parties to proceed with their trial or suffer judgment to be entered by default, the business of the courts would be immeasurably hastened, and the client would soon be able to look for a prompt adjudication of the matter in controversy. He would soon learn to give his case only to a lawyer in a position to handle it promptly and efficiently, and the result would be a wholesome diffusion of legal business which would benefit the entire profession.

The evil of an overcrowded profession is not in itself serious, so long as it does not engender other and greater evils. By more effective organized effort, on the part both of the bench and of the bar, it seems to us that it is reasonable to hope for the suppression of these secondary evils which obstruct the ad-

ministration of justice and have a pernicious effect on the profession as a whole. The profession will then offer better prospects of advancement to deserving beginners and the premium at present placed on questionable methods will be removed.

"A. LINCOLN. MARCH 7, 1832"

AS time passes and the distance widens between the present and the closing years of the Great Emancipator's life, few incidents are so insignificant, touching that life, as to be without public interest. For this reason we venture the following narrative, vouching for nothing except that the men who made the discovery named are well known and thoroughly reliable persons. The log with its inscription can answer for itself.

A man by the name of Morgan — William Morgan — living at Osbernvill, Illinois, a little town fifteen miles southwest of Decatur, the city, by the way, in which was held the state convention that nominated Mr. Lincoln for the presidency, recently brought to the custodian of the State Historical Library, a section of red-elm log, measuring some twenty inches in length, and bearing on one side of it the following inscription: —

"A. Lincoln. March 7, 1832."

The log was discovered more than a year ago in a pile of drift in the Sangamon river, and that the name and date carved upon it were carved by Lincoln, there seems to be but little doubt among those personally familiar with the history of Mr. Lincoln's early life and habits. It is recalled by these men that Lincoln was quite as much given, in those earlier days, to the inscription of his name, here and there, as he was in later years to sitting for his picture;

not because of vanity — for he was anything but vain — but because it was a simple source of pleasure to him.

Mr. Morgan gives his story of the finding of the log in a rather concise way, so that we have followed, largely, his own words in the transcription of it.

“Richard Cochran and I were together when we found the log; it was in March, 1910. We were prying out some large pieces of wood from a drift that had formed in the Sangamon, at a bend just north of Osbernvillle, when part of a tree about twelve feet long was released and rose to the surface of the river. I didn't think anything of that until Cochran exclaimed, ‘My God, look at this!’ We both stared at it. The part bearing the inscription included the fork of the tree, so we sawed off the upper portion where the two limbs branched and then cut the log in two, several inches below the inscription.

“The point where we found the log was less than a mile, I should say, from the old Hanks farm, just over the line in Macon county, where Lincoln lived for a time. The part of the log that remained was perhaps four or five feet long. The part having the inscription I took home, intending some time to take it to Springfield and place it in the hands of someone where it could be kept for a while for people to see.”

Morgan, who has lived near Osbernvillle, where he was born in 1839, has no doubt as to the genuineness of the inscription. He thinks the tree lay upon the ground and that Lincoln, who was engaged in cutting rails on the Hanks farm, probably sat upon it while resting or eating his lunch, and on the day named, March 7, 1832, whiled away a few moments while he was resting from his rail-splitting, in cutting this inscription.

The style of the signature, “A. Lin-

coln,” was the form Lincoln invariably used, and is an indication of its genuineness, at least. The letters are evenly carved, evidently with a sharp knife, as the letters, after all these years, are an eighth of an inch deep. Lincoln's name is on the first line and the date a line below it.

Robert Warnock, one of the oldest residents in Christian county — Osbernvillle is in Christian county — believes fully in the genuineness of the inscription. He knew Lincoln when he, Warnock, was a lad of nine. Lincoln went to Macon county, to the Hanks farm, only a few miles from where Osbernvillle now is, in 1831, and was twenty-three years old when he carved his name in the trunk of the old red-elm tree now in the Historical Library at Springfield.

Lincoln came to Springfield in 1837, five years after his engagement on the Hanks farm alluded to above, and entered upon the study of law and the marvelous career that was to end in martyrdom. There are still a number of men living in Springfield who knew him even at this early period, and who knew him intimately in later years. Among this number are John W. Bunn, Dr. William Jayne and Senator Shelby M. Cullom. It is quite true, of course, that Mr. Lincoln was unassuming and of an extremely amiable disposition, but it is utterly a mistaken notion that he lacked dignity or was wanting in ambition.

In a recent interview with Mr. Bunn touching this matter, he said: “Those who profess to have been familiar with Mr. Lincoln, and speak of calling him ‘Abe,’ are presuming on ignorance. The people of Springfield knew him only as ‘Mr. Lincoln.’ He was a young law student when he came here in the spring

of '37. He had already been a member of the legislature for two terms, and as the leader of the 'Long Nine' had done more than any other man to bring about the removal of the state capital from Vandalia to Springfield. They may have called him 'Abe' in Indiana, and out here in New Salem, where he spent his boyhood and youth, but not here in Springfield. Naturally, many have wished to make it appear that they were intimate with Mr. Lincoln, but, unfortunately for their stories, when they speak of calling him 'Abe' they simply disprove their claim."

That he was ambitious to become a man of distinction in public life there can be no manner of doubt. In 1832 he was splitting rails in the Sangamon bottoms and dreaming dreams. Five years later, after having been elected twice to the legislature, he is everywhere regarded as a man of far more than ordinary promise. Dr. Jayne, who, by the way, was made Territorial Governor by Mr. Lincoln during his first administration, met him for the first time in 1836. "At that time," said Dr. Jayne in a little chat some time ago, "he was still living at New Salem, where he was surveyor and postmaster; even then there was something about the ungainly, poorly-clad young man that foretold, to an observing mind, a bright future for him in public life.

"He was often in Springfield while living in New Salem, and it was when on one of these visits that I first saw him. My father and I took dinner at the same table with him in the common dining-room of the Rutledge Tavern. Later in the day I heard my father say to N. W. Edwards, his partner in a store at Huron, and long afterwards Mr. Lincoln's brother-in-law, 'That young man Lincoln will some day be governor of Illinois.' I was then a boy

of ten, but I thought my father must be insane to say such a thing. I had seen two governors, Ninian Edwards of Belleville, and Joseph Duncan of Jacksonville; they were very different looking men from Mr. Lincoln. They were well dressed, drove about in their own carriages and were attended by servants. Mr. Lincoln made no such showing as this. My father's prophecy seemed ridiculous; but time proved my father's foresight much better than his son's."

But Lincoln's ambition was neither selfish nor mean. When he came to Springfield to enter upon the study of law he made his home with Joshua Speed, a merchant, and a warm, personal friend. One day in a conversation of a somewhat serious nature, he said: "Speed, when I am dead I want my friends to remember that I always pluck a thorn and plant a rose." His life certainly attested this, in its fullest sense; but he was not a god, and while he abhorred notoriety in its grosser forms, he did not disdain praise nor decline the friendship of the great; and, although his tastes were simple, they were catholic, but catholic without being coarse.

After his debate with Douglas, and after he had been named for the presidency, he was still reluctant to be made conspicuous, so much so, indeed, that when Mr. Scripps of the Chicago *Tribune* came to him asking material for a campaign biography, he hesitated to aid him, first, because he disliked anything that savored of display, and secondly, we may fairly take it, because he felt that there was very little in his life out of which such a biography could be constructed. In going over the matter with Mr. Scripps, he said: "There is no romance, nothing heroic in my early life; the story can be condensed into

one line, and that line you can find in Gray's Elegy:—

“The short and simple annals of the poor.”

But his later life was not lacking in heroism, at least, and as one recalls the sombre and tragic circumstances of his closing years, the words of the old Hebrew prophet seem to apply to them with singular fitness:—

“He is despised and rejected of men; a man of sorrow and acquainted with grief; and we hid as it were our faces from him. . . . But he was wounded for our transgressions, he was bruised for our iniquities; and the chastisement of our peace was upon him.”

A CASE IN VERSE

A CORRESPONDENT sends us a clipping from a Binghamton, N. Y., paper which struck him as more clever than most attempts at forensic verse. The case in question was recalled by a recent Supreme Court action, based upon a record in the same old docket which contained the versified pleadings in a suit which has won some celebrity. The old case was an action of conversion brought in 1896, both the parties residing in Deposit, N. Y. “It is the recollection of local attorneys,” to quote the Binghamton paper, “that the attorneys in the case agreed to make out all papers in the case in rhyme, and that the matter was adjourned along and was finally discontinued because the plaintiff's attorney could not get his poetry-producing machinery working.”

The defendant's answer was as follows:—

JUSTICE'S COURT

CHARLES JACKSON, *Plaintiff*,
v. FRANK FENTON, *Defendant*
Before C. E. Scott, J. P.

To save his rights, in court intact, defendant here presents his facts:—

First

Defendant says 'twixt man and man
He does not owe this African;
And never did, a single cent,
Since he first struck this continent.

Second

He further says that in this bout,
He'll show the court beyond a doubt,
That what they do in court aver,
Did not and never will occur.

Third

And for a third and full defense,
The statement lacks good common sense;
It fails to show a state of fact
On which a court like this can act.

Fourth

Defendant asks this court to say,
Sir Frankie, you may go your way,
And as the plaintiff's case is lost,
Why, Charley you must pay the cost.

Dated Jan. 7, 1896.

FRANK FENTON, *Defendant*.
E. D. Cumming, *Defendant's Attorney*.

ACTION FOR CONVERSION

Brief

The Court decreed to my great grief,
That we in verse must make our brief;
So now we'll try and court the muse
For language to express our views.

The plaintiff here with solemn air
Upon the stand doth sit and swear,
That on one day in '96
He was possessed of dollars five.

This fact defendant don't deny,
Nor does he see the reason why,
If plaintiff was so wondrous blest,
He couldn't let defendant rest.

He says again, and this is true,
He owed defendant and 'twas due;
And that to him he handed o'er
A dollar bill in Maley's store.

He next affirms he went outdoors,
To pay a knight from Afric's shores;
Sad day for Fenton then, alack,
When Charley paid poor Silas Jack.

'Twas then that Charley saw and spake,
Like this, I've made a great mistake;

To Fenton then his tale he spun,
And said, I paid you five for one.

Defendant then, with honest zeal
Says, Jackson, do you think I'd steal;
And also said, with right good will,
I'll show you that same dollar bill

What you paid me, then forth he drew,
A dollar bill not very new;
Commercial life and tariff fare
Had won that bill that once was fair.

The plaintiff then was sore amazed,
A moment on that bill he gazed,
Then cried there is no blood on there;
Poor soul, he saw blood everywhere.

The bill you had from me just now,
Was stained with blood from Jersey cow;
While this one has no bloody mark;
The plaintiff could not see — 'twas dark.

He testified 'twas getting late,
The time of day was nearly eight;
He had that "five" fixed in his mind,
To all things else he was as blind.

He's not to blame, by passion crazed,
To reason and to logic dazed;
He fiercely rushes from the room,
And seeks a Court to seal his doom.

He begs the Court to quickly send
A summons to his trusty friend,
Who on that fateful yesterday,
Had fought with him the bloody fray.

Then in conversion laid his plaint;
To thus the court with facts acquaint;
How true it is in human strife,
Especially so in legal life,

That pictures painted with words fair,
Oft 'vaporate into the air,
For want of proof the simplest cause,
Are placed beyond the pale of laws.

Conversion must be proved, not guessed,
So crime is proved or else confessed,
We must not slur another's name
Unless our proof supports the claim.

It would have been inhuman skill
To show that Fenton had such bill,
Or in their being thus estranged,
To show just where he got it changed.

Counsel here may rave and rant,
The fact they do not, shows they can't.
The fact it may have happ'ed, I trow,
Did not and cannot make it so.

Like this the ancient poet sang,
On circumstance shall no man hang;
This rule of such a homely source,
Is still the law in all its force.

And when man's liberty is assailed,
Or to the cross he might be nailed,
'Tis then the rule must stricter be,
To guard the rights of all the free.

No facts by prose herein are stirred,
No naked truth the court has heard
From which he can with all his tact,
Deduct a single wrongful act

That lays the crime at Fenton's door,
Converting thus the plaintiff's store;
Nor can he from the proof infer
That such an act did then occur.

There is no proof, howe'er you strain,
By which the plaintiff can maintain
The case which he in court has brought,
Because that he has proven naught.

That shows defendant did convert,
Five dollars as they do assert;
But looking at its true intent,
It shows defendant innocent.

And so we say from all we've heard,
This Court cannot, from act or word,
Find any proof by which to cheer
The plaintiff by a judgment here.

From proofs we scanned and nothing missed,
The plaintiff's case must be dismissed,
And though he's nipped with legal frosts,
He'll get thawed out while paying costs.

My muse is dead, he lingered long,
Considering my doleful song;
His cause was just, his mission true,
And dying, left it all with you.

Dated Jan. 29, 1896.

Respectfully submitted,

FRANK FENTON, *Defendant*,

E. D. Cumming, *Defendant's Attorney*.

The Legal World

International Law

American Society of International Law.

— The fifth annual meeting of the Society was held at Washington, D. C., April 27–29. At the opening session Senator Root, president of the Society, delivered an address, after which there was a general discussion of “the status of resident aliens in international law,” in which Charles Cheney Hyde of Chicago, Prof. James F. Colby of Dartmouth College, S. Mallet-Prevost and James Barclay of New York took part. At the two following days' sessions “The Admission and Restrictions upon the Admission of Aliens” and kindred topics were discussed by Solicitor Earl of the Department of Commerce and Labor, Theodore Marburg of Baltimore, Prof. Charles Noble Gregory of Iowa State University, Prof. J. W. Garner of the University of Illinois, Frederic R. Couderd, and others. The annual banquet was made notable by an address of President Taft, the honorary president, dealing with the sanction of international law, other speakers being Japanese Ambassador Uchida, Sir Charles Fitzpatrick, Chief Justice of Canada; Martin A. Knapp of the Court of Commerce; Representative Foster of Vermont and Senator Henri La Fontaine of Belgium.

Third National Peace Congress. — The Third National Peace Congress met in Baltimore May 3–5, the first having been held in New York in 1907, and the second in Chicago in 1909. President Taft opened the Congress with an address, and other speakers on the first day included Harry Holt, president of the Congress, Cardinal Gibbons and Andrew Carnegie. On the second

day, addresses were made by Huntington Wilson, Congressman Richard Bartholdt, James L. Slayden, Prof. E. H. Griffen, Dr. F. W. Boatwright and James Speyer.

One of the chief speeches made at the Congress was that of Hon. John W. Foster, former Secretary of State, on the afternoon of the closing day, scoring our neutrality laws for the faults revealed in connection with the Mexican difficulty. Other addresses were made by Dr. T. Iyenaga, Dr. Lyman Abbott, Price Collier, President E. D. Warfield of Lafayette College, Speaker Champ Clark, Henry Clews, Edwin Ginn and United States Senator Theodore E. Burton of Ohio, who was elected president, the other officers chosen being: Dr. Benjamin F. Trueblood of Boston, secretary, and George W. White of Washington, D. C., treasurer.

The proposed unlimited treaty of arbitration between Great Britain and the United States drew forth appreciative remarks from many of the speakers. The proposed League of Peace, as discussed by Mr. Holt, excited interest, as did also the suggestion of James Speyer the New York banker, that war might be prevented by “financial neutrality.” In case two nations went to war without first submitting their differences to arbitration, why, he asked, should not the other neutral powers bind themselves not to assist either of the belligerents financially?

The Madrid Conference. — The Institute of International Law, meeting at Madrid early in May, considered the question of the employment of mines by neutral powers for the protection of their neutrality. The law relating to international aerial navigation received

much discussion, especially on the point whether an air ship should have the nationality of its owner, as proposed by the committee, or that of its place of registration. The latter alternative was eventually adopted with a qualification. Another point was whether aerial war should be forbidden. The British members were practically unanimous in condemning the use of air-vessels as engines of war. Professor Holland, regretting the very existence of aeroplanes, thought their free circulation even in time of peace a public danger.

The term *aéronef* has been adopted by the Institute as the best generic term for vessels used in aerial navigation. The propositions adopted in their somewhat inchoate form are:—

I. IN TIME OF PEACE

1. A distinction is made between public air vessels and private air vessels.

2. Every air vessel shall have a nationality, and one nationality only, which shall be that of the country in which it is registered.

Air vessels shall carry some special sign by which they can be distinguished.

The state in which registration is applied for shall determine to whom and under what conditions it may be granted, suspended, or withdrawn. Nevertheless, the state which registers an air vessel belonging to a foreign owner shall have no right to assert protection over such air vessel on the territory of the state to which its owner belongs against the operation of laws under which the said state may have forbidden its subjects to register air vessels abroad.

3. International aerial navigation is free, subject to the right of subjacent states, to take certain fixed precautions with a view to assuring their own safety and that of the persons and property of inhabitants on their territory.

II. IN TIME OF WAR

1. War in the air is permitted, provided it do not expose the persons or property of non-combatant populations to greater danger than those to which they are exposed in war on land or war on the sea.

An invitation to meet next year at Christiania was accepted.

Personal

W. H. Cobb of San Francisco succeeds Oscar Lawlor, resigned, as assistant Attorney-General for the Interior Department.

Judge William P. Whitehouse, who has been re-appointed to the Supreme Court of Maine, has been a member of that bench since 1890.

Hon. George B. McClellan has accepted a lectureship in politics and government at Princeton University, a chair having been endowed through the efforts of some of his friends.

Hon. U. G. Denman, former Attorney-General of Ohio, has accepted an appointment as United States Attorney for the northern district of Ohio, succeeding the late R. W. Tayler of Cleveland.

The deadlock in the Iowa Legislature ended April 12, when Judge William S. Kenyon of Fort Dodge was elected United States Senator to succeed the late Senator Jonathan P. Dolliver. Judge Kenyon was born in Elyria, O., in 1869. He was Judge of the Eleventh Iowa judicial district, and in 1903 was appointed attorney for the Illinois Central Railway. In 1907 he was made general counsel of that company, with offices at Chicago. He was appointed assistant to the Attorney-General of the United States March 14, 1910. His home is at Fort Dodge, Ia.

Judge Claudius B. Grant, formerly of the Michigan Supreme Court bench, laid down some practical rules for brief-making in an address April 15 before the

Detroit Lawyers' Club. "It isn't the long briefs that are always the winners before the Supreme bench," he suggested. "My experience has shown that a concrete, short statement is the most helpful one for the court. Sometimes the lawyer thinks he should cite a host of authorities to sustain his case. It isn't necessary to cite a dozen cases to prove one point. The better way to do, is to cite the one that establishes a precedent and then simply to refer to the fact that there are other authorities."

Governor Woodrow Wilson, speaking before the Knife and Fork Club of Kansas City May 5, expressed himself as follows regarding the recall of judges; "The recall is a means of administrative control. If properly regulated and devised it is a means of restoring to administrative officials what the initiative and referendum restore to legislators — namely, a sense of direct responsibility to the people who choose them.

"The recall of judges is another matter. 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."

President A. Lawrence Lowell of Harvard University, speaking at the Founders' Day exercises at Carnegie Institute in Pittsburg April 27, considered problems of public administration, saying in part: —

"The habit of frequent changes in public office means administration by persons unskilled in their duties, government by amateurs. We need in the public service both the expert and the lay elements, and the latter may very well take the form of non-professional heads to departments, provided they have under them

thoroughly competent permanent experts. In many branches of the public service, central and municipal, we have no expert officials performing duties that involve the exercise of discretion; and even in the branches of our administration, like the law, medical or engineering departments, where experts are regularly employed, we rarely allow men to remain in office long enough to acquire the familiarity with their peculiar problems that confers efficiency and authority.

"Our people complain loudly, pass and amend Sherman acts that prove ineffectual and adopt with ardor ingenious primary laws and municipal charters, only to find the old evils recur in new forms, for they still believe that liberty can be bought by formulas and popular enthusiasm, when its only price is constant vigilance. We must learn not only to use permanent officials, but also to control them."

New Legislation

Governor Wilson has affixed his signature to the so-called sterilization bill passed by the New Jersey legislature, and with its adoption New Jersey joins with Indiana, Connecticut and California in legislation providing for the sterilization of criminals and the hopelessly defective. (See p. 316 *supra*.)

An act has been passed in Massachusetts allowing amendments of pleadings "changing an action at law into a suit in equity, or a suit in equity into an action at law, if it is necessary to enable the plaintiff to sustain the action or suit for the cause for which it was intended to be brought."

The so-called anti-injunction bill became law in Massachusetts, April 26, after being denounced by leaders of the state bar. The bill provides that in cases of contempt of court arising from the issuance of injunctions where the alleged act of contempt is also a crime the facts of the alleged violation of the injunction shall be determined by a jury.

A bill has also been enacted in Massachusetts permitting the Prison Commissioners to release prisoners from the state prison on parole, whose minimum term is more than two and one half years when they have served at least two-thirds of such minimum term, provided, however, that no prisoner shall be so released until he has served at least two and one half years.

The following joint resolution was adopted by Congress on April 13:—

Resolved, etc., That the chairman of the Committee on the Library of the Senate, the chairman of the Committee of the Library of the House of Representatives, the Secretary of the Treasury, and the president and secretary of the Alexander Hamilton National Memorial Association, are hereby created a commission with power to select a site upon the property belonging to the United States in the city of Washington, other than the Capitol and Library grounds, for the erection of a statue to Alexander Hamilton, and to have charge of the erection of said statue, for which purpose \$100,000, or so much thereof as may be necessary in addition to the funds contributed by the Alexander Hamilton National Memorial Association, is hereby appropriated out of any money in the Treasury not otherwise appropriated.

Miscellaneous

The annual meeting of the Utah Bar Associations was held at Salt Lake City April 8. M. E. Wilson spoke on "Our Ninth Legislature," and Judge Whitecotton on "The Evaporation of a Constitution." The address of the retiring president, Charles E. Baldwin, dealt with the duty of the lawyer to his profession. The following officers were elected: E. B. Critchlow, president; Judge F. C. Loofbourow of Salt Lake, Judge N. J. Harris of Ogden and each of the other judges of the other districts, vice-presidents; Stephen L. Richards, secretary; L. B. Swaner, treasurer.

Varying views were expressed at the annual meeting of the American Academy of Political and Social Science in Philadelphia early in April, on the many phases of employers' liability, workmen's compensation and voluntary insurance. For two days the risks of modern industry were discussed by such competent observers as Secretary of Commerce Nagel, John Graham Brooks, Walter George Smith, P. Tecumseh Sherman, Miss Crystal Eastman, James A. Lowell, James B. Reynolds, John Mitchell, John Hays Hammond, R. C. Bolling, Senator J. Mayhew Wainwright, Charles P. Neill, Dean William Draper Lewis, Lee K. Frankel, Falcott Williams, Joseph P. Cotton and others.

Obituary

Judge Ogden.— Judge Charles W. Ogden, one of the leading lawyers of Texas, died April 19 at his home in Galveston. He was general attorney for the Texas Midland Railroad, the San Antonio Traction Company and other large corporations.

Col. B. F. Abbott.— The lawyer who drafted Atlanta's charter in 1874, Col. Benjamin F. Abbott, died in that city April 5, at the age of seventy-two. Until his retirement a few years ago he had been a leading citizen of Atlanta and one of the most prominent lawyers in the state.

General Andrew J. Baker.— General Andrew Jackson Baker, pioneer Iowa lawyer, died at Centerville, Ia., April 23. He had been Attorney-General both of Iowa and of Missouri. A native of Virginia, he spent the greater part of his life in Iowa. He was the author of "Baker's Annotated Constitution of the United States," issued in 1891.

Judge John H. Rogers.—Federal Judge John H. Rogers of the western district of Arkansas died in a hotel at Little Rock April 17. He went to Arkansas in 1869 from North Carolina, locating at Fort Smith. In 1877 he was elected to the state circuit bench and served until 1882 and the next year went to Congress. In 1896 he was appointed United States Judge by President Cleveland.

Ingold K. Boyesen.—Ingold K. Boyesen, at one time one of the foremost lawyers in the Middle West, died April 20, in Colorado Springs, where he had lived for the last five years. Before going there for his health he was a member of the law firm of Herrick, Boyesen, Morson & Allen of Chicago, one of the most prominent corporation firms of that city. He was a brother of the late Hjalmar H. Boyesen, the Norwegian author.

Stephen A. Osborn.—Stephen A. Osborn, a prominent attorney of Denver, died May 2. He was born in Wisconsin July 25, 1851, was educated at Tabor College, Iowa, and began the practice of law at Brownville, Neb. In Denver he was associated with the legal department of the Burlington road for many years. In Colorado he specialized in irrigation law and was an acknowledged authority. He was connected with many irrigation enterprises.

Judge Hiram Knowles.—Hiram Knowles of Missoula, Mont., died April 6. He began his career in Nevada in 1862, becoming prosecuting attorney of Humboldt County. In 1865 he moved to Idaho, and on to Montana in 1866. From 1868 to 1879 he served as Associate

Justice of the Supreme Court of Montana. He was a member of the Montana Constitutional Convention in 1889. From 1890 to 1904 he was United States district judge for Montana.

Sir Henri Taschereau.—By the death of Sir Henri Taschereau, Canada has lost one of its most distinguished lawyers. Sir Henri, who was born in 1836, was educated at the Quebec Seminary, and called to the bar in 1857. In 1878 he was promoted to the Supreme Court of the Dominion, of which he afterwards became Chief Justice. On account of advancing age he resigned the Chief Justiceship three years ago, when he was succeeded by the Right Hon. Sir Charles Fitzpatrick. He was the author of works on the criminal law of the Dominion and on the civil law of Lower Canada.

Edward A. Moseley.—Edward A. Moseley, secretary of the Interstate Commerce Commission, died at Washington April 18 after a long illness. Mr. Moseley was recognized as an authority upon measures designed to insure the safety of railway employees and travelers, and was instrumental in securing the enactment of laws requiring the use by railways of safety devices. Born at Newburyport, Mass., on March 23, 1846, he was admitted to the bar of the Supreme Court of the United States, became a member of the Massachusetts Legislature, and had been secretary of the Interstate Commerce Commission since 1887. He was a thirty-second degree Mason, a standing committeeman of the Massachusetts Society of the Cincinnati, ex-president-general of the American-Irish Historical Society, and a member of the Society of Colonial Wars and many other clubs and societies.



JUDGE ADOLPH J. RODENBECK
OF THE NEW YORK COURT OF CLAIMS

CHAIRMAN OF THE RECENT BOARD OF STATUTORY CONSOLIDATION

(Photo. by Albany Art Union)

The Green Bag

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Judge Rodenbeck and the Proposed Reform of Procedure in New York

"The New York bar may well command the intellectual respect of the nation. Any bar that have been able to practise law under the Code of Civil Procedure in the state of New York with a degree of success which enables them still to receive comfortable emoluments from their clients have earned no mean distinction." — *Attorney-General Wickersham, at last annual banquet of New York State Bar Association.*

"That immediate simplification of the procedure is imperative is apparent to all serious-minded members of the profession. Our present system in many respects is so antiquated and cumbersome as frequently to result in a denial of justice. We are far behind the states of Pennsylvania and Massachusetts, and much more backward than England in this regard." — *Report of Committee on Law Reform, Judge A. T. Clearwater, Chairman.*

AT last there is good reason to anticipate that the revision of the New York Code of Civil Procedure which has long been ineffectually discussed will in the next few years be successfully carried out. The legal profession of the state is now thoroughly awake to the necessity of this reform. A bill has been introduced in the New York Legislature of which we have the very best assurance, at this writing, that it will pass both houses at this session. This bill continues in existence the able Board of Statutory Consolidation which not long ago completed the task of consolidating the general statutes, and directs it to report a plan for the revision of the civil practice in New York. At the head of this Board of Consolidation, assuming that the bill is enacted, will be Judge Adolph J. Rodenbeck of Rochester, whom we think ourselves justified in pronouncing the best fitted lawyer in the state to take charge of

this important undertaking. For this task he possesses conspicuous qualifications. His was the guiding hand which directed for years the gigantic labor of classifying and consolidating the general statutes, the successful outcome testifying to his great industry, zeal and learning. This work proved Judge Rodenbeck a jurist of rare analytical and constructive powers. He has long devoted much study to the intricate details of the complicated problem of procedure. Two years ago he was planning a revision of the code, and the thoughtful paper which he read at the last annual meeting of the New York State Bar Association was at once one of the most notable of recent contributions to the literature of the subject and an eminently practical discussion embodying a perfectly feasible plan of reform. The prospect of Judge Rodenbeck's now giving the state the full benefit of his personal equipment is

the most auspicious factor in the existing situation. If the bill is passed he will at once take up the work of preparing a plan for the simplification of practice which will be presented for adoption at the next legislative session.

By many New York lawyers in a good position to form an estimate of Judge Rodenbeck's ability, it is felt that there is no one, either in the state or out of it, who is so well qualified for preparing such a plan, or whose suggestions are more likely to meet with favor by the judiciary and bar of the state.

Judge Rodenbeck is a native of Rochester, in which city he resides. He was educated at the University of Rochester, being admitted to the bar of the state of New York in 1887. He was corporation counsel of Rochester from 1894 to 1898, member of the New York Assembly in 1900 and 1901, and Mayor of Rochester in 1902 and 1903. He was appointed by Governor Odell to the bench of the Court of Claims before his term as Mayor expired.

While Judge Rodenbeck was in the Assembly he became the mainstay of a joint committee which was investigating the methods of the Statutory Revision Commission which had been engaged since 1889 in revising the statutes of the state. This committee completed the unprecedented task of examining every New York session law from the earliest times. The results accomplished under Judge Rodenbeck's direction were so favorable to statutory reform, and his report was so encouraging for a scientific consolidation of the statutes, that the Board of Statutory Consolidation was created in 1904 by act of the Legislature. Judge Rodenbeck's associates on this Board were Hon. Charles Andrews of Syracuse, former Chief Judge of the Court of Appeals, Justice Judson S. Landon of Schenectady, William B.

Hornblower and John G. Milburn. Judge Andrews being unable to serve, his place was filled by the appointment of Mr. Moot. Justice Landon died not long after the Board began its labors, but the other members carried the undertaking to its completion. In 1909 the Legislature enacted the consolidated laws and repealed all other general laws, thus bringing order from chaos, and making available a convenient and scientific classification of the statute law of the state.

The Board of Statutory Consolidation was empowered to revise the Code of Civil Procedure as well as to consolidate the statutes, in accordance with the efforts of the New York State Bar Association, extending back nearly twenty-five years, to secure a reformation of the practice. The Board found, however, that it was physically incapable of accomplishing both undertakings, and confined its attention to revision of the substantive law. The revision of the practice was felt to be so delicate and difficult a task as to call for independent treatment at some subsequent time. The Board did, however, prepare the way for such a revision, as it removed from the Code of Civil Procedure more than five hundred sections or parts of sections of a substantive character.

In his paper on "The Reform of the Procedure in the Courts of the State of New York" read before the State Bar Association last January, Judge Rodenbeck reviewed the history of the Code of Civil Procedure, and of the numerous attempts and projects to reform its evils, and indicated the design which might be utilized in re-arranging the materials of the code. "Some basis must be adopted which will appeal to the mind as consistent and which will be broad enough to take in all the

practice provisions in an action. At the same time a purely scientific or philosophical arrangement must be avoided. It is a question of expediency."

He accordingly proposed a classification based upon the successive steps in an action, arranged under the following general heads: (1) general provisions, (2) commencement, (3) trial, (4) judgment, (5) review, (6) satisfaction.

When, however, a satisfactory classification has been adopted, and consolidation has been accomplished, the result will be incomplete, Judge Rodenbeck said, if the work stops there. There are reasons for a thorough reform. But "a total repeal of the present system would be demoralizing. It would be unwise to adopt a practice act not based upon the present code."

Judge Rodenbeck proceeded to lay down the principles that should control the drafting of a practice act. He favored an act as brief as possible, leaving details to be covered by rules of court, and showed himself in general agreement with Professor Roscoe Pound's proposals in his article on "Some Principles of Procedural Reform" (4 *Illinois Law Review* 388, 22 *Green Bag* 237). He worked out the topic, however, with much thoroughness, with great vigor of analysis, and with no little ingenuity, his conclusions being the more valuable as those of an independent observer.

To do justice to Judge Rodenbeck's paper would require fuller discussion than can here be accorded it. It differed from the typical bar association address in its laborious research, its compression of material, and its clear-cut reasoning. Not simply a helpful address, but something more than that, a legal monograph of striking merit, it deserves the attention not only of those interested in a local question, but of students of procedure generally.

The paper met with a favorable reception, the Association manifesting its desire that the reform so ably advocated be straightway begun, by adopting a resolution which provided for the appointment of a committee of five with full power to act with regard to Judge Rodenbeck's recommendations, and for the printing and distribution of five thousand copies of the address at the Association's expense. In supporting this resolution Mr. Adelbert Moot said:

"I have worked with Judge Rodenbeck. I know his plan will stand examination. I know this is a great subject, and if this plan will not stand examination it is the first one he ever submitted in a work of this kind that I know anything about that would not."

The committee appointed by the President, Senator Root, consisted of Judge Rodenbeck, chairman, three other members of the old Board of Statutory Consolidation, Messrs. Hornblower, Milburn and Moot, and as the fifth member Charles A. Collin.

The next step, after the appointment of this committee, was taken when Frederick E. Wadhams, secretary of the state bar association, prepared a legislative bill requiring these same five men, as the Board of Statutory Consolidation, to take up the subject of revision of the code and report upon it, provision being included that copies of this work be distributed to the judiciary and members of the bar for suggestions and advice.

The enactment of the bill will naturally result in the discharge of the bar association's committee, and the defeat of the bill, if it be a remote possibility, will stir the committee to whatever action seems most desirable. It has done no work but awaits developments. The bill is as follows:—

STATE OF NEW YORK

No. 1140

In Senate, April 19, 1911.

Introduced by Mr. Saxe — (by request) — read twice and ordered printed, and when printed to be committed to the Committee on Finance.

AN ACT authorizing the Board of Statutory Consolidation to examine and report a plan for the classification, consolidation and simplification of the civil practice in the courts of this state.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. The Board of Statutory Consolidation created by the laws of nineteen hundred and four, chapter six hundred and sixty-four, consisting of Adolph J. Rodenbeck, William B. Hornblower, John G. Milburn and Adelbert Moot, together with Charles A. Collin, who is hereby appointed to fill the vacancy existing in said board, or such other persons as may be appointed by the Governor in the case of other vacancies, is hereby continued and directed to report to the next Legislature a plan for the classification, consolidation and simplification of the civil practice in the courts of this state.

Sec. 2. The board shall have power to conduct such inquiries as it may deem necessary to the preparation of such report, and to hold sessions in Albany or elsewhere in this state. The members of the board shall serve without compensation, but shall receive their necessary expenses and disbursements incurred in the discharge of their duties to be paid, together with the compensation of persons employed by the board and the other expenses and disbursements of the board, by the comptroller out of any moneys herein appropriated upon the certificate of the chairman of the board. The board shall distribute copies of its work to the members of the Legislature, judges of the courts and such other persons as it may see fit for the purpose of securing their suggestions and advice. The necessary printing of the board shall be done by the state printer and payment therefor shall then be made out of the appropriation for legislative printing.

Sec. 3. The sum of five thousand dollars (\$5,000), or so much thereof as may be necessary, is hereby appropriated for the purpose of this act, out of any moneys in the treasury not otherwise appropriated, to be expended as above provided.

Sec. 4. This act shall take effect immediately.

The Balm (?) of Litigation

[We are indebted to a South Dakota subscriber for the following lines written by a lawyer in Sioux City, Iowa, in the Supreme Court at Des Moines, while he was waiting for his "turn at the mill."—*Ed.*]

COURT now is in session, come near, ye distressed,
 And all of your wrongs shall be quickly redressed.
 Has any one libeled, or slandered your name
 By false accusations, dimmed the glare of your fame,
 And brought down the scorn and the cold disrespect
 Of neighbors and friends and their cruel neglect
 Till your heart is as lead and ambition destroyed,
 And life and its hopes are but one dismal void;
 Till you look forward to death as release from your pain,
 And all hope is abandoned of ever again
 Looking men in the face without trembling with dread,
 And, try as you will, cannot hold up your head?
 Then come into court and damages claim
 From him who has dared to so blacken your name,
 And when you are through you'll be led to confess
 That you've made of the whole an unsavory mess.

Or, it may be that some one has wronged you in purse,
And when you have dunned him is very averse
To paying the sum, and anathemas dread
Calls down in his wrath on your innocent head, —
That he tells you to go where the climate is hot,
And of paying the bill he has never a thought.
You are outraged in mind that he'd be such a knave,
And you say to yourself that justice you'll have
By suing at law for the overdue money,
And seek the advice of some guileless attorney,
Who tells you his heart is wrung with your wrong,
That no one can hinder success very long,
If you'll employ him in bringing a suit
You'll get judgment, and teach rogues a lesson to boot.
So you hurry to court where your fortunes are cast,
But the lawyer, he keeps all the money at last.

Maybe troubles domestic have clouded your skies,
And the wife who was once as the light of your eyes
Has broken the peace that surrounded your hearth,
And you feel now that she is the worst upon earth.
You forget for the time all the love of the past,
For the box of Pandora has opened at last,
With all of its troubles and plagues brought to view,
And stored till this moment expressly for you.
The thought that yourself may be wrong ne'er occurs
But you feel without question the fault is all hers.
You go to the lawyer just over the way,
Who sits like a spider awaiting his prey,
You tell him your troubles, laying all on your wife,
That she is in fault for the whole of the strife.
He condoles your misfortune, advises divorce,
And charges fat fees as a matter of course.
Court severs the contract that heaven ordained,
And a future of blight and dishonor is gained.

What then shall I say of the courts of the land,
Where the blindfolded Miss holds the scales in her hand?
Are they wrong? No, by no means; the courts are all right,
When viewed as they should be, through reason's clear light.
The ermine of justice, unspotted and pure,
Makes our liberties safe, abiding and sure.
We could not do without them a moment I ween;
They're the wheels most important in all the machine
Of the State; and no freeman should ever deny
This or should question the how or the why,
But swallow the creed as it here is pronounced,

Or else for contempt he will quickly get bounced.
 But the lesson to learn and the sooner 'tis done
 The better, my readers will find, every one,
 Is not to demand of all slanders the truth,
 Nor an eye for an eye or a tooth for a tooth.
 And if you are hit on the cheek by a blow,
 It has wisely been said, "Turn the other also."
 But ne'er go to court when the fires of hate
 Are aflame in your soul; — it is better to wait.

P. A. SAWYER.

The Interest and Value of the Study of Legal Biography¹

BY HON. HAMPTON L. CARSON²

*M*R. *President and Members of the Bar of Rhode Island: —*

I appreciate deeply the distinction conferred by asking me to share with you so interesting an occasion. I was a little at a loss to understand why a Philadelphia lawyer should be selected, particularly when I recall that a Philadelphia lawyer in the early days was not highly regarded. I remember picking up in one of the old book stalls of London, some ten or twelve years ago, a brochure of about ninety pages, printed in London fifteen years after William Penn had landed at Old Chester, and written by Gabriel Thomas, in which, after giving an account of "ye flourishing province of Pennsylvania," which at that time consisted chiefly of the town of Philadelphia and some two thousand people, and after describing the butchers, the bakers, the bricklayers, the masons, the carpenters and the jewelers, the author said, "Of doctors

and of lawyers I shall say nothing because the place is very peaceable and healthy," and then he added this pious prayer, "Long may we be preserved from the pestiferous drugs of the one and the abominable loquacity of the other."

Now, the doctors and lawyers, in the early history of Pennsylvania, had quite a neck and neck race. William Penn, before he left London, appointed a lawyer, a man by the name of Crispin who was his cousin, to be the first Chief Justice of the province, and it happened that on the ship in which Crispin was coming to America there was a doctor of the name of Nicholas Moore. Crispin fell sick, and according to the experience not altogether beyond our own, it happened that the doctor survived the patient, and thus it came about that it was a doctor who became the first Chief Justice of Pennsylvania and it was a doctor also who was the first Speaker of the province. Pluralism was catching, for at one time Thomas McKean held the offices of President of the Continental Congress, Chief Justice of Pennsylvania, and Governor of the state of Delaware. They had to borrow men from Pennsylvania, in those days, in

¹An address delivered before the annual meeting of the Rhode Island Bar Association, at the banquet held December 5, 1910.

²Of Philadelphia, former Attorney-General of Pennsylvania, author of "History of the Supreme Court of the United States," "The Genesis of Blackstone's Commentaries and their Place in Legal Literature," etc.

order to run the state of Delaware. Well, after awhile the doctors began to fall to the rear and the lawyers forged ahead so that — I don't know how it is here — but in other parts of the country there is a general impression that the gentle art of bleeding has passed from the medical to the legal profession.

I think it was Lord Stowell who once said, in answer to an objector who gave vent to some expressions of opposition to public dining for parish or other purposes, "Sir: I believe in public dining; it brings people together. It causes men to agree who might otherwise dispute; besides, it lubricates business." Lord Stowell, as we know, was of a convivial disposition, as also was his brother, the famous Lord Chancellor Eldon, and neither of them was above a bottle of port.

We all know that the ability to dine once a term, for twelve consecutive terms, in the great Hall of the Middle Temple, was once regarded as an ample proof of the fitness of one to come to the bar, to be called to the bench of the Inn. Mr. Walker, an English barrister whose dinners were the most successful in his day and generation, in London, has given us a little book on the art of dining. With some knowledge of the habits and the exercises in other state bar associations, it seems to me that you, gentlemen of Rhode Island, have rather improved upon the practice. Instead of having formal essays read at a morning session of the State Bar Association, to be followed by a banquet for the survivors some two nights later, you happily combine the two functions, and postpone disaster.

My friend Mr. Eaton having thrown out a caution that if I came here under the idea that I was to read a formal paper there might be something sodden and heavy about the discourse, I concluded that I would come here and

simply talk to you without a single note, upon a subject which has been familiar to my thoughts but which I have never in any way attempted to put into type, although I am somewhat terrified by the sight of the "chiel" in front of me taking notes.

Your President has said that I would say something about the value and the interest of the study of legal biography as an aid to legal education, and to that topic I shall confine myself.

There are several ways of approaching it, and when I say the study of legal biography I do not mean that accidental passing of time which very many of us indulge in, in our otherwise unoccupied hours at night, by picking up a charming volume of legal biography and simply turning the pages to find out when the man was born, and what he did, and how he came to the bar, and how, in the first month of his practice, he captivated all the bystanders and the juries and astounded them by the extent of his learning and eloquence and how, in the course of three years, he was able to amass, as Thomas Jefferson is said to have done, a sum very much larger than most of us are able to do at the end of fifteen or twenty years, as is the manner of ordinary legal biographies, but I mean, gentlemen, something more serious and much more scientific and systematic than that.

The principle lying at the foundation of any interest in legal biography can be best illustrated by this simple thought. We all know that if we visit the city of Washington and go into the Supreme Court of the United States and see the nine Justices upon the bench, we ask their names, and notice the exact order in which they are arranged to the right and left of the Chief Justice, and, if we are there on a Monday when opinions are handed down, we listen intently to

the tones of their voices, and mark the manner with which they announce their decisions; thus we acquire more or less of a personal acquaintanceship with each man, which leads us to inquire into his mental characteristics, and from that time out no longer do the reports of the Supreme Court of the United States remain mere legal abstractions. Having heard an opinion read by Chief Justice Fuller in mild tones, or by Mr. Justice Harlan or Mr. Justice Brewer in deep bass, or Mr. Justice White with energy, or by Mr. Justice Holmes with the intonations of a scholar, these men no longer are mere dim figures to us. They are living legal personalities, and we attach more importance, and are much more inclined to weigh opinions in the scales of our own judgment based on our own knowledge of the men, than if they were total strangers to us.

Now, of course, with regard to the great body of judges at large, that is an impossibility. With regard to those who are dead it is an absolute impossibility. Their faces cannot be seen, their voices will never sound again, and their hands will no longer take up their pens to write judgments which are to stand as expositions of great principles. The next best thing that can be done is to gather the portraits, the autograph letters, and the documents of those men. In this way we substitute, through the engraver's art and the multiplications of the issues of the printing press, a body of engraved or written images which impress themselves on the mind, which will lead us thereafter to personify the judgments of a court instead of dealing with them as items under the headings in an encyclopedia, or digest, or dictionary. The extent to which this can be carried is an exceedingly interesting study. I confess that I have ridden the hobby for the past

thirty years, during which I have been engaged in the serious work of collecting all the portraits and many autograph letters and legal documents, illustrative of the history of the profession on both sides of the Atlantic, and at the end of some thirty years of accumulation, I have all the portraits, so far as they can be had, of the Chancellors, the Vice-Chancellors, the Masters of the Rolls, the Chief Barons, the puisne Barons of the Exchequer, the Lord Chief Justices and puisne Justices of the King's Bench, the Chief Justices of the Common Pleas and the Associate Justices, and since the passage of their Practice Act of 1873 and their Judicature Act, as it is called, the Lord Justices of Appeal as well as those who deal with matters of admiralty, of probate and divorce — and in that way it becomes perfectly possible to know what manner of men they were. The collection now numbers some twelve thousand pictures, some of them superb mezzotints, line engravings, stipple or mixed illustrations, and others, finished with the most perfect skill of the engravers, displaying trials and scenes in court. To them I add everything that can be found in the shape of published trials, curious books, early editions, legal documents, autograph letters, until there is in my mind a storehouse of pictures, so that if a name should happen to be mentioned, that man is no longer a mere abstraction. He represents not only a definite human being, but a human being in the right place, in connection with his official position. I could readily fill this room on the one wall with portraits of Lord Mansfield, of Lord Eldon on the other; and of John Marshall, I could not place them all upon this end of the room. That is merely an illustration. When it is found that the art of engraving and the art of

painting lend themselves to this work, that a portrait painted by Sir Joshua Reynolds, or Sir Thomas Lawrence, or by Sir Peter Lely, or by Holbein, to get back into more ancient days, engraved by the very finest masters of the art of engraving in England, which portray a man in his earliest years, through his successes at the bar, during his career as Solicitor, or Attorney-General, and then after his promotion to the Common Pleas or to the King's Bench, and from there to the Woolsack, and that at every stage of his career we can have a definite impression on the mind as to what he looked like, how he was robed, who his associates were, we are instinctively led to inquire something as to the man himself and learn to know him more vividly than merely through his decisions. If we pick up books like Foss' Dictionary of the Judges of England, Roscoe's Lives of Eminent Lawyers, Townsend's Eminent Judges, Story's Life of Story, Benjamin Robins Curtis' Life by George Ticknor Curtis, we see the truth of this statement. Biography becomes an essential element in the mastery of a knowledge of our profession. The life of the law, after all, is but the life, in the aggregate, of its various members. We are all familiar with the value of leading cases, not only as live storehouses of principles, but as engines of energy for the affecting of the future whether for weal or for woe. But behind every case stands a judge, and behind every judge stands an occasion, and behind the occasion necessarily stands the century that produced it, because these things are not accidental; and, we, in analyzing the decisions in a leading case, are necessarily analyzing the brain of the judge who pronounced that decision, his ancestral environment, his opportunities of contact with this or that

question, until we reach a point in time and the place of discharge of legal force. A leading case becomes a part of the wondrous warp and woof which the judges are perpetually weaving into a fabric like the Ægis for the protection of the liberties of ourselves and our distant posterity.

It is an astonishing thing how much we can learn simply from the exhibition of legal documents. We read about the conflict between Lord Coke and Lord Ellesmere, one the Lord Chief Justice of the King's Bench and the other the Chancellor, upon the question of the right of the Chancellor to restrain in equity by injunction the execution of a judgment recovered at law and alleged to have been fraudulently obtained, and the conflict between Coke and Ellesmere became of vital importance in the establishment of the superior jurisdiction of chancery; but I confess that my own appreciation of the matter was very much intensified when in the course of a collection of autograph documents I finally secured a document upon which the signatures of Lords Ellesmere and Coke stood side by side. When I supplemented that by the collection of their portraits, when I attempted to gather around them the figures, the small simulacra of their associates, then I was impelled to read the history of the times to see what manner of men they were, and what their real contribution to jurisprudence was. I felt that there was a principle at the basis of all this by which, if the study were intelligently conducted, there could be found some method of appraisal — which is of great importance — of the value of judicial judgments.

We have had thousands of judges in all parts of the country, even in the short time we have existed as a republic. There have been about sixteen hundred

judges in England since the days of William the Norman. To merely take up a volume of reports and to see that Mr. Justice Ashhurst said so-and-so, and Mr. Justice Buller said so-and-so, and Mr. Justice Patteson said another thing, is a matter of very little real consequence to us unless we have some sort of knowledge of the true value of that man's work in his position as a judge. In this age when we are overburdened with the multitude of decisions, and where frequently the active practitioner is looking out not for the strong judgment but simply for the last ruling on the case, it must be of infinite assistance to counsel, in discussing intelligently and scientifically before the court of last resort, where they wish to weed out what happens to be ephemeral, or extraneous, or irrelevant, or merely of temporary importance, from those golden strands which alone should enter into the imperishable fabric of jurisprudence, to have a clue to a knowledge of the man and to the value of his work. This is a laborious task, but it is a most absorbing and most fascinating one. Cases themselves, unless properly understood as to their history, are sometimes misleading. I recollect being very much impressed, some years ago, by looking into that extraordinary book, so far as its scholarship is concerned, known as "The Reporters," by John William Wallace, Reporter of the Supreme Court of the United States, in which, when he was the librarian of our Law Association of Philadelphia, he dealt with most of the old common law reporters and old equity reporters from Atkyns down to Ventris and Vesey. He attempted to give a systematic and illustrative description of the character and the value of the reporter, and there dwelt on two striking instances. One of the cases involved the fate of a throne

and was followed by the beheading of a king; and the other involved the foundations of a great branch of equity jurisprudence. When Charles the First was engaged in his unhappy differences with his Parliament he relied on a learned Attorney-General, Sir William Noy, for guidance, who, in drawing on his recondite knowledge of the law, attempted to justify the King's exercise of his prerogative by certain old cases which he had found in some antiquated reports. He either lacked the requisite knowledge, historically, to be able to properly appraise the circumstances under which those decisions were given, or else he lacked courage to be frank with his Sovereign and tell him that they were dangerous precedents to follow, but he threw his weight in that national struggle upon those precedents against the rising powers of the people. The result was that Charles the First lost his throne. He was beheaded through the ignorance or weakness of his Attorney-General in misreading precedents. The other instance was a case reported in the 4th Wheaton, where even so high an authority as Chief Justice Marshall — and his opinion was concurred in by Mr. Justice Story — went so far as to subvert the foundations of equity jurisprudence with regard to a trust in favor of a charity where the object of the charity was vague and indefinite. The poison crept into the veins of your sister state of Connecticut. It has even, in recent times, affected the jurisprudence of our distant sister state of Oregon. It did not attack you here, nor did it attack Massachusetts, but it did assail us in Pennsylvania, when the great merchant, Stephen Girard, attempted to establish a charity which at the present time sparkles like a jewel on the brow of the adopted city of the French merchant, and Daniel

Webster was brought from Boston to argue the case against Horace Binney. John Marshall's decision — he being then dead — was cited as conclusive authority against the maintenance of the trust; Mr. Binney, through an ample knowledge of the history of chancery — a branch in which John Marshall was not particularly versed though he was strong on many sides — was able to satisfy Mr. Justice Story, not only of his own original error but of the error of Chief Justice Marshall in misreading a certain ancient precedent as to which there were four conflicting reports in the books, three of which were absolutely unreliable. I mention this as an instance, showing how sometimes, right at the very basis of a great department of jurisprudence, the wholesome growth of a doctrine may be checked and perhaps buried for a time, or utterly destroyed; and its rescue is due to some man having studied the very roots and foundations of the profession, and learned to estimate at their true worth and value the reporters who have transmitted the decisions of courts for our guidance.

Take, too, an illustration which occurs to me just at this moment. I never knew how it was that an English counsel who had been promoted from stuff to silk and had been made King's Counsel, could defend a prisoner at the bar against the Attorney-General, the true allegiance of the King's Counsel being to the Crown. I could find no explanation of it in the books. Nobody seemed to have considered the matter, until there happened to come into my possession a document addressed to Sir James Scarlett, afterwards Lord Abinger, the most successful verdict-getter England ever saw, which explained the whole matter. It was a petition on the part of Scarlett, one of the King's Counsel,

addressed to William the Fourth, reciting the fact that, as King's Counsel, he owed allegiance to the Crown, but as it was the desire of the Earl of Cadogan to have the services of Scarlett in his defense, he petitioned the monarch most graciously to dispense with his services so that he might serve the Earl, and His Majesty responded that he was so "graciously inclined." The King waived his right and expressly licensed his counsel to defend the prisoner, and the document, signed by William the Fourth and attested by Sir Robert Peel, I have in my possession. I have also the original recognizance, in the handwriting of John Marshall, holding Aaron Burr to bail on his trial for treason. I have letters written by the Justices of the Supreme Court of the United States, the early Justices I mean, like James Wilson of Pennsylvania and John Blair of Virginia, addressed to President Washington thanking him for the positions which have been conferred, and one addressed to the Governor of Virginia resigning the Chancellorship in order to take a seat among the federal judiciary. Without attempting to weary you with detail, or pointing out specific instances of this or the other aspect, I simply indicate that here is a branch of much neglected study which, if properly pursued — I mean earnestly and systematically pursued — so as to become saturated with a personal knowledge of these men, of how their work came into conflict with the work of other men, of how their ambitions clashed in the great questions that they argued, will invest the leading cases with an atmosphere which makes them living forces in the development of jurisprudence, instead of mere dead dry bones of the law buried in the charnel houses of books — mere annals or calendars of a bygone age.

Now, what can be done with regard

to the lives of judges can also be done with regard to the lives of the great authors in the law. At the end of nine hundred years but six names stand out like towering peaks — but six names in English law stand there as beacon lights and guides to succeeding generations: Glanville, Bracton, Littleton, Coke, Hale and Blackstone. Take Glanville, the Chief Justice of Henry the Second, the greatest English king upon the throne for a period of at least three hundred years: Glanville, the author of the first systematic treatise upon the law of England. The sort of fellow he was, the material of his biography, you will find in the preface of the eighth volume of Coke's reports. Then you can trace it out from there to earlier works. A man starting originally as sheriff in the County of York, on the northern border, when the king was on crusade, acting really as Vice-Regent of the realm, of such military capacity that he organized a military force and surprised the Scottish King, William the Lion, and made prisoner of him; a man who afterwards became so fired with holy zeal that, at the age of seventy, he went on the crusade and died at the foot of the walls of Acre, in the presence of Richard Cœur de Lion — and yet the author of the first systematic treatise of the English law. You open the book and look at it. You say it is not a philosophical discourse. It is a book of practice, but, strange to say, the very language of the writs by which suitors were summoned to appear before the King wherever the King happened to be in the kingdom, was couched precisely in the same terms that we have today in our ordinary writs of summons — and even of execution. We find much space devoted to the doctrine of *essoigns*, we find that the excuses for non-appearance were that the defendant was be-

yond the seas, or that he was in the crusade, or with the army, or that a freshet had broken down a bridge and that he could not reach Winchester in time, or that he lay sick on the road, and then to guard against malingering a special commission was issued to investigate into the truth of the excuse. We associate this first great treatise with the period of the crusade fifty years before the passage of Magna Carta. It is not difficult to remember that the six great names I have mentioned are more or less closely associated with events of importance to American history, Glanville writing about fifty years before the great statute of Magna Carta, Bracton writing about fifty years after the statute of Magna Carta, the principles of which lie at the basis of our constitutions, both federal and state. Bracton for five hundred years dominated the profession, one of the justices itinerary of Henry III, traveling over the kingdom of England in order to take the part of the King, who had at that time delegated the personal duty of sitting in his Court to his Chief Justice. The work of Bracton is the most beautiful treatise, scientifically and in point of expression, that existed in the law prior to the time of Blackstone. Neither Coke nor Hale can compete with it in style. There is a reference in Bracton to what a good judge should be, to what exalted justice should be, that deserves to be quoted on the notes in full. I won't attempt to give it from memory. I will write it because it will give you an idea not only of the loftiness of the man's mind, the extent of his grasp upon the breadth and sublimity of jurisprudence, but also his exalted notions of the function of the judge.¹

¹ Let not one, who is unwise and unlearned, ascend the judgment seat, which is, as it were, the throne of God, lest he convert darkness into light and light into darkness, and lest with a sword in

Then we come to Littleton. We find that his period was particularly that of the discovery of America by Columbus. And then we come to Lord Coke's day. We find that it is just at the dawn of American colonization. Then we come down to Hale and we find that it is just at the close of American colonization, which is about co-eval with the settlement of Pennsylvania, which was the last of the thirteen colonies to be settled with the single exception of Georgia. Finally, we come to Blackstone as the master of them all in point of style and the most perfect in analysis.

I have often put to myself the question: What is the value of Blackstone's

the untaught hand, as it were, of a madman he should slay the innocent and set free the guilty, and lest he tumble down from on high, as from the throne of God, in attempting to fly before he has acquired wings.

"And when a person is obliged to judge and to be judged, let him take care for himself, lest by judging perversely and against the law, through entreaties or for a price, for the advantage of a paltry temporary gain, he presume to bring upon himself the sadness of eternal grief, and lest in the day of the fury of the Lord he feel the vengeance of him who has said, 'Vengeance is mine, and I will repay,' and when kings and princes of the earth shall weep and bewail, when they behold the Son of Man, through fear of his torments, when gold and silver will not avail to set them free. Who, indeed, would not fear that examination in which the Lord will be the accuser, the advocate, and the judge, and from his sentence there shall be no appeal possible. For the Father has given all judgment to the Son, who shuts and no one can open, who opens and no one can shut. Oh! strict judgment, in which men shall have to render account, not only for their acts but for every idle word that they have unrighteously spoken! Who then shall escape from his coming wrath? For the Son of Man shall send his angels, who shall separate from the kingdom of God all scandals, and those who work iniquity, and shall bind them into bundles to be burnt, and shall send them into a furnace of fire, where there shall be weeping and gnashing of teeth, groans and howlings, weepings and tortures, hissing and screaming, fear and trembling, pain and labour, burning heat and fetid smells, darkness and anxiety, bitterness and roughness, calamity and want, straitness and sadness, forgetfulness and confusion, twistings and prickings, sorrows and terrors, hunger and thirst, cold and heat, sulphur and blazing fire forever and ever. Let each, then, beware of that judgment, when the Judge will be terribly strict, intolerably severe, immoderately offended, vehemently angered, and his sentence unchangeable, his prison without any return from it, his torments

Commentaries? What is their real place and value in legal literature? We can answer that question in one of two ways, by reading his work and by examining his raw material. I submit that we cannot begin to understand the value, or the extent, or the character of the work that he performed except by the latter method. We read the work — delightful reading. A month will amply suffice for the reading of it, but it is not the charm of his style that we are most impressed by. It is not the perspicacity and the precision, and the brevity, and the accuracy of his definitions, though the work is remarkable for that; but it is because the commentator, taking as raw material Anglo-Saxon customs, Norman accretions, ecclesiastical rules, Roman maxims, Plantagenet statutes and English digests — a turbid mass tumbling through the centuries, carrying down foul and conflicting matter — was able by the most astonishing degree of intellectual and legal alchemy to distil a limpid fluid which could be quaffed without disgust. If you were to pile up on the tables in this room the unabridged statutes, the old folios, the treatises, the digests, the entries, the abridgments, the reports, you would find that out of ten camels' loads he had by a marvelous power of intellectual compression brought the vast bulk into four small quartos. Now, the publication of his book — the first edition — was in 1767, and think of the importance of that date to us in this country, just prior to our Declaration of Inde-

without end, without interval, and without assuagement, his tormentors horrible, who never grow weary, who never pity when fear disturbs the accused, his conscience condemns him, his thoughts reproach him, and he may not flee away, whence the blessed Augustine, 'Oh! how far too great are my sins; wherefore, when one has God as a rightful judge, and one's own conscience as a witness, on has nothing to fear but one's own cause.'" — Bracton De Legibus Angliæ, *Liber 1, Chap. 11, Twiss' translation.*

pendence. There were more copies of Blackstone's Commentaries sold in the thirteen colonies than there were in London. The first American edition of Blackstone's Commentaries was published in Philadelphia just five years after the appearance of the first edition in London. In 1772 twenty-five hundred American lawyers subscribed for that book and at the very head of the list of subscribers stands the name of John Adams of Massachusetts. English common law had a new birth on this continent owing to that very circumstance, and therefore it is that whether in crowded cities, on the plains, in valleys, among the mountains, or on the shores of our Great Lakes, and along the banks of our mighty rivers the great commentator for years was omnipresent.

Now to this may be added the thought that it is not alone to the lives of our judges, or to the lives of our commentators and our great authors that we must turn, to properly appreciate the full value of this as an aid to the mastery of the various and ill-sorted learning of the law, but we must take the statutes and we must take the cases. Cases themselves must have an ancestry. Judges cannot usurp jurisdiction. They cannot, however philosophically inclined, settle doubts, or contrive that an issue shall be evolved on the records brought to them for decision. It is one of the extraordinary things that had John Marshall gone to his grave after only fifteen years of service only one great decision of his would have appeared, the case of *Marbury v. Madison*, but all the other great cases which have made his name immortal occurred in the second half of his career. Why? Because the country had not grown up during the earlier years of his judicial incumbency; time was required for the evolution of the

raising of the questions in *Cohens v. Virginia*, *Gibbons v. Ogden* and *McCullough v. Maryland*. They were in embryo awaiting the decision of that great mind which was to move like Newton's, or Kepler's, or Copernicus', in the settlement of principles which should guide our legal astronomy and dominate our legal heavens forever.

We take the statutes. Statutes, too, have a biography. They are not dead things. They are the will of the people crystallized into law. Do we not ask ourselves the question: How was it that in such a degraded and degenerate age as that of Charles the Second a statute such as that against Frauds and Perjuries should happen to be passed? Is it enough simply to say that the 17th clause is enforced in most of the states of the Union? We require to know something about the history of those times and why it was that those various sections had to be put in the form of some statutory expression of the will of the English Parliament in order to guide judges in their determination of matters and principles which lie at the foundation of jurisprudence. Take a national illustration. Our great Judiciary Act of 1789 can be personified in the same way. The 25th section particularly provided for the appellate jurisdiction of the Supreme Court of the United States. Surely, when we read the journals of the Continental Congress and the letters that George Washington addressed to the Governors of the different states, and his correspondence with the members of the Continental Congress, we find that Washington, being the focus upon which all the converging rays of dissatisfaction were centred, saw as no other man saw the necessity for a great, strong, federal, central jurisdiction which should regulate and control matters with which the state governments

themselves were inadequate to deal. During the time of the Continental Congress, when we had no President, no real executive force, when we had but a single Legislative Chamber and no federal judiciary, how were questions of the conflicts of boundaries between the states to be settled? How questions between citizens of different colonies? How questions of prize and capture on the sea when a Pennsylvania privateer happened to share in the exploit of Captain Manly in an expedition fitted out under the auspices of the colony of Massachusetts? Here we had the germs of the federal jurisdiction pressing themselves in and upon the consideration of the members of the Continental Congress, seven of whom afterwards served as framers of the Constitution of the United States, and among them was that great man of Connecticut, Oliver Ellsworth. So that the genesis of the statute is one of the rock-rib sources of our national jurisprudence and in that we reach the living law. In the 25th section the appellate jurisdiction of the Supreme Court is described in words of light. Then think of the danger which threatened that statute. The greatest service that James Buchanan ever performed to the jurisprudence of the nation was to save that statute from repeal. The disciples of Thomas Jefferson, enraged at the extent and meaning and the application of Chief Justice Marshall's decision in *Cohens v. State of Virginia*, had a bill introduced into the House to repeal the 25th section of the Judiciary Act. A majority report was presented dissented from alone by James Buchanan, and in reading the minority report he said, "Instead of a bill to repeal the 25th section, this bill ought to be entitled a Bill to abolish the Supreme Court of the United States and to dissolve the Union," and the strength of his minority

report was such as to carry sufficient weight on the floor of the House to defeat the measure.

Now, these are mere illustrations to show that a knowledge of the statutes and cases and the judges who decide cases, can all be supplemented by a study of biography, by a collection of autographs and documents, and by the collection of pictures. Surely, gentlemen, we, as a body of lawyers — it matters not what the name of the state from which we come — are all members of the great federal republic which is our pride and our glory, and the state lines which separate us from each other are invisible. There is running through the whole science of jurisprudence a struggle to make, on earth, the closest approach, from the practical side, to the administration of the justice of the Most High. There is no more splendid political architecture ever conceived by the brain of man than the conception which entered into the brains of the framers of the Constitution of the United States when they conceived that great court, the Supreme Court of the United States, to regulate, without the spilling of a single drop of blood, all differences between citizens and foreigners, or citizens of different states, and to spread the mantle of the Constitution without stretching until its ample folds involved state after state with principles which are the bed-rock foundation of things which were rooted, not simply in Anglo-Saxon customs or Norman precedents, or Roman philosophy, or Hindu law, or Gentoo "codes," but principles which justify themselves to the intelligent appreciation of the scientific as well as the practical jurist, as being based, not alone on abstract philosophy, but based upon man as an individual hoping to realize, in his own case, the highest opportunities for individual advance-

ment. That is the glory of our citizenship. That is the glory of our jurisprudence which we lawyers hold dear, dearer than tongue can tell, those principles of which Choate, Webster,

Binney, Gibson, Sergeant, Dexter, Story, Kent and Marshall are the great luminaries, whose figures stretch in majestic procession before us—dead, but still alive, ruling our spirits from their funeral urns.

Reviews of Books

BRYCE'S AMERICAN COMMONWEALTH

The American Commonwealth. By James Bryce. New edition, completely revised throughout, with additional chapters. V. 1, *The National Governments; The State Governments.* V. 2, *The Party System; Public Opinion; Illustrations and Reflections; Social Institutions.* Macmillan Co., New York. V. 1, p. xv, 679+62 (appendix); v. 2, pp. vii, 933+5 (appendix)+22 (index). (\$4.)

MR. Bryce's "American Commonwealth" deservedly enjoys the reputation of being the best account of our institutions in existence. Written by one of the foremost living publicists and lawyers, a writer as dispassionate as he is able, it is crowded full of skilfully generalized information and candid yet friendly criticism of the shortcomings of American democracy. In its new revised edition, brought down to date, it more than ever before impresses the reader with its intellectually ripe and stimulating qualities.

In 1888, when the first edition appeared, Mr. Bryce, while he described in detail the weaknesses of the American commonwealth, was led to entertain a hopeful view of the future of popular government in this country. Twenty-two years later, he finds no reason for retracting this opinion. He sees no deterioration in the character of American legislatures, noting what appears to be a slight improvement in some of the western states. While the distrust of legislatures is such as to lead in some

instances to the demand for the popular initiative and referendum, he indulges in no pessimistic reflections, considering it is too early to draw deductions regarding the success or failure of this movement. On the whole, the state legislatures are less open to moral censure than they were in 1888. And "the forces working for good seem stronger today than they have been for the last three generations."

One must not be misled by this hopefulness, however, to suppose that the author is not fully aware of the deficiencies noted in the original edition. He adheres to his position that it is almost impossible to elect a great man President, that the best men do not enter public life, and that the influence of the bar has declined with the rise of the commercial and financial classes. He finds us still ignoring differences of capacity between man and man, adhering to the Puritanical belief in original sin underlying our constitutional arrangements, and underrating the difficulties of government and overrating the capacities of the man of common sense. He finds the members of legislatures, on the whole, not of a grade of intelligence and capacity substantially higher than that of the public at large. That is a serious charge, when we bear in mind the worthlessness of the opinions emanating from the untrained mind of the average citizen, and truly, as he says,

"Great are the blessings of equality, but what follies are committed in its name!"

He is led, also, to declare the tone of public life "lower than one expects to find it in so great a nation." It is notably lacking in refinement. There is a lack of that respect for the dignity of office which tends to elevate public life. There is, moreover, some disgust on the part of the luxurious and fastidious with the vulgarities of public life. Not only the elevation but the independence and courage of public men have been affected, "and the country has suffered from the want of what we call distinction in its conspicuous figures." But there are signs, he says, that this is becoming less true than it was twenty-two years ago.

At the same time, Mr. Bryce considers the "general tone of vulgarity" of public life an insignificant factor in deterring men of ability from entering politics. The necessity of forming disagreeable associations, and the certainty of misrepresentation and abuse, are no greater than in old world countries, where "a politician has to associate with men whom he despises and distrusts." A fact, however, which he perhaps neglects to bring out, is that the artificial selection of public officials in a country which does not show due respect for superior talent necessarily interferes with the bestowal of public distinction on the fittest, and to this extent the vulgarity of politics is responsible for the deterrence of able men from going into public affairs. Nevertheless, in later years, "good citizens are beginning to put their hands to the machinery of government, and those who do so are, more largely than formerly, young men."

Had this new edition been prepared a year later, its author might have been

in a position to supplement his chapter on the federal courts with some remarks on the new dignity to which the Chief-Justiceship has been raised by the present incumbent. That the custom of choosing a jurist of high distinction for Chief Justice, if there is any reason to hope for its becoming firmly established, would have far-reaching effects on the workings of our governmental machinery is not to be denied.

It is interesting to note that Mr. Bryce takes a hopeful view of the prospects of young lawyers. The overcrowding of the profession, though admitted, is not grave in comparison with more serious conditions in England. Here, "according to the universal witness of laymen and lawyers, no man who combines fair talents with reasonable industry fails to earn a competence, and to have, within the first six or seven years of his career, an opportunity of showing whether he has in him the makings of something great."

The new material of the revised edition is embodied sometimes in the text and sometimes in footnotes, and there are four new chapters, on our transmarine possessions, immigration, later developments in the negro problem, and later observations on the universities. During the past fifteen or twenty years the universities "have become popular and national in a sense never attained before in any country." Mr. Seth Low has also rewritten his chapter on municipal government.

COMMISSION GOVERNMENT

City Government by Commission. By Ford H. MacGregor, Instructor in Political Science in the University of Wisconsin. Bulletin of the University of Wisconsin, no. 423. Pp. 131+19 (bibliography). Pamphlet. (40 cts.)

MMUCH information regarding commission government in the United States is presented in this brochure,

which throws much light on the general types of this new form of municipal government and analyzes the merits of the system. We quote the following conclusions reached by the author:—

“That the commission form of city government is a panacea for all municipal ills, is a claim that no one familiar with the problems of municipal administration will make. That it is an improvement on the ordinary system of city administration as it has been organized down to the present time, would seem to be borne out by the experience of those cities which have operated under it for any considerable length of time. Our present system promises a simplification of the machinery of government and a definite fixing of responsibility for official action should be worthy of the careful study and consideration of all students of municipal administrative law. That the commission form of organization is more in harmony with the industrial and business methods of today, and more in harmony with the most important functions which the city is now called upon to perform, can scarcely be questioned; but that a wider application of the plan will reveal defects in the system, also cannot be doubted.

“It is too much to expect that the commission form as it has been perfected up to the present time will be the final form of municipal organization in this country. Other safeguards will probably have to be erected around it. Our electoral system has not yet been perfected in this country; and under the commission plan, the election system is of the utmost importance. Under the commission plan the matter of publicity is also of unusual importance. Cost accounting systems must be installed

and other industrial tests and practices must be adopted, as well as the form of organization, if the efficiency of the municipal corporation is to be brought up to the standard maintained in our present-day industrial enterprises.”

BIGELOW ON FRAUDULENT CONVEYANCES

Bigelow on Fraudulent Conveyances. Revised edition, by Kent Knowlton of the Boston bar. Little, Brown & Co., Boston. Pp. 762 + lxxix (index and table of cases). (\$6.50 net.)

THE editor of the present work has divided Dean Bigelow's work on fraud into two parts, of which the present volume on fraudulent conveyances forms an independent text-book. The subjects treated not only cover the original statute of Elizabeth on fraudulent conveyances at common law, but also the more recent statutes, such as the American and English Bankruptcy Laws, State Insolvency Statutes, Sale of Goods in Bulk laws and laws relating to conditional sales. In view of the provisions of our Bankruptcy Law, much of the original subject-matter of the treatises is superseded for practical purposes. The principles involved and the discussion of them are, therefore, of rather academic interest and of more value to the scholar or law student than to the practical lawyer. Nevertheless, such a work has a place in legal literature, and is of far greater value to the profession at large than the mere compilation of decisions of which so many modern text-books consist.

The spirit of the ripe scholarship of Professor Bigelow, which pervades this book, gives it a real and permanent value. His elaborate discussion of the theory of law is a constant source of illumination. The editor has done well to preserve this in so large a degree in the present edition. The wisdom of the editor is again illustrated in directing

his efforts to a careful selection of citations from any state which has decisions fairly in point rather than in an attempt to compete with digests or encyclopædias in exhaustive catalogues of innumerable cases too often bearing but remotely on the text. The editor is to be commended in keeping this a real law book rather than an undigested collection of citations.

It is to be regretted that some subjects, which have been added to the present volume, have not been more adequately treated. The subject of "reasonable cause to believe" on the part of a creditor in dealing with the subject of preferences under our Bankruptcy Law has been as important as any under that statute and there are many conflicting decisions, yet Mr. Knowlton has devoted less than a page to its discussion and has completely ignored the amendments to the Act passed in 1910 that have introduced important changes here. Again, the subject of Sales in Bulk might well have been more exhaustively treated. The conflicting decisions on the constitutionality of such statutes is but scantily noticed, and no attempt made to show the line of distinction which may be drawn between some of these cases. These statutes differ quite materially from each other in form and substance but that is hardly remarked nor is any attempt made to explain or correlate the various decisions of the different jurisdictions that while in apparent conflict can be explained by reference to the differences in the statutes themselves. If sufficient space cannot be devoted to such matters in the present volume, it would have been better to omit them altogether rather than produce a result that makes the weakness of the book all the more conspicuously contrast to so much that is most excellent.

HOPKINS' JUDICIAL CODE

The Judicial Code; being the Judiciary Act of the Congress of the United States, approved March 3, 1911. With an introduction and annotations by James Love Hopkins of the Bar of the United States Supreme Court, author of Hopkins on Unfair Trade and Hopkins on Trademarks. Callaghan & Co., Chicago. Pp. 236 + 18 (table of cases and index). (\$2.50 net.)

THIS year Congress codified the law establishing the Federal Courts and defined their respective jurisdictions. This Act, officially designated "The Judicial Code," in the words of the present annotator, is "certainly the most compact code of *nisi prius* and appellate jurisdiction and procedure in all history, considering the wide range of its subject-matter and the great number of courts affected by it." Some of the changes, such as the abolition of Circuit Courts, the increase of minimum financial interest involved in the jurisdiction of federal courts, are of considerable importance. Other provisions are merely re-enactments of prior statutes. Where changes are made, it is often essential that the practitioner should have them called to his attention and have ready at hand these former statutes. Where decisions have interpreted these former statutes, which are now simply re-enacted, it is not always easy to put your hands on the authorities. This little book has gathered together in a convenient form the sections of the "Judicial Code," references to the statutes superseded and the decisions of the federal courts so far as they shed light on the present code and the changes it embodies. The material is handled so compactly and intelligently that the reader loses no time in getting what he wants. Perplexing subjects such as the removal of causes to the federal courts from the state court, while not exhaustively treated, are given sufficient attention so that the main principles are clearly presented so as to enable the

general principles involved to be readily comprehended. Terse, clear and sensible, the book has much to recommend it to the federal bench and bar. A full index and list of cases add much to the effectiveness of the book.

When the Judicial Code goes into effect, at the end of this year, there is no doubt this volume will find a welcome place amongst the lawyers of the federal courts throughout the country.

NOTES

The New York State Library Yearbook of Legislation for 1908 (v. 10), edited by Clarence B. Lester, Legislative Reference Librarian, is made up of three bulletins. Legislation 37 gives the seventh annual Digest of Governors' Messages, covering all regular and special messages made by Governors of all states from October 1, 1907, to October 1, 1908. The message of the Governor of Porto Rico is digested, also topics in the President's message. The annual series of these digests is discontinued with this number, but the Review of Legislation will continue to cover two years in each number. Legislation 38 gives the nineteenth annual Index of new legislation. References to fifty statutes declared unconstitutional during the year are included. Legislation 39, the Review of Legislation, the most valuable feature, perhaps, of the Yearbook, contains a number of articles by competent writers, and sets forth the developments of statute law classified by important subjects. (\$1.)

Little, Brown & Co. of Boston are publishing a fifth revised and enlarged edition of "Dillon on Municipal Corporations." In speaking of his great treatise, which was first published in one volume in 1872, when its author was a judge of the Supreme Court of Iowa, its author says: "Over forty-five years have elapsed since the preparation of the 'Municipal Corporations' began, and more than thirty-eight years since its first publication. It is, therefore, not only a child, but the companion of the greater part of a prolonged professional career. Any justifiable satisfaction I might feel in its success is somewhat subdued, if not saddened, by the sombre, although not melancholy, reflection that in this

edition I am taking final leave of a work which is intimately incorporate with the studies, lucubrations and labors of so many years." In the interval since its first edition, Judge Dillon, who is now seventy-nine years of age, has successively served as Chief Justice of the Iowa Supreme Court, judge of the United States Circuit Court, president of the American Bar Association and professor in the Columbia University Law School.

BOOKS RECEIVED

The Proceedings of the thirty-fourth annual meeting of the New York State Bar Association, at Syracuse, January 19-20, 1911, is a volume of interest chiefly because of the discussions that it contains of several topics of great importance, such as, for example, issuance of shares of stock without par value, abolition of imprisonment in civil actions, appointment of receivers under the bankruptcy act, contingent fees, commitment and discharge of insane criminals, the Torrens system of land registration, revision of the Code of Civil Procedure, and the regulation of medical expert testimony. The debates and committee reports on these subjects are worth reading. The volume also contains several notable papers read at the meeting, the most important being Judge Rodenbeck's extended discussion of the best way to improve upon the Code of Civil Procedure, other papers being: "The Reform of Procedure," by Hon. Elihu Root; "How can we Improve Our Courts?" by Adelbert Moot; and "Concerning Certain Essentials of Republican Government" (annual address), by Hon. George W. Wickersham. The next annual meeting of the association will be held in New York City.

A Philadelphia Lawyer in the London Courts. By Thomas Leaming. Illustrated by the author. Henry Holt & Co., New York. Pp. 199 (index). (\$2.).

A Practical Medical Dictionary. 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 Law of Street Railroads: a complete treatise on the law relating to the organization of street railroads, the acquisition of their franchises and property, etc. By Andrew J. Nellis. 2d ed. Matthew Bender & Co., Albany. V. 1, pp. clxxx, 654; v. 2, pp. ix, 688 + 159 (index). (\$13.)

Constitutional Law in the United States. By Emlin McClain, LL.D., Justice of the Supreme Court of Iowa, sometime Lecturer on Constitutional Law at the State University of Iowa, author of "A Treatise on the Criminal Law," compiler of "A Selection of Cases on Constitutional Law." American Citizens Series. 2d ed. Longmans, Green & Co., New York and London. Pp. xxxviii, 365 + 53 (appendix of documents) + 14 (index).

Index to Periodicals

Articles on Topics of Legal Science and Related Subjects

Administration of Justice. See Criminal Procedure.

Agency. "An Agent's Right to Sue upon Contracts." By Floyd R. Mechem. 59 *Univ. of Pa. Law Review* 517 (May).

The first instalment of an article in two sections, concisely setting forth in text-book style the law governing this subject.

Armaments. "Relation of Treaties and Armament." By Major-General W. H. Carter, U. S. A. *North American Review*, v. 193, p. 801 (June).

"There is nothing offensive from a diplomatic standpoint in treaties involving defensive alliances, but when the signatory nations are among the recognized great world powers the effect on the others is instantaneous, for having commerce of their own to extend and protect they are goaded to preparation for the possible contingencies of war. . . .

"While international agreements are usually entered into for the purpose of avoiding causes of friction, no general peace movement can be made so effective as one looking to the elimination of treaty articles which directly provide for allied war whenever the indeterminate sphere of influence of either contracting party is interfered with."

"If the United States Should go to War." By John Bigelow, Jr. *Atlantic Monthly*, v. 107, p. 833 (June).

"Let us believe that there is a sufficiency of men and of ammunition for the efficient working of the armaments. There can still be no greater delusion than to think that our seacoast forts constitute a protection to our coast-lines."

See Panama Canal Fortification.

Asylum. "The Right of Asylum." By G. Addison Smith. 27 *Law Quarterly Review* 199 (Apr.).

Banking Law. "Liability of Banks Receiving Checks to a Trustee's Order for Deposit in His Individual Account." By Harold C. McCollom. 11 *Columbia Law Review* 428 (May).

Discussing *Niagara Woolen Co. v. Pacific Bank* (141 App. Div. 265), which is the present law of New York State, and other cases. When this case comes before the Court of Appeals, the writer thinks that among four possible alternatives the following is the one that it would be preferable to adopt: "It may reverse the judgment below and hold that the bank is liable only where it has notice from a payment to itself or otherwise that there has been an actual appli-

cation of the trust funds to purposes which are on their face, individual and personal. . . .

"Where there is an actual application to a debt which the trustee personally owes the bank, or to any other debt which is a personal obligation of the trustee, there is, *prima facie*, a mis-appropriation which the bank should not be allowed to disregard. The line of demarcation between an application to personal uses and a deposit in the individual account may seem to be rather vague; but there does seem to be a legitimate distinction between the two cases in that moneys of an individual account are not necessarily applied to personal debts, whereas in the case where the liability should exist there is no question that the use made of the check is personal."

Capital Punishment. "Should Capital Punishment be Abolished?" By Maynard Shipley. 2 *Journal of Criminal Law and Criminology* 48 (May).

The writer considers the restoration of the guillotine in France to have had a pernicious effect in increasing crime.

"M. Deibler resumed his active duties as public headman on the morning of January 11, 1909. . . . During the month of March, after several executions had taken place, no less than fifty-seven murders and one hundred and eighty-nine robberies were reported by the French press. During the preceding November, before the revival of the 'lean widow,' as the guillotine had been facetiously dubbed, when cold and hunger were gripping the poor and driving them to crime, fewer than twenty cases of murder, and only forty-three cases of robbery were reported."

See Penology.

Civil Service Reform. "The Story of a Post-office Clerk: The Experience of a Young Woman in the Civil Service of the United States." By Charles W. Eliot, LL.D. *McClure's*, v. 37, p. 178 (June).

"The moral of this story is plain. A young woman, well born, well brought up, intelligent, better educated than nine-tenths of American children, and of irreproachable character, demonstrates by five years of service as assistant in two post-offices that she is fully capable of discharging well the duties of a postmaster. By fidelity and intelligence she reaches a good position in the United States Post Office — that of postmistress in a third-class office — only to be deprived of it by the action of local political managers through the administration at Washington. . . . The case was not an exceptionally hard one. All appointees on political grounds are liable to just such treatment."

Codification. "The Resurrection of our Criminal Code." By H. J. Randall. 27 *Law Quarterly Review* 209 (Apr.).

"This 'elasticity' objection must be considered by every one who supports codification in any form, but for the purposes of a Criminal Code it is completely irrelevant. Arguments may be found to support the proposition that it is desirable that the Law of Contracts should be in a state of movement and uncertainty, but no one could support such a proposition with regard to the Law of Crimes. The Court of Star Chamber may have performed a useful function as a Court of Criminal Equity in the days of the Tudors, but the days when criminal equity would be tolerated by the community belong to past centuries. . . . As far as human ability can make it so, there should be no room for doubt as to whether any particular acts constitute a criminal offense or not. And the greatest step that can be taken in furtherance of this object is to codify the Criminal Law."

See Law Writing, Negotiable Instruments.

Contingent Fees. "The Contingent Fee." By F. C. Wilkinson. 72 *Central Law Journal* 335 (May 12).

"The abuse of the contingent fee comes not so much in theory as in practice. It relates to the amount of the fee. This is an abuse that no amount of technical rules will obviate. Yet there must be some supervision of these possible arsonious cases. It appears that our only answer to the problem can be, 'Allow the court to supervise all contingent fee contracts.' Here are a few of the reasons why the court should exercise such jurisdiction:—

"1. Parties to this contract are not at arm's length. Similar conditions exist as in a contract between a shipper and a railroad company. The parties are in a position where unfair advantage may be easily taken, and it is the duty of the court to interfere in such cases.

"2. Public policy demands a change. Scandal is frequently caused by the exorbitant exaction of fees. Respect for the law is lowered with respect to the bar.

"3. The attorney is the officer of the court. He is in the nature a public official, and in many respects his employment is a public duty. The right to charge fees comes from the court, and the court should regulate that right.

"4. It would be in accord with the law of attorney and client. These parties are in a certain fiduciary relation, that the courts are accustomed to deal in accord with equitable principles.

"5. A reasonable contingent fee may be obtained better this way than any other. The court's adjudication of such cases in the past has proved its efficiency."

Contracts. See Corporations, Liquidated Damages.

Contributory Dependency. See Juvenile Delinquency.

Conveyancing. See Real Property, Torrens System.

Copyright. "The Copyright Bill, 1911." By G. Herbert Thring. *Fortnightly Review*, v. 89, p. 901 (May).

"There is no fear as to international relations. These are fixed firmly and favorably in the Berlin Convention. As far as America is concerned, it can only be hoped that with the growth of years will come the growth of wisdom, and that the Senate, abandoning the slavish obedience to trade unions, will face the matter fairly and squarely, and legislate without restrictions, not only for their own, but for the authors of other countries, and will join the Berlin Convention.

"At the present time, however, and in the near future, the real issue lies with the Colonies and with the Government's relations with the Colonies. Indeed, this has been the crux of the situation for many years; but now that separate copyright legislation has been proclaimed the real crisis is at hand."

Corporations. "Has the Common Law Received the Fiction Theory of Corporations?" By Sir Frederick Pollock, Bart. 27 *Law Quarterly Review* 219 (Apr.).

A learned and notable article, reviewing at length from the fifteenth century the decisions bearing on the subject.

"No one who is familiar with the English judicial mind will be surprised at the scantiness of positive utterances on a question of this high order of generality. The nearest approach to such an utterance that I have found within our own time is twenty-one years old and occurs in a judgment of the late Mr. Justice Cave, a learned and thoughtful lawyer. Counsel had argued that certain retired members of an insolvent building society were liable, notwithstanding their retirement, to contribute to the payment of its debts. The precise question turned on the interpretation of special enactments, the terms of which have no interest for our present purpose. But as to the general principles involved the learned judge said: 'A corporation is a legal *persona*, just as much as an individual; and, if a man trusts a corporation, he trusts that legal *persona*, and must look to its assets for payment: he can only call upon individual members to contribute in case the Act or charter has so provided.' No such word is here as 'fiction' or 'fictitious,' not even 'artificial.' It is true that no formal theory was before the Court at all: it is probable that Mr. Justice Cave was not thinking of the controversy between fictionists and realists; it is possible that he had never heard of it. Still, do we trust a Fiction? and is a Fiction 'just as much' a person as a real man? I do not know what inference a Continental jurist might be tempted to draw from the admission that an Act of Parliament or royal charter may displace the usual presumption, *Quod universitas debet singuli non debent*. In this country there is no doubt since Blackstone's time, some would say since Sir Thomas Smith's, that the legislative competence of Parliament is unlimited, and there has never been any that the King's discretion as to the terms of the charters he is pleased to grant is very large. An English lawyer will therefore draw no speculative inference at all.

"On the other hand, we may certainly find Lord Selborne saying in 1872 that a railway

company 'is a mere abstraction of law. All that it does, all that the law imputes to it as its act, must be that which can be legally done within the powers vested in it by law. Consequently a thing which is *ultra vires* and unauthorized is not an act of the company in such a sense as that the consent of the company to that act can be pleaded.' (1 L. R. Ch. at p. 152.) This might well have been said by a man with his head full of the Fiction theory, and Lord Selborne, who was a scholar, though not very learned in the antiquities of the law, may well have known something of the theory in its earlier forms. But the English doctrine of Ultra Vires, as we call it, does not really go back to any ultimate conception as to the nature of a corporate body. It is a doctrine, to use a convenient American term, of constitutional limitations. If the same authority which created a given juristic person, or authorized the constitution of many juristic persons by the performance of certain conditions, has at the same time set bounds to the legal competence of such persons, bounds which are matter of public knowledge, then acts professedly done in their name and exceeding those bounds are nullities. . . .

"As for the question *utrum universitas delinquere possit*, our modern way has been to circumvent it. The real difficulty was to make out how any man, any natural man, could be vicariously liable to pay damages for the wrongful act or negligence of his servant, which he had in no way authorized and might even have expressly forbidden. When this was overcome, the difficulty of ascribing wrongful intention to an artificial person was in truth only a residue of anthropomorphic imagination. Fraud and malice, some learned persons continued to say, belong only to individual men; much as our Germanic ancestors could not conceive any right being transferred without a tangible symbol, and, as late as the fourteenth century, men thought the patron of a church insecure until he had solemnly grasped the handle of the church door. But those learned persons were already a minority half a century ago. The story is well and sufficiently told by Mr. C. T. Carr in his recent book on the Law of Corporations. My only regret is that he asks himself whether 'the Fiction theory has been officially discarded.' The time has come, I think, to ask whether any English Court ever officially or semi-officially adopted it, and I make bold to answer in the negative."

"Executory *Ultra Vires* Transactions." By Prof. Edward H. Warren. 24 *Harvard Law Review* 534 (May).

A company is incorporated "to engage in the business of transporting persons by means of hacks or other vehicles." Thereafter the incorporated associates vote to engage in the business of transporting goods by express. An extensive express business is carried on in the name of X. M. delivers goods to a servant of X. to be carried by express, and the goods are not delivered. M. sues X., and X. defends on the ground that the contract was *ultra vires* and therefore its breach imposes no liability. Ought this defense to prevail?

"It is submitted that (1) if all the shareholders of X. who were such at the time the contract with M. was made authorized or ratified the transaction of the business in the course of which this contract was made, and (2) if M. did not know and could not reasonably be charged with knowledge that the contract was outside the contemplated scope of X.'s action, then X. should not be allowed to defend on the ground that the contract was *ultra vires*."

There is an extended note on the authorities.

See Federal and State Powers, Professional Ethics.

Criminal Law. See Codification, Penology.

Criminal Procedure. "The Administration of Criminal Justice in Wisconsin." By Judge E. Ray Stevens. 2 *Journal of Criminal Law and Criminology* 39 (May).

Judge Stevens, who is president of the Wisconsin Branch of the American Institute of Criminal Law and Criminology, reviews the progress which has been made in the reform of criminal procedure in Wisconsin during the past two years. Several instances in which the Supreme Court has refused to be guided by technicalities not affecting the substantial rights of the parties are pointed out. But perfection in the administration of the criminal law has not been attained, notwithstanding these improvements.

"Three or four years ago a defendant was on trial for wife abandonment before a jury of twelve in Fond du Lac County. During the trial one of the jurors disappeared. As he could not be found by the officers, the defendant consented in open court that the case be submitted to the eleven that remained. He was convicted. He carried the case to the Supreme Court, where he presented the single question, that the judgment must be set aside because he could not consent to be tried by eleven instead of twelve jurors. A majority of that court, considering themselves bound by the strict rule of the earlier cases, reversed the judgment. . . .

"We preserve the right to be tried by a jury of the county in which the offense was committed, and then spend weary hours and even days in carefully excluding every juror that possesses even the slightest tinge of a suspicion of knowledge that would have qualified him to act as a juror in the days when the rule was established requiring jurors to come from the vicinity in order that they might have a knowledge of the facts that would enable them to decide the case justly."

"Delays and Reversals on Technical Grounds in Criminal Trials." By E. J. McDermott. 2 *Journal of Criminal Law and Criminology* 28 (May).

"The delays in civil and criminal trials here are inexcusable, and yet it would not be hard to avoid most of them. These delays are due to the complicated, obsolete nature of our procedure; to the deep-rooted, unreasonable conservatism of our courts, and to the dilatory habits of the lawyers themselves. Delay usually suits the purpose of the defendant; the plaintiff proceeds slowly because he must proceed with cau-

tion to avoid the innumerable pitfalls that are needlessly put in his pathway. The follies which we allow in the selection of juries, especially in criminal cases, are astounding. Such absurd indulgence as we show to men accused of crime is unworthy of an enlightened people."

"The Serious Absurdities of the Criminal Courts." By Herbert Bruce Fuller. *World's Work*, v. 22, p. 14516 (June).

A number of recent instances of gross miscarriages or delays of justice are recorded. Some attention is given to faults of the jury system. The writer says the two greatest evils of the present administration of justice are sentimentality and technicality. He urges that legislation be adopted preventing reversals on purely technical grounds, that juries be reformed, that the judiciary be taken out of politics, and the powers of judges be enlarged.

See Juries.

Damages. See Liquidated Damages.

Direct Government. "The Referendum in Operation." I, "In Switzerland," by Prof. W. Oechsli; II, "In the United States," by President A. Lawrence Lowell; III, "In Australia," by Prof. Harrison Moore and Ernest Scott. *Quarterly Review*, v. 201, no. 427, p. 509 (Apr.).

Prof. Oechsli's review of the operation of the Swiss referendum is temperate; he finds that it has fulfilled neither all the hopes nor all the fears entertained of it. His position is in the main, however, distinctly in its favor. The popular initiative, however, does not warrant as favorable conclusions; it is a right of individuals or minorities and "goes beyond mere liberty, for it enables a minority to put compulsion on a whole people."

President Lowell, eliminating from consideration the special referendum on purely local questions, examines the working of the general referendum in the United States. Three different forms of this institution have been introduced at different periods. The first of these, the referendum for the adoption or rejection of state constitutions and of constitutional amendments, came first. It has not been an empty form but has been effective, but the smallness of the vote usually cast renders it difficult to say whether it has as a rule fairly expressed public sentiment. The institution of the constitutional referendum is deeply rooted in the public esteem, and a survey of Massachusetts history "leaves the impression that almost all" votes of doubtful wisdom "were either in accord with the best thought of the time or were afterwards reversed."

The second form of referendum to be introduced was that designed to put a check upon particular measures or policies of the legislature, arising mainly in the newer states; it is to be regarded as "the product of immature conditions, for it has shown no marked tendency to spread to other parts of the country or to expand over new subjects."

The third form of referendum is that very recently introduced enabling a popular vote on any law not declared urgent by the legislature.

"As yet it is too early to say what the effect of the institution will be; a generation must pass before that can be determined."

The writers on the situation in Australia give the greater part of their attention to recent events, and submit no general conclusions, but they point out several defects of the system as there employed, which they apparently think can be remedied.

"Popular vs. Delegated Government — A Defense of the Initiative, Referendum and Recall." By Senator Jonathan Bourne, Jr. *72 Central Law Journal* 354 (May 19).

"When the Constitution was finished by the convention and signed, every grant of power it contained, every bar it put up between the people and the Government, every check and balance it imposed on the electorate and on the States was Hamiltonian, and, so far as possible, was constructive of an irresponsible machine. It was aggressive against state sovereignty, against popular sovereignty and against the spirit of democracy among the electorate of the states. Jefferson and his school were, in truth, on the defensive, and the battle resulted in a victory for what exactly at that time was needed — and all that the conditions then warranted — a union of states under a centralized government. Conditions were not then ripe for Rousseauism, in the application of popular sovereignty on a national scale. But witness the fifteen amendments to the Constitution and observe this curious fact: Every single one of them, in its last analysis, is a recognition of the sovereign rights and powers of the people as against both the sovereignty of the state, as such, and that of the federal government. They are the people's bill of rights.

"In the last one hundred and twenty years conditions have greatly changed. Electricity and steam, the telegraph, telephone, railroad and steamboat have established media of instantaneous intercommunication of ideas and rapid co-operation of action of the individual units of society.

"Centralization of government, business and the individual units of society is the inevitable result incident to the evolution of civilization. With this centralization comes increased power, and to insure the proper use of same it must be correlated with increased responsibility, and accountability, which should go together."

Due Process of Law. See Workmen's Compensation.

Estoppel. "Pleading Estoppel, II." By Gordon Stoner. *9 Michigan Law Review* 576 (May).

"It is the writer's belief that the careful code pleader will prefer the rule that the facts constituting an estoppel, whether it constitutes a part of his cause of action or a defense, must be pleaded unless there is no opportunity to do so — understanding 'opportunity' to refer to the order of pleading rather than to the knowledge or information of the party seeking to avail himself of the benefit of the estoppel. Though, as above suggested, there are varying

decisions on the subject, and some of them holding flatly that in the case of estoppel by matter in pais the facts constituting the estoppel need not be pleaded, still these cases are in the minority and are opposed to the great weight of authority. Even in Connecticut and New York, in which states the doctrine that estoppel may be shown in evidence though not pleaded is strongest, some of the expressions of the courts lead one to believe that they themselves are not too well satisfied with the doctrine or the reasons given to uphold it."

See Liquidated Damages.

Federal and State Powers. "Constitutional Limitations upon State Taxation of Foreign Corporations." By William C. Coleman. 11 *Columbia Law Review* 393 (May).

An extended discussion of *Western Union Tel. Co. v. Kansas* (216 U. S. 1) and *Pullman Co. v. Kansas* (216 U. S. 56), viewed in the light of previous decisions of the Supreme Court on constitutional limitations. The final conclusions reached are:—

"First, that the Kansas tax was in violation of the Fourteenth Amendment, and to say that it was not would be to announce a doctrine not simply in extension of, but contrary to, all previous interpretations of that amendment, and to the true rule of constitutional limitations upon the state taxation of foreign corporations.

"Second, that the court in basing its opinion, not upon the Fourteenth Amendment, but upon the Commerce Clause, has announced an extension of the scope of that clause for which there is clearly not only no precedent, but which is expressly negated by decisions which have been thought to be unquestioned as bulwarks of our constitutional law. Whether or not it was expedient or economically wise for the court so to extend the scope of the interstate commerce clause is a question entirely apart from our considerations, which, as asserted at the very beginning, are exclusively legal. No doubt from other points of view, as Mr. Justice Holmes himself admitted, the tax 'deserved the reprobation it receives from the majority,' but with that we are not here concerned. . . .

"Perhaps it is not inaccurate to describe our highest court as a permanent constitutional convention. Who can say but what Hamilton and Marshall, were they interpreting the Constitution today, would see no error in this most recent construction placed upon the Commerce Clause? But may we not be advancing too rapidly? Can we truthfully say that nullification by indirection is only an imaginary and not a real danger? Our government is a dual one, and as such it must remain."

"The State's Power over Foreign Corporations." By Harold M. Bowman. 9 *Michigan Law Review* 549 (May).

By a striking coincidence, the writer of the opening article in another law journal discusses the same subject, reviewing much the same authorities in the course of an extended examination of leading cases. Mr. Bowman is inclined, however, to treat the opinions in the Kansas cases more sympathetically, and he analyzes

the resulting nullifications of doctrine with greater particularity, reaching the following conclusions:—

"1. Foreign corporations that have become persons within the jurisdiction of the state—at least those that, previous to attainment of the status of persons within the jurisdiction of the state, were not subjected to continuing conditions—cannot be deprived of any 'privilege' guaranteed by the federal Constitution to which domestic corporations of the same class are entitled. . . .

"2. Foreign corporations that have become persons within the jurisdiction of the state cannot be deprived of the equal protection of the laws secured by the Fourteenth Amendment.

"3. The conditions under which foreign corporations may become persons within the jurisdiction of the state have not yet been either precisely defined or indicated but the recent cases indicate that much less is required to make a corporation a person within the jurisdiction of the state than had been assumed. If this is so the effect of the decisions of 1910 is to emancipate many foreign corporations from the power of the state to impose 'unconstitutional' and discriminatory conditions. . . .

"4. The effect of the decisions correspondingly reduces the numbers of corporations that can be said to act or do business in the state without being persons within the jurisdiction of the state. . . .

"5. Opinion will be encountered to the effect that the tendency of the recent decisions is to deprive the state of the power to impose 'unconstitutional conditions' subsequent—as distinguished from conditions amounting to unequal treatment under the equal protection of the laws guaranty—even on such foreign corporations as are not persons within the jurisdiction of the state. But desirable as this would seem, it cannot yet be declared on authority. . . .

"6. The state still has power to refuse admission to foreign corporations. But this may be subject to marked qualification in the future so far as a certain class of foreign corporations is concerned. If the opinion expressed by Justice White in *Pullman Co. v. Kansas* should become the doctrine of the court it would seem that no foreign corporation engaged in interstate commerce can be denied the right to engage in intrastate commerce, whether or not in its capacity as a corporation engaged in intrastate commerce it is a person within the jurisdiction of the state."

General Jurisprudence. "Jurisprudence." By A. H. F. Lefroy, K.C. 27 *Law Quarterly Review* 180 (Apr.).

An article more lucid than acute, which aims "to give a clear meaning to the word 'Jurisprudence.'" The writer has no fault to find with Holland's definition of the science. He also accepts Professor Jethro Brown's definition in his "Austinian Theory of Law." The writer suggests that these two definitions reveal the line of distinction between the English and German, or analytical and historical schools—"that the German school where it deals with the origin of law deals rather with the developments of legal systems as a whole, while the English

school deals rather with the development of juridical ideas and particular institutions within the legal system. . . .

"Thus, then, to adopt once more words of Professor Vinogradoff, we have 'two methods of scientific investigation which may be applied to the study of law: the method of deductive analysis on the basis of abstractions from the present state of legal ideas and rules, and the method of inductive generalization on the basis of historical and ethnographical observation.'"

See Corporations.

Government. "The New Stateism." By John M. Mathews. *North American Review*, v. 193, p. 808 (June).

"While some Western states are adopting the initiative and the referendum under the mistaken impression that a more direct participation of the people in legislation will necessarily and, as it were, almost automatically produce a more democratic government, New Jersey is working out a truer conception of democratic government. . . . The significance of the 'new stateism' lies not in its past accomplishments, but in its present and future possibilities. If the Governor is now urging the passage of 'administration bills' introduced by his adherents, who can say that he will not soon be introducing them directly?"

Great Britain. "The Duty of the Lords." By Professor E. C. Clark, University of Cambridge. *Nineteenth Century*, v. 69, p. 811 (May).

"With respect to the abolition of co-ordinate legislative power in general, there can surely be little doubt. To give up that power is, to all intents and purposes, to surrender their existence as a Second Chamber. With regard to money bills, there is everything to be said, on the score of convenience and reasonable expectation, for retaining the present practice as much as possible. But until some reform can be made in our electoral system that will render the gross injustice and class oppression with which we are now threatened less possible or less likely, the Lords must, as it seems to me, retain or reclaim the power both of amendment and rejection which they have never formally abandoned."

Hawaii. "The Rule of the Unfit." By J. Liddell Kelly. *Westminster Review*, v. 176, p. 477 (May).

"To ensure efficient government in Hawaii, the conviction gains ground among Americans that the territory must 'progress backwards' — must be placed under government by commission, civil or military, instead of going forward to the goal of Statehood. This does not imply that the white citizens of the territory would not keenly appreciate the boon of managing their own affairs. It simply means that they recognize the literal truth of what Lowell wrote in sarcastic vein, that —

'Liberty's a kind o' thing
That don't agree with niggers.'"

See Direct Government, Federal and State Powers.

International Arbitration. "The War Against War." By Havelock Ellis. *Atlantic Monthly*, v. 107, p. 751 (June).

"It is feared by some that the reign of universal peace will deprive them of the opportunity of exhibiting daring and heroism. . . . There are an infinite number of positions in life in which courage is needed, as much as on a battlefield. . . . There are departments in the higher breeding and social evolution of the race — some perhaps even involving questions of life and death — where the highest courage is needed."

"Human Nature and Peace by Law." By Congressman Richard Bartholdt. *Editorial Review*, v. 4, p. 452 (May).

"We learn from history that for more than a century whenever a controversy arises between two states of the Union the individual citizen does not even become excited; his fighting blood remains calm and the animal in him remains dormant. And why? Because he sees no opportunity to fight, knowing as he does that the case will be taken to the Supreme Court of the United States and there adjudicated according to the recognized principles of right and justice. It is only a question of time, in my judgment, when, after the establishment of the permanent Court of Arbitral Justice at The Hague, the same consciousness will cause the savage instincts of man the world over to be bridled in the same manner. Man's intellect has not yet discovered another solution of the problem, and in my judgment there is none."

"Peace on Earth." By Harold Spender. *Contemporary Review*, v. 90, p. 385 (Apr.).

"On May 5, 1897, the Senate refused to ratify the treaty as agreed between the Powers, and from that time to this nothing more has been heard of it. Now, it is no secret that this decision of the Senate, which was arrived at by an overwhelming majority, was largely influenced by the Irish vote, a very powerful factor in the Senatorial elections. The Irish-Americans took the view that the treaty was proposed by a British Government which strenuously opposed the grant of Home Rule to Ireland. They determined that the United States should not be bound by such close bonds to a country which was resolved to refuse the chief aspiration of the Irish race. In 1911, indeed, we have a different situation. The American people will have to deal with a Government which has staked its existence on the grant of Home Rule. It is possible that that fact may make a great difference in the attitude of the Senate."

Editorial. [By L. J. Maxse.] *National Review*, v. 57, p. 368 (May).

"We hear much of the negotiation of this stupendous compact, to which Mr. Bryce is applying his gigantic powers and in which the American Secretary of State is mildly participating, but even the Draft Treaty does not bear the faintest resemblance to the 'epoch-making' speech of Sir Edward Grey; and when it is published and presented to the Senate for ratification, so far from being a general unrestricted agreement, automatically submitting every

Anglo-American difference, 'no matter what it involves, whether honor, territory, or money' (we quote the equally 'epoch-making' utterance of Mr. Taft), it will be found to be an exceedingly modest document, enabling a two-thirds majority of the Senate, if so disposed, to submit any specific dispute between the two countries to arbitration—a course the Senate could take tomorrow without any Arbitration Treaty, provided the President were willing. Never has such a ridiculous mouse emerged from such an enormous mountain."

See Armaments, International Law of War.

International Law of War. "Intervention in Theory and in Practice." By Charles C. Hyde. 6 *Illinois Law Review* 1 (May).

"From the conduct of the United States illustrated in the foregoing cases it is believed that the following conclusions may be drawn:—

"Apart from considerations of policy applicable to a particular case, the United States may be expected to assert a right of intervention—

"(a) Whenever it believes its own safety to be endangered by the conduct of a foreign state manifested (1) in aggressive measures of hostile design, or (2) in the failure to control its own population, or (3) in the consent to such use of its own territory by a third state as may directly weaken the relative security of position of the United States;

"(b) Whenever within the territory of a foreign state there continue to exist conditions of disorder persistently and irreparably injurious to American life and property therein, and which the territorial sovereign lacks the power or disposition to abate;

"(c) Whenever a foreign state wrongfully interferes with the political independence of a third state, in the welfare of which the United States, by treaty or otherwise, may have a special interest."

"The Regulation of War." By James L. Tyron. 20 *Yale Law Journal* 535 (May).

The Second Hague Conference "required that hereafter there must be a declaration of war with reasons, or that a conditional ultimatum to be complied with on pain of war, be issued before hostilities are begun. That the requirement for declarations of war is in part a peace measure is suggested by the thought that if a declaration be made in advance it may bring to his senses the belligerent that is notified of what may happen, and on the other hand, that it may give the notifying power a chance to cool off. Meantime, if the friends of peace become active in their cause, they may secure peace by mediation or by reference of the question at issue to a Commission of Inquiry and so prevent war altogether. The measure is, therefore, not only in the interests of fair play, but of peace, and the opportunity afforded for agitation in case of threatened war justifies in some degree the making of rules for a brutal system that it is hateful to recognize but which must be recognized if its regulation is attempted."

See Asylum, Maritime Law.

Insurance. "The History of the Development of the Warranty in Insurance Law." By Dean William R. Vance, Yale Law School. 20 *Yale Law Journal* 523 (May).

"It is a cause for gratification that the total abolition of the warranty, which never had good reason for existence and now has none at all, will tend to enable the courts to apply to insurance policies the same rules of construction that determine the meaning of other contracts."

"The Incontestable Life Insurance Policy—May it Ever be Contested?" By Thomas Benjamin Gay. 17 *Virginia Law Register* 1 (May).

"The Massachusetts Legislature has in terms required all policies sold in that state to provide for incontestability after two years, thus lending the weight of statutory enactment to the long line of cases previously cited sustaining the exclusion of fraud as a defense to policies made incontestable a specified time after date, and arraying itself against the reasoning of the *Fox* case [*Insurance Co. v. Fox*, 106 Tenn. 347].

"The express holding of the Court [in *N. Y. Life Ins. Co. v. Hardison*, 199 Mass. 190] that the provision proposed by the New York Life Ins. Co., making it incontestable from date, is void for reasons of public policy, in every way confirms the judicial interpretation of that clause in the *Reagan* case [*Reagan v. Union Mutual Life Ins. Co.*, 189 Mass. 555].

"In conclusion it may be said generally that death, the risk in life insurance, the event upon which the insurance money is payable, is certain of occurrence; the uncertainty of the *time* of the occurrence is the material element and consideration of the contract. Can it be in the contemplation of the parties that the assured, by his own fraudulent representations as to his state of health, shall deprive the contract of its material element, shall vary and enlarge the risk and hasten the day of reckoning?"

Interstate Commerce. "The Commerce Court—Its Origin, Its Power and Its Judges." By J. Newton Baker. 20 *Yale Law Journal* 555 (May).

See Federal and State Powers, Railway Rates.

Juries. Special Jury Number. 17 *Case and Comment* 589-606 (May).

Containing articles by John M. Steele, on "The Jury Commissioner System"; Robert A. Edgar, "Proposed Reforms of the Jury System"; Sam. M. Wolfe, "A Defense of the Jury"; and Joseph T. Winslow, "Knowledge of Facts of Cause as Affecting Competency of Juror."

"Practice with Respect to Directing Verdicts." By Winifred Sullivan. 25 *Bench and Bar* 19 (Apr.).

Treated with reference to New York law.

Juvenile Delinquency. "The Contributory Dependency Law of Iowa." By Henry E. C. Ditzen. 2 *Journal of Criminal Law and Criminology* 72 (May).

"The state of Iowa has, to my mind, taken a very advanced position by passing what is known as the contributory dependency law, mention of which was made in the second issue of this *Journal* on page 149. Other states have contributory dependency and contributory delinquency laws, but they are, generally, criminal statutes. There is only one other state, so far as I am aware, that has a statute similar to this one, and that is Kentucky. The proceeding in Iowa is an equity proceeding and not a criminal one. . . .

"The Iowa statute provides some ways and means. It does not as yet, however, provide all the instrumentalities that are necessary to carry out the full intent of the law. The law is, virtually, also a contributory delinquency act, since, generally, the delinquents are also dependents. The Iowa statute covers not only the case of parents who are not properly doing their duty, but also 'any other person or persons who shall by any act or omission of duty encourage, counsel, or contribute to the neglect of such child.' 'Neglect' and 'dependency' are one and the same thing under the Iowa statute. It covers the entire field of influence upon a child's life. . . .

"The Iowa law provides the foundation, but the legislature must furnish a sufficiency of help, a sufficient number of paid probation officers with such a salary that really competent men and women can afford to give up their time for the work and do the work in a scientific manner. More institutions should be created. There should be an adult reformatory for people who have the lazy habit; there should be a psychological clinic, homes and hospitals for crippled and otherwise defective children, and for those who have contagious and infectious diseases, etc. No doubt all of these things will be provided by Iowa in time, and when that time comes Iowa will be able to handle almost any kind of a problem affecting delinquency and dependency, juvenile or adult."

"Procedure in Children's Courts." By Justice Robert J. Wilkin. 25 *Bench and Bar* 12 (Apr.).

"Is not the practice in the criminal procedures of our states a more simple running and more equitable, just and comprehensive proceeding than could be built up under any form of civil procedure? If it is, then is it not possible for the lawyers of the country to frame a practice which would contain pleadings and procedure affecting children, which in themselves would embody all of the protection given to him who is charged with an offense against the law, and at the same time eradicate entirely all of the peculiar criminal processes which would stamp the child as a convicted miscreant in after life?"

Law Writing. "A Digest of English Case Law." By A. E. Randall. 27 *Law Quarterly Review* 187 (Apr.).

The author considers that the time is approaching when Mews' Consolidated Digest, a revision of which in sixteen volumes is now announced, will have to be brought fully up-to-date. The

following suggestions are offered regarding a model revision:—

"1. The period which the Digest purports to embrace should be, ostensibly, eighty years; but cases of an earlier date should be admitted with a view to ensure that the Digest contains a complete statement of the law.

"2. That the titles of the existing Digests should be revised with a view to obtain comprehensive titles, and the exclusion of redundant matter, while ensuring that each title should approximate to a text-book upon the subject-matter.

"3. That competent persons, preferably persons having experience as reporters, and, if possible, having special knowledge of the particular subject, should be chosen to prepare the titles.

"4. That the staff should be as small in numbers as is consistent with efficiency and rapidity of output."

Legal Education. "Early Law Schools in London." By Hugh H. L. Bellot. 36 *Law Magazine and Review* 257 (May).

Legal History. "Bonds of Manrent." By John Bartholomew. 23 *Juridical Review* 42 (Apr.).

"'There was formerly,' says Stair, 'a kind of bondage in Scotland called Manrent whereby free persons became the men or followers of those who were their patrons and defenders (and therefore these were rather in *clientela* than in bondage); but it is utterly abolished both by Act of Parliament 1457, c. 77, and Parl. 1555, c. 43, and by our custom.'"

See Corporations, Legal Education.

Liquidated Damages. "Liquidated Damages and Estoppel by Contract." By Joseph H. Drake. 9 *Michigan Law Review* 588 (May).

"We may perhaps conclude then that the new light thrown on the subject of liquidated damages by the two cases cited at the beginning of this article [*Sun Association v. Moore*, 183 U. S. 642, and *Clydebank E. & S. Co. v. Castaneda*, A. C. 6], show us that in case we have to determine the meaning of an agreement in reference to the value of an undeterminable future event, the old canons may be used as of yore to aid in the interpretation of the contract, recognizing that we may have difficulty in each instance in determining whether our agreement is one to do a single thing of an indeterminable value or to do several things one or more of which has an easily calculable value. In all of these cases the fact that the sum has been predetermined by the parties is not the significant element in the decision but the fact that the agreement may be one or the other of those mentioned above. The old canons of interpretation are appealed to for aid in the actual determination of the question of penalty or liquidated damages whether we acknowledge the doctrine of 'pre-ascertainment' or not, and no more since than before the decisions by the United States Supreme Court and the House of Lords can the parties

'pre-ascertain' and fix upon what is actually a penalty under the guise of liquidated damages."

Maritime Law. "The Declaration of London, I." By G. D. Valentine. 23 *Juridical Review* 1 (Apr.).

"The manner in which various persons will regard these rules will depend, to some extent, on the preconceptions with which they approach them. There are some who consider it the interest of this country [Great Britain] to preserve an absolutely free hand in naval war. Those who regard all law as evil will naturally not except the rules laid down in the Declaration from the general ban; it pleases them little to think that the age of anarchy is past. Others again, and particularly such as have their livelihood in commerce, will be disposed to regret that the abolition at least of conditional contraband has not been secured; they must remember, however, that this could only be done by general consent, which at present it is utterly vain to hope for, and may console themselves with the homely proverb that half a loaf is better than no bread. The Declaration does not seem to us substantially to modify the law of contraband, as recognized by the best authorities prior to its promulgation. It makes it perfectly clear that a belligerent who has formed the design of reducing the enemy nation by famine, unless in the inconceivable case of his being strong enough to form an effective blockade of the whole coasts of his adversary, cannot, in pursuance of that design, hinder neutral ships from bringing in grain to its commercial ports. This, however, was law before, though it was satisfactory to have the bad precedent we mentioned finally disposed of; moreover, it is extremely doubtful whether there is any case in which the question could be of practical importance. To those who think that the Declaration regarding contraband would hamper the operations of our fleet in case of Great Britain being involved in war, we would point out that it is not so favorable to the neutral as the rules which our Government has for the last fifty years been upholding, and must in all good faith consent to be bound by in her own conduct. Those who complain that the Declaration is too stringent should reflect that all the principal Continental Powers, whose attitude is most practically important to us as neutrals, maintain and enforce severe rules. Diplomats may perhaps succeed in modifying the text of this Declaration in some future conference, when experience has shown in what ways it is defective, and when the feeling against interference with neutral commerce has grown stronger. The existence of a document on which to work does not in our eyes render amendment of maritime law less, but rather more, easy. If, however, the present Declaration fail to meet with approval, it is certain that for a long time to come all will despair of reaching, and none will venture to seek for, agreement; every nation must remain a law unto itself."

"The Declaration of London." *Quarterly Review*, v. 201, no. 427, p. 539 (Apr.).

"It would certainly be reasonable to propose

that the International Prize Court should not decide any question which is not covered by the Declaration until agreement has been reached on it. That would remove one great objection to ratification. It would certainly be reasonable to have an express understanding as to the meaning of article 34 and the ports to which it is intended to apply. If the meaning is as clear as is suggested in some quarters, there can be no difficulty in obtaining an assurance upon the point satisfactory to Great Britain. That would remove a second great objection."

See International Law of War.

Marriage and Divorce. "A Proposed Uniform Marriage Law." By Ernst Freund. 24 *Harvard Law Review* 548 (May).

A detailed exposition of the Act proposed by the Conference on Uniform State Laws.

Mining Law. "An Anomaly in Mining Law." By Hon. Theodore Brantley. 20 *Yale Law Journal* 548 (May).

"The local courts, confronted with declaration so emphatically made by the Supreme Court in many cases, that the statute must be the sole guide in determining the rights of mineral claimants, are often at a loss in the effort to determine cases for which the statute seems to make no provision because their occurrence was not anticipated when the statute was enacted. It is not surprising, therefore, that there should be conflicting views. . . . The failure of Congress to make specific provision for the disposition of these irregularly-shaped areas gives rise to these anomalies, and has tempted the courts to supplement the statute by judicial legislation, although the authority to do so is consistently disavowed. Would it not have been better if the court of last resort had adhered strictly to the rule, so often theretofore declared, that the statute is the only guide, and have left it to the Congress to supply its deficiency by additional legislation?"

Monopolies. "Extra-Territorial Effect of the Sherman Act: *American Banana Company v. United Fruit Company*." By Warren B. Hunting. 6 *Illinois Law Review* 34 (May).

Negotiable Instruments. "The Uniform Negotiable Instruments Law: Is it Producing Uniformity and Certainty in the Law Merchant?" By Crawford D. Hening. 59 *Univ. of Pa. Law Review* 532 (May).

"Absolute uniformity could not be attained even by a harmony of judicial interpretations of Sections 119, 120 and 192. Three states, Wisconsin, Illinois and Kansas, never adopted sections 119, 120 and 192 in the form adopted by the other states. These three states were influenced to adopt a modification of the sections in question by the criticism of the Act offered by Professor Ames, who predicted in 1900 that very eclipse of the surety's rights accomplished over seven years later by the Act in the five states of Maryland, Washington, Oregon, Utah and Ohio.

"The three states above mentioned, viz: Wisconsin in 1899, Kansas in 1905, and Illinois in 1907, when they adopted the Act, attempted to avoid certain predicted wrongs to the surety by introducing somewhat different phraseology into the sections under examination. But even as between Wisconsin, Illinois and Kansas there is no uniformity. The equitable defences are different in Wisconsin from the equitable defences in Illinois and Kansas. . . .

"These variations from the Act in Wisconsin, Illinois and Kansas are not the only variations. But the writer's purpose is not to emphasize the point that local patchings and mendings of an act, which is intended to introduce uniform rules of law, defeat the entire program of uniformity. Professor Patten has clearly pointed out and illustrated this unfortunate local tendency. The question is, what is to be done to prevent the destruction of the rights of the surety on commercial paper? Uniformity cannot be accomplished by judicial interpretation of the Act. The question then must be answered, should the surety's rights be saved by supplemental legislation in the various states, substituting for the Act the Wisconsin or the Illinois or the Kansas modification, or a modification different from each?

"It is the writer's view that no legislation of the kind should be attempted but that sections 120 and 192 should be totally repealed. . . .

"Mr. Jeremy Bentham, no doubt, would say, let these pre-existing statutes and the general doctrines of suretyship be all incorporated into a New Comprehensive Code of Suretyship and let that be promulgated by the Commissioners and adopted by the states. Uniform Codification of Suretyship is however something much easier said than done. As to the defence based on a request to sue, we must note that all states do not have this statutory defence; and as apart from statute the defence does not generally exist, the enactment of this defence in a code of suretyship must alter the law now existing in many states.

"It is not the writer's purpose to discuss the general question of the feasibility of uniform codification either of suretyship or of other branches of the law. Certainly the results of the uniform codification of the law of commercial paper cannot be called an auspicious augury for the draftsman of a code of suretyship."

See Uniformity of Law.

Panama Canal Fortification. "The Panama Canal and Sea Power in the Pacific." By A. T. Mahan. *Century*, v. 82, p. 240 (June).

"We recognize well, an Australian has recently said, that if the British navy be once overthrown a condition of peace will be that its present power shall not be restored. *Vae victis*. Defeat of the American navy, followed by a prolonged tenure of parts of American territory, which would then be feasible, might be followed by a demand to give up the Monroe Doctrine, to abandon Panama, to admit immigration to which either our Government or a large part of our population objects, and on no account to attempt the re-establishment of a military or naval

force which could redeem such consequences. So Rome forever disabled Carthage."

Penology. "The Cell: A Problem of Prison Science." By Prof. Charles R. Henderson. *2 Journal of Criminal Law and Criminology* 56 (May).

A valuable article on the ideal prison cell, the relative merits of the separate and common life systems receiving attention, and important documents being summarized. There is a detailed description of the typical modern systems, the English cell being fully described.

"It may be fairly concluded from all the data at hand that it is the consensus of the well-informed that the separate system should be used exclusively in all county jails and city lockups, places of detention for prisoners awaiting trial. It would seem reasonable under any form of the Auburn system which prevails with us, to provide separate cells for about ten per cent of the population in order that the warden or superintendent might be able to employ individual treatment as the peculiarities of prisoners require.

"It is worth considering whether in the case of very long sentences the prisoner might have his choice of common life or individual cell after a certain period. Since, under any system, the cell is the essential unit of the prison, its structure and furniture, even to the minute details, must be carefully studied in the light of the widest experience. Some of the materials for a judgment and for experiment may be briefly outlined in this connection."

"The International Union of Criminal Law." By Dr. J. A. Van Hamel. *2 Journal of Criminal Law and Criminology* 22 (May).

Groups of the International Union of Criminal Law, organized in 1888, are in existence in the chief Continental countries of Europe. The president of the American group is Prof. Charles R. Henderson of Chicago.

The chief problems that have been dealt with in the discussions of this useful organization are indicated.

"More and more the methods of dealing with classes of criminals in a satisfactory way has become the *pièce de résistance* on the programs of the International Union. Finally, quite a detailed system of preventive and curative institutions has been worked out (Conference at Hamburg, 1907). But here difficult and fundamental questions are still waiting their solution, especially this one: How far may legislation go in determining a state of dangerousness to the common safety (*état dangereux, Gemeingefährlichkeit*), which would justify the confinement of a person whether he be delinquent or not? On this subject there has been a very remarkable and lasting difference of opinion among the members of the Union; remarkable because it is connected with a difference of political and fundamental philosophical convictions. It is not by accident that especially the German members, led by von Liszt, are declaring themselves in favor of rigorous and determined though humane measures against this class of offenders. On the contrary, the French Group,

represented by its leaders Gabriël Tarde, Garçon, and Garraud, seconded by the Russians (liberals in their country), and others, have maintained the necessity of respecting the rights of the individual and of safeguarding them against elastic formulas or arbitrary confinements. This controversy also crops out in the discussions when the German school recommends for habitual criminals an indeterminate preventive confinement after the expiration of the prison term, while the other parties declare this preventive confinement to be contrary to the social and ethical conception of 'punishment.'

"So the result is that for the real recidivist the principle of the relatively indeterminate sentence has now been adopted. Indeed the principal difficulty is not lying here. But it still remains to be settled, even after the conference of Amsterdam (1909) and Brussels (1910), how far a legal definition of 'danger to the common safety,' covering also non-recidivists, will be agreeable. In this respect much will depend on the shaping of the measures to which this 'state of dangerousness' is made to lead, and here indeed is the need for a liberal, humane and intelligent organization of institutions."

"The Prevention of Crime and Reformation of Criminals." 36 *Law Magazine and Review* 315 (May).

"This brief sketch of the Probation Act and the Prevention of Crime Act shows that there is in existence a reasoned and comprehensive scheme for dealing with crime. The Probation Act applies to every offender in whose case the Court thinks that probation may be the means of reformation. It is not restricted to first offenders, though no doubt in practice it is applied most frequently to them. The absence of previous convictions indicates that criminal habits are not ingrained in the character, and that the offender will respond to the influence of the probation officer. For the youth or girl who shows signs of becoming a regular criminal, the prolonged discipline and training of the Borstal system provides the means of eradicating criminal habits and of building up an honest character. For the professional criminal, the system of preventive detention has been devised with the primary object of protecting society and with the incidental object of reforming the criminal."

See Capital Punishment, Juvenile Delinquency.

Perpetuities. "Some Recent Decisions on the Rule Against Perpetuities." By Charles Sweet. 27 *Law Quarterly Review* 150 (Apr.).

Discussing *South Eastern Ry. v. Associated Portland Cement Manufacturers* (1910, 1 Ch. 12), *re Earl of Stamford* (1911, 1 Ch. 255), *re Frost* (43 Ch. Div. 246), *Whitby v. Mitchell* (44 Ch. Div. 85) and *re Nash* (1910, 1 Ch. 9).

Pleading. See Estoppel, Procedure.

Prisons. See Penology.

Procedure. See Criminal Procedure.

Professional Ethics. "Ethics and the Corporations." By Robert McMurdy. 6 *Illinois Law Review* 54 (May).

"That corporations — particularly, again, public service corporations — have been guilty of bribing witnesses and jurors, have suborned perjury, have spirited witnesses away from the jurisdiction of the court, have made up false books and have destroyed evidence, is well known.

"What is the duty of a lawyer connected with one of these corporations which thus violate the canons and principles of legal ethics? Wherever it ends, it begins with the obligation to make an honest and continuous endeavor to educate his client to a proper standard. . . .

"What will be the outcome of such legislation [as that of New York prohibiting corporations from practising law] it is not easy to predict. That some correction of existing conditions will some day be brought about goes without saying. Here is food for thought for lovers of the profession."

See Contingent Fees.

Railway Rates. "Railway Rate Theories of the Interstate Commerce Commission." By M. B. Hammond. *Quarterly Journal of Economics*, v. 25, p. 471 (May).

The final one of a noteworthy series of papers. Recapitulating his conclusions, the author says:

"The Commission began its work with the idea that *value of service* was the underlying principle of railway rates. It was unable, however, to furnish such a precise definition or explanation of this term as would enable it to be used as a concrete measure of a reasonable rate. . . .

"The great advantage which *cost of service* has over *value of service* is that it furnishes a concrete standard of measurement. It states a *quid pro quo* as a reason for making the charge. . . . The fact that it is universally accepted in other transactions as a test of reasonableness explains why the Commission has naturally turned to a consideration of costs when the equity of a given rate has been brought in question, and it also explains why railway officials have naturally made *cost of service* their defence whenever their rates have been attacked.

"At the outset of its labors the Commission was not inclined to place much confidence in *cost of service* as a principle for determining rates. The feeling that rates fixed in this way would prevent the free movement of certain commodities explains in part the attitude of the Commissioners, but the main objection has seemed to be the practical impossibility of determining the exact cost of transporting a particular commodity. . . . The method followed, as we have seen, has been that of comparison. The ascertainable costs of moving a certain commodity have been compared with the costs of moving the same commodity in a different manner or under different circumstances. The method of *comparative costs* does not yield absolutely accurate results but it is oftentimes sufficient for practical purposes and we must remember that economics, like law, does not concern itself with trifles.

"The method of comparative costs has not always been applicable however. The Commission has then been confronted with the task

of discovering some other means of measuring rates which would yield the same results as would be attained by a comparison of costs, were that method practicable. In some cases, as we have seen, *distance* may be used as a means of measuring the reasonableness of rates. Considered as the sole element in the determination of rates distance would of course yield unsatisfactory results; but it is nevertheless, as the Commission says, 'in the absence of other influences a controlling element.' Its value as a measuring instrument lies not in the fact that it is independent of costs but that in the absence of other influences it reflects costs.

"The same thing may be said of the effort of the Commission to preserve for a place its *natural advantages of location*. A place can have no advantage of location which a carrier is bound to respect other than that which is due to its ability to place its products on the market at less cost than can its competitors. Rates based on the principle of recognizing natural advantages of location are therefore true to the cost of service principle.

"Even in the absence of these indirect methods of determining costs, the Commission has found it possible to reach the same goal by other methods. It is a fundamental principle of economics that free and untrammelled *competition*, operating over a long period of time, tends to reduce prices to a cost basis. . . . In spite of all the inconsistencies and contradictions involved in the Commission's discussion of competition,—many of which, as we have observed, are due to an effort to preserve the spirit of the law,—we see running throughout the Commission's decisions a tendency to fix rates at the point where a normal and healthy struggle between competing interests has tended to leave them. Competitive rates are therefore true to a cost of service principle. . . .

"In accepting different methods of measuring the reasonableness of railway rates the Interstate Commerce Commission has been confronted with the same difficulty that we find when we come to measure the size or magnitude of physical objects, and it has solved the problem in the same way. In some cases we use dry measure, in others liquid measure, in others cubic measure, and in still others measure by weight. . . . In the same way the Commission in its efforts to base rates upon cost of service has found it practically advantageous at times to use other methods of measurement—distance, advantage of location, competition, fair return on investment; all of which in the sense in which they are employed by the Commission are merely expressive of cost relations. . . .

"Two other considerations emphasized by the Commission, value of commodity and sectional or class interests, still remain to be dealt with. With reference to the last-named consideration it is hard to see how it can be made to fit in with any defensible theory of railway rates. Possibly the decisions rendered in most of the cases coming under this head are entitled to a degree of justification on the ground that the Commission was endeavoring to preserve competition among producers. Many of the cases in which value of commodity was made the basis of the Commission's decision might

easily have been grouped under the heading of cost of service. . . . In many cases we have observed that the values of commodities were allowed to affect rates because the Commission felt under obligation to maintain competition between establishments located at different points and engaged in turning out products in different stages of manufacture. . . .

"If the conclusion be accepted, which these articles seem to support, that the tendency of the Interstate Commerce Commission's decisions is, on the whole, towards a cost of service theory of rate making, there still remains the task of so stating a theory of rates as to bring in the various considerations which we have seen the Commission has emphasized as factors in rate making, and show how they can be related to the fundamental principle. It is perhaps well to say that nowhere has the Commission undertaken to state such a comprehensive theory of rate making."

The writer proceeds to formulate eight rules, the practical applicability of which "is proved by the fact that the application of every one of them can be shown by illustrations taken from the Commission's decisions."

Real Property. "Release and Discharge of Powers." By Prof. John Chipman Gray. 24 *Harvard Law Review* 511 (May).

Considering the subject under the following headings: I, Powers Appendant; II, Powers Simply Collateral; III, Reversed Powers in Gross; IV, Powers in Gross; and each of these heads is this subdivided: (a) general powers exercisable by either deed or will; (b) special powers exercisable by either deed or will; (c) general powers exercisable by will only; (d) special powers exercisable by will only.

See Torrens System.

Religious Freedom. "Religious Liberty and Bible Reading in Illinois Public Schools, I." By Prof. Henry Schofield, Northwestern University. 6 *Illinois Law Review* 17 (May).

Scots Law. See Legal History.

Self-Incrimination. "Corporate Privilege Against Self-Incrimination." By Joseph M. Proskauer. 11 *Columbia Law Review* 445 (May).

"Today in the Southern District of New York, at all events, it is temporarily, at least, the law that a corporation has no privilege against self-incrimination. The distinction between a corporation and an individual in this respect is not based on any legal logic. If it is desirable to curtail the privilege generally, appropriate constitutional amendment to that end is the proper course. In its final analysis the fining of the corporation is deprivation of the property of its stockholders, and the Fifth Amendment looks by its terms to the protection, not only of life but of liberty and property. And so long as those guarantees stand, the property of individuals cannot reasonably be appropriated because it exists in corporate form, by a process which, if attempted to be applied to individuals,

would everywhere be regarded as a violation of fundamental privilege."

Suretyship. See Negotiable Instruments.

Taxation. See Federal and State Powers.

Tichborne Case. "The *Tichborne Case*." By William J. Kinsley. 20 *Yale Law Journal* 563 (May).

A general review of this litigation written primarily to indicate the unequalled duration of the proceedings. The famous *Russell* will case in Massachusetts "is probably the nearest approach that the new world has ever had in any case, in importance and length of hearing, to the famous *Tichborne* case of England, but the *Tichborne* case does not 'sink into insignificance when compared with the *Russell* case.' In fact, in England and in this country no other case has ever equalled in interest and amount involved the famous *Tichborne* identity case."

Torrens System. "The Report of the Land Transfer Commissioners." By Arthur Underhill. 27 *Law Quarterly Review* 173 (Apr.).

Sympathetically commenting upon the Commissioner's recommendations.

Trademarks. "The Transfer of Trademarks and Trade Names." By Wallace R. Lane. 6 *Illinois Law Review* 46 (May).

"As a general proposition, trademarks constitute a part of the assets of an individual, firm or corporation, and title thereto may be conveyed by the same bill of sale which conveys the title to the business and good will. We may conclude, therefore, that the title to a technical trademark may be passed in a number of ways; also that the transfer may be made by means of various instruments or conveyances, namely: assignment, deed, license, bill of sale, and under bankruptcy orders; by separate conveyance or in the same conveyance with the business and good will in connection with which it is used; by specific mention or as an incident of or appurtenant to a business and good will in connection with which it is used."

Trust Funds. See Banking Law.

Uniformity of Laws. See Marriage and Divorce, Negotiable Instruments.

Warranty. See Insurance.

Workmen's Compensation. Symposium of Opinions on Decision of New York Court of Appeals. *Survey* v. 26, pp. 185-196 (April 20).

The decision is reviewed by the following writers: Henry R. Seager, Professor of Economics, Columbia University; Ferd C. Schwedtman of National Association of Manufacturers; Miles M. Dawson of New York; Raynal C. Bolling, assistant general solicitor of the United States Steel Corporation; Louis Marshall of New York, of counsel for appellant in the *Ives* case; Professor Frank J. Goodnow of Columbia University; Bernard Flexner of Louisville; Louis M. Greeley of Chicago; Morris Hillquit of New York; P. Tecumseh Sherman of New York, former State Commissioner of

Labor, and Professor Ernst Freund of Chicago University, author of *Police Power, Public Policy and Constitutional Rights*.

Of these writers, six of them, all lawyers or law writers, criticize the legal grounds of the decision, namely Professors Freund and Goodnow, and Messrs. Flexner, Greeley, Hillquit and Sherman. Some of these views are expressed with considerable ability. Mr. Sherman, for example, finds the ruling on due process of law categorically opposed to the doctrine laid down by the United States Supreme Court in *Twining v. New Jersey*, 211 U. S. 78, 101, and in *Hurtados v. California*, 110 U. S., 516, 529.

Professor Seager finds the decision unsound and proposes a constitutional amendment as the only solution.

The other contributors do not find fault with the reasoning of the Court, but recognize the soundness of the decision. Messrs. Schwedtman and Marshall think that it has furnished a starting point for subsequent decisions laying down rational principles of compensation. Mr. Dawson considers that the solution is to be found in compulsory insurance by use of the taxing power. Mr. Bolling favors elective compensation, and says:—

"In my opinion, it would have been most unfortunate for the New York compulsory compensation act to have become the model for similar legislation throughout this country. From the beginning I have believed that this was an undesirable piece of legislation and that it would not give a fair test to the principle of workmen's compensation.

"The vice of this act lay in the fact that it allowed a choice of remedy *after the accident*. This would inevitably involve a continuance of the worst evils of the present system, to wit, uncertainty, waste, and antagonism between employer and injured employee. The uncertainty as to whether an injured workman would bring suit or accept the terms of the act would have existed in every case. In view of the activity of those lawyers who exploit injured men, very many injured employees would have been led by persuasion and misrepresentation to take the gambling chance of a lawsuit or at least to demand more than was allowed under the act. The very principle is unfair because the whole theory of an irrational compensation system is a disregard of the question of fault so far as the compensation system is concerned. . . .

"A large number of the lawyers who have given this matter careful attention believe that the constitutional infirmities of the New York act can be avoided and the practical objections to it overcome by such acts as that which has become law in New Jersey, or those which are proposed in Pennsylvania, Wisconsin and Illinois. Under any of these acts the election to accept or to reject compensation must be made long before any accident has happened; and both employer and employee know at all times exactly where they stand in regard to their relations in the event of accident. It is confidently believed that these acts will almost immediately and inevitably be applied in all cases. . . .

"I think they may come to feel that the decision of the New York Court of Appeals is one of

those 'secular processes and struggles by which the law has been, is now, and ever will be struggling towards justice and emerging into a better conformity to the actual wants of mankind.' These are the words of one of the greatest constitutional lawyers of our time, the late James Bradley Thayer."

"Workmen's Compensation." By Theodore Roosevelt. *Outlook*, v. 98, p. 49 (May 13).

"I fail to see how any thoughtful man can read what I have above quoted and not see that this decision of the Court of Appeals of the State of New York is a case, not really of interpretation of the law, but of the enactment of judge-made law in defiance of legislative enactment, and in defiance of the interpretation of other legislative enactments by the highest courts of this country. . . . Decisions such as this of the Court of Appeals, involving such far-reaching injustice and wrong (and implying in our Government such contemptible futility from the standpoint of remedying wrong and injustice), if unchecked and uncorrected, will go a long way toward convincing people that, at whatever cost, the entire system must be changed. The so-called conservatives who work for and applaud such decisions, and deprecate criticism of them, are doing all in their power to make it necessary for the Nation as a whole in these matters to go to a far more radical extreme than the most radical state has as yet even proposed to go."

Miscellaneous Articles of Interest to the Legal Profession

America. "America Revisited: The Sensations of an Exile." By William Morton Fullerton. *Scribner's*, v. 49, p. 658 (June).

"The theory of 'equal rights' has been tried and has been found wanting. The tradition of that persistent Jeffersonian principle is being hopelessly demolished by the lessons which Americans of the last generation have drawn from their political and economic experience. It is becoming a democracy of selected individuals, who are obliged constantly to justify their selection. It is no longer, as Matthew Arnold called it, the home of *das Gemeine*. Its members are becoming united in a sense of joint responsibility for the success of their political and social ideal."

Biography. *Harmon*. "Judson Harmon and the Presidency." By William Bayard Hale. *World's Work*, v. 22, p. 14446 (June).

An interesting study of Governor Harmon.

Morgan. "Masters of Capital in America; Wall Street — How Morgan Built the 'Money Power.'" By John Moody and George Kibbe Turner. *McClure's*, v. 37, p. 185 (June).

"General democracy is not in his vision; politicians and movements in politics are cheap, claptrap things. He is the arch-representative of property. . . . He works for the development of the country and its industries at large, as well as for more immediate property. The interests of both to him seem identical. This is a curious

place, after all the years of agitation for democracy, for the actual power over the daily living made from the great co-operative associations of modern industry to centre. Yet it is a perfectly logical place, established by natural economic forces. And it came to Morgan in the straight course of doing his duty, as he saw it, to the top of his strength and ability."

"The Life Story of J. Pierpont Morgan: The Spirit of Combination." By Carl Hovey. *Metropolitan*, v. 34, p. 365 (June).

"In the past twenty years we have seen many kinds of men at work in the field of changing conditions, some building up institutions like the Standard Oil or the Woolen Trust as a means of making and keeping an enormous personal fortune; others, opportunists, dipping in and getting out whenever they see the vision of a possible 'clean-up'; but Morgan in his long life has not been a simple fortune-maker of either class — he has been the maker of industries, the consistent agent of solid business conditions. Yet there are many who distrust what they call the 'Morganization' of industry, with their eyes fastened upon the social flaws inherent in these same wonderful organizations of his."

Canadian Reciprocity. "Reciprocity between Canada and the United States." *Quarterly Review*, v. 201, no. 427, p. 491 (Apr.).

"The East [of Canada] has manufactures and a complicated urban structure. The West as yet is mainly agricultural. . . . Should the East and West seriously diverge, it is all over with the Confederation of Canada. The present measure, it is argued, makes for such a divergence. . . . The advocates of reciprocity . . . deny that the present arrangement can have any of the harmful political consequences ascribed to it. . . . Which of these two views is correct the future alone can tell."

Capital and Labor. "Business: The Moral Question, I." By George W. Perkins. *World's Work*, v. 22, p. 14465 (June).

"We have now at Washington a Supreme Court to which is referred the final settlement of our legal questions. . . . Why not have a similar goal for our business men? Why not have a court for business questions, on which no man could sit who had not had a business training, with an honorable record?"

Foreign Trade. "The Commercial Strength of Great Britain." By James Davenport Whelply. *Century*, v. 82, p. 159 (June).

"There is no sign of decadence in England. By contrast with the rapid development of Germany and of the United States she seems, however, to be progressing but slowly. . . . In brief, this little island is the commercial heart of the world. . . . It is her money which builds the pioneer railroads, opens mines, dams the waters, and finances the lesser nations. From all these enterprises the people take their toll and seek new outlets for this increment. That too much money and too many men have been sent abroad attracted by promise of greater

returns is probably true. She has bled herself too freely, and the heart now shows some signs of weakness."

International Politics. "The Powers in the Pacific." By Archibald R. Colquhoun. *North American Review*, v. 193, p. 861 (June).

"The only way to insure peace in the Pacific Ocean is to maintain a proper balance of power between East and West, and unless the British Empire and the United States are prepared to co-operate the task will be almost impossible."

Irrigation. "The Service that Makes the Desert Bloom." By Frederick Palmer. *Hamp-ton's*, v. 26, p. 699 (June).

In a comprehensive article on reclamation work being done in the West, Mr. Palmer pays a high tribute to the United States Reclamation Service. He is especially enthusiastic over the accomplishments of Frederick H. Newell, Director of the Service.

Music. "Music and the Profession of the Law." By Clement Antrobus Harris. 23 *Juridical Review* 65 (Apr.).

Party Politics. "Theodore Roosevelt, Please Answer." By Melville E. Stone, Jr. *Metropolitan*, v. 34, p. 265 (June).

Criticizing Mr. Roosevelt's record with respect to the "Panama scandal."

Political Corruption. "The Lorimer Case." By James H. Blount. *North American Review*, v. 193, p. 871 (June).

If a chain is only as strong as its weakest link, the chain by which Mr. Lorimer is anchored to his seat in the United States Senate is indeed shamefully weak, for, unless perjury on the part of Meyers be admitted, the crookedness of Browne is clear.

Tariff. "Testing the Tariff by Moral Effects." By Ida M. Tarbell. *American Magazine*, v. 72, p. 186 (June).

"The final case against the doctrine of protection as we know it lies then in the kind of men it makes: men who are worse, not better, for its practice. No system against which this, the greatest of human offenses, the corruption of manhood, can be proved can stand.

"Protection must ultimately disappear from this land because it is breeding bad men."

Latest Important Cases

Administrative Powers. *Question of Unlawful Delegation of Legislative Power to Secretary of Agriculture — Federal Public Lands — Rules and Regulations of which Violations are Criminally Punishable.* U. S.

In *U. S. v. Grimaud* and *U. S. v. Inda* (L. ed. adv. sheets 480), decided by the United States Supreme Court May 1, to quote the opinion of the Court (Lamar, J.):—

"The defendants were indicted for grazing sheep on the Sierra Forest Reserve without having obtained the permission required by the regulations adopted by the Secretary of Agriculture. They demurred on the ground that the forest reserve act of 1897 [30 Stat. at L. 35, chap. 2, U. S. Comp. Stat. 1901, p. 1540] was unconstitutional, in so far as it delegated to the Secretary of Agriculture power to make

rules and regulations, and made a violation thereof a penal offense. Their several demurrers were sustained. The government brought the case here under the clause of the criminal appeals act (34 Stat. at L. 1246, chap. 2564, U. S. Comp. Stat. Supp. 1909, p. 220) which allows a writ of error where the 'decision complained of was based upon the invalidity of the statute.'

"The federal courts have been divided on the question as to whether violations of those regulations of the Secretary of Agriculture constitute a crime. The rules were held to be valid for civil purposes in *Dastervignes v. United States*, 58 C. C. A. 346, 122 Fed. 30; *United States v. Dastervignes*, 118 Fed. 199; *United States v. Shannon*, 151 Fed. 863; *ibid.* 88 C. C. A. 52, 160 Fed. 870. They were also sustained in criminal prosecutions in *U. S. v. Deguirro*, 152

Fed. 568; *U. S. v. Domingo*, 152 Fed. 566; *U. S. v. Bale*, 156 Fed. 687; *U. S. v. Rizzinelli*, 182 Fed. 675. But the regulations were held to be invalid in *U. S. v. Blasingame*, 116 Fed. 654; *U. S. v. Matthews*, 146 Fed. 306; *Dent v. U. S.*, 8 Ariz. 138, 71 Pac. 920.

"From the various acts relating to the establishment and management of forest reservations, it appears that they were intended 'to improve and protect the forest and to secure favorable conditions of water flows.' It was declared that the act should not be 'construed to prohibit the egress and ingress of actual settlers' residing therein, nor to 'prohibit any person from entering upon such forest reservations for all proper and lawful purposes, including that of prosecuting, locating and developing mineral resources thereof; provided that such persons comply with the rules and regulations covering such forest reservations, (Act of 1897, 30 Stat. at L. 36, chap. 2, U. S. Comp. Stat. 1901, p. 1540). It was also declared that the Secretary 'may make such rules and regulations and establish such service as will insure the objects of such reservations; namely, to regulate their occupancy and use, and to preserve the forests thereon from destruction; and any violation of the provisions of this act or such rules and regulations shall be punished' [30 Stat. at L. 35, chap. 2, U. S. Comp. Stat. 1901, p. 1540], as is provided in sec. 5388 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 3649), as amended.

"Under these acts, therefore, any use of the reservation for grazing or other lawful purpose was required to be subject to the rules and regulations established by the Secretary of Agriculture. To pasture sheep and cattle on the reservation, at will and without restraint, might interfere seriously with the accomplishment of the purposes

for which they were established. But a limited and regulated use for pasturage might not be inconsistent with the object sought to be attained by the statute. The determination of such questions, however, was a matter of administrative detail. What might be harmless in one forest might be harmful to another. What might be injurious at one stage of timber growth, or at one season of the year, might not be so at another. . . .

"The Secretary did not exercise the legislative power of declaring the penalty or fixing the punishment for grazing sheep without a permit, but the punishment is imposed by the act itself. The offense is not against the Secretary, but, as the indictment properly concludes, 'contrary to the laws of the United States and the peace and dignity thereof.' The demurrers should have been overruled."

See Forest Reserves.

Boycotts. Reversible Error in Taking Questions from the Jury — Principal and Agent.
U. S.

The long-standing controversy between the Danbury (Conn.) hatters and the union known as the United Hatters of North America was brought up again March 10 by a reversal of the judgment for \$232,240.12 which D. E. Loewe & Co. of Danbury obtained as damages for the union's alleged boycott of the hat manufacturers' interstate business. The United States Circuit Court of Appeals took up the case on a writ of error to review the judgment of the Circuit Court in Connecticut. In an opinion written by Judge Lacombe and concurred in by Judges Coxe and Noyes, the judgment is reversed. The ground for the reversal was the error of the lower court in taking the case from the jury and itself "deciding every

question, except the amount of damages."

The Court said:—

"It has been argued here that the mere fact that any individual defendant was a member of and contributed money to the treasury of the United Hatters' Association made him principal of any and all agents who might be employed by its officers in carrying out the objects of the Association, and responsible as principals if such agents used illegal methods or caused illegal methods to be used in undertaking to carry out their objects. We cannot assent to this proposition. . . . Something more must be shown, as for instance that with the knowledge of the members unlawful means had been so frequently used with the express tacit approval of the Association that its agents were warranted in assuming that they might use such unlawful means in the future, that the Association and its members would approve or tolerate such use whenever the end sought to be obtained might best be obtained thereby."

Conservation of Natural Resources. See *Forest Reserves*.

Contempt. *Distinction between Civil and Criminal Offense — Proceedings in Equity for Civil Contempt Make only Fines Possible.* U. S.

In *Gompers v. Buck's Stove & Range Co.*, L. ed. adv. sheets, 492, the United States Supreme Court held on May 15 that Samuel Gompers, John Mitchell and Frank Morrison, president, vice-president and secretary, respectively, of the American Federation of Labor, had been erroneously sentenced to jail on a charge of contempt of a local court. The Court unanimously held fines the only sentences that could be imposed. The Supreme Court of the United States found that the

Court of Appeals of the District of Columbia and the Supreme Court of the District erred in treating the contempt proceedings as a criminal case and not a civil one.

The Court (Lamar, J.) said:—

"This was a proceeding in equity for civil contempt, where the only remedial relief possible was a fine payable to the complainant. The company prayed 'for such relief as the nature of its case may require,' and when the main cause was terminated by a settlement of all differences between the parties the complainant did not require and was not entitled to any compensation or relief of any other character. The present proceeding necessarily ended with the settlement of the main cause of which it is a part. . . . The criminal sentences imposed in the civil case therefore should be set aside."

Forest Reserves. *Power of Congress to Establish Without State's Consent — Wilful Trespass — Administrative Powers — Federal Public Lands.* U. S.

Replying to the contention that Congress cannot constitutionally withdraw large tracts of land from settlement without the consent of the state where it is located, the United States Supreme Court (Lamar, J.) said in *Light v. U. S.*, decided May 1 (L. ed. adv. sheets p. 485):—

"All the public lands of the nation are held in trust for the people of the whole country.' *U. S. v. Trinidad Coal & Coking Co.*, 137 U. S. 160, 34 L. ed. 640, 11 Sup. Ct., Rep. 57. And it is not for the courts to say how that trust shall be administered. That is for Congress to determine. The courts cannot compel it to set aside the lands for settlement, or to suffer them to be used for agricultural or grazing purposes, nor interfere when, in the exercise of its discretion,

Congress establishes a forest reserve for what it decides to be national and public purposes. In the same way and in the exercise of the same trust it may disestablish a reserve, and devote the property to some other national and public purpose. These are rights incident to proprietorship, to say nothing of the power of the United States as a sovereign over the property belonging to it. Even a private owner would be entitled to protection against wilful trespasses, and statutes providing that damage done by animals cannot be recovered, unless the land had been inclosed with a fence of the size and material required, do not give permission to the owner of cattle to use his neighbor's land as a pasture. They are intended to condone trespasses by straying cattle; they have no application to cases where they are driven upon unfenced land in order that they may feed there. *Lazarus v. Phelps*, 152 U. S. 81, 38 L. ed. 363, 14 Sup. Ct. Rep. 477; *Monroe v. Cannon*, 24 Mont. 324, 81 Am. St. Rep. 439, 61 Pac. 863; *St. Louis Cattle Co. v. Vaughn*, 1 Tex. Civ. App. 388, 20 S. W. 855; *Union P. R. Co. v. Rollins*, 5 Kan. 176."

See Administrative Powers.

Immunity. *Granted by Constitution only with Regard to Incriminating Evidence — Federal Immunity Act Constructed — Sherman Anti-Trust Law.*

U. S.

Judge Carpenter of the United States District Court, in ruling upon a motion to quash the indictments under the Sherman Act in the "beef trust" cases, *U. S. v. Swift et al.*, at Chicago, March 22, rendered an extended opinion considering constitutional questions. He said in part: —

"The Constitution guaranteed to the defendants the right of silence only with respect to evidence which might in-

criminate them; the Immunity Act rendered the constitutional provision inapplicable, by destroying the incriminating effect of the evidence given, and by providing absolute immunity from prosecution for any crime already committed concerning the matters, transactions and things testified about; the immunity furnished related to present and not future crimes; that immunity purged the evidence given of all unlawful characteristics, and assured the defendants that up to the time they testified they had done no wicked or wrongful thing; the Immunity Act did not, and could not alter or destroy the transactions, matters and things concerning which the information was furnished. They must exist still as facts, harmless and pure, to be sure, but still tangible facts; and those facts, proper foundation having been laid, and when legally competent and relevant, may be shown at any time, in any action, civil or criminal.

"If I am right in my conclusion as to the effect of the Fifth Amendment and the Immunity Statutes, upon the evidence given by the defendants to the Commissioner of Corporations in 1904, then the only question remaining is whether the court ought to quash an indictment because incompetent evidence was presented to the grand jury."

The Court answered this last question in the negative.

The Court thus reached the result that the "immunity bath" granted the defendants by Judge Humphrey's decision in 1906 would not bar the prosecution begun six months previously.

The defendants filed demurrers which were overruled by Judge Carpenter May 12. In his ruling Judge Carpenter upheld the constitutionality of the Sherman Act, and held that it defined with sufficient accuracy the criminal

offenses therein enumerated. "While the facts do not disclose an absolute monopoly, yet the large percentage of the business which they control indicates that they intended to acquire at least a commercial monopoly." (See 23 *Green Bag* 108.)

See Monopolies.

Monopolies. "*Tobacco Case*" — *Sherman Law* — "*Rule of Reason*" — *Trade Wars and Appeals to Cupidity of Competitors* — *Abnormal Competition*. U. S.

In *Standard Oil Co. v. United States*, the Supreme Court held that the Sherman Act must be interpreted in the light of reason, its meaning being deducible from the state of the common law at the time of its passage, and as the law existing at the time of the adoption of the act permitted a wide scope of freedom of contract and the exercise of every reasonable right incident thereto, short of undue restraint of competition, the statute was to be construed as prohibiting only those practices which the law regarded as unreasonable at that time. The Court thus reached the result that the criterion to be applied was the rule of reason guided by the established law, and further held itself bound by the duty to apply and enforce the public policy obviously underlying the statute. Applying the rule to the facts, the Court considered that the Standard Oil Company was guilty of an illegal restraint of trade because a power dangerous to the public welfare had been built up by other than normal methods of competition. The Court did not go into any particulars as to the nature of the abnormal business practices by means of which competition had been suppressed, evidently thinking them sufficiently obvious.

In *American Tobacco Company et al.*

v. United States, decided May 29, the Court handed down a companion judgment closely resembling the former in its fundamental reasoning. The chief interest of the opinion, however, arises from the fact that it goes more into particulars with regard to the nature of the abnormal practices which the statute was designed to prevent. The Court said:—

"Indeed, the history of the combination is so replete with the doing of acts which it was the obvious purpose of the statute to forbid, so demonstrative of the existence from the beginning of a purpose to acquire dominion and control of the tobacco trade, not by the mere exertion of the ordinary right to contract and to trade, but by methods devised in order to monopolize the trade by driving competitors out of business, which were ruthlessly carried out upon the assumption that to work upon the fears or play upon the cupidity of competitors would make success possible. We say these conclusions are inevitable, not because of the vast amount of property aggregated by the combination, not because alone of the many corporations which the proof shows were united by resort to one device or another. Again, not alone because of the dominion and control over the tobacco trade which actually exists, but because we think the conclusion of wrongful purposes and illegal combination is overwhelmingly established by the following considerations:—

"A. — By the fact that the very first organization or combination was compelled by a previously existing fierce trade war, evidently inspired by one or more of the minds which brought about and became parties to that combination.

"B. — Because, immediately after that combination and the increase of capital which followed, the acts which

ensued justify the inference that the intention existed to use the power of the combination as a vantage ground to further monopolize the trade in tobacco by means of trade conflicts designed to injure others, either by driving competitors out of the business or compelling them to become parties to a combination — a purpose whose execution was illustrated by the plug war which ensued and its results; by the snuff war which followed and its results and by the conflict which immediately followed the entry of the combination into England and the division of the world's business by the two foreign contracts which ensued; by the ever-present manifestation which is exhibited of a conscious wrongdoing; by the form in which the various transactions were embodied from the beginning, ever changing but ever in substance the same, now the organization of a new company, now the control exerted by the taking of stock in one or another or in several, so as to obscure the result actually attained, nevertheless uniform, in their manifestations of the purpose to restrain others and to monopolize and retain power in the hands of the few who, it would seem, from the beginning contemplated the mastery of the trade which practically followed; by the gradual absorption of control over all the elements essential to the successful manufacture of tobacco products, and placing such control in the hands of seemingly independent corporations, serving as perpetual barriers to the entry of others into the tobacco trade; by persistent expenditure of millions upon millions of dollars in buying out plants, not for the purpose of utilizing them, but in order to close them up and render them useless for the purposes of trade; by the constantly recurring stipulations, whose legality,

isolatedly viewed, we are not considering, by which numbers of persons, whether manufacturers, stockholders, or employees, were required to bind themselves, generally for long periods, not to compete in the future.

“Indeed, when the results of the undisputed proof which we have stated are fully apprehended, and the wrongful acts which they exhibit are considered, there comes inevitably to the mind the conviction that it was the danger which it was deemed would arise to individual liberty and the public wellbeing from acts like those which this record exhibits which led the legislative mind to conceive and to enact the Anti-Trust act, considerations which also serve to so clearly demonstrate that the combination here assailed is within the law as to leave no doubt that it is our plain duty to apply its prohibitions.”

The Court thus devoted some attention to the subject of trade wars, evidently treating them as an improper and illegal method of acquiring the monopoly of a business, and took occasion to condemn methods “ruthlessly carried out upon the assumption that to work upon the fears or play upon the cupidity of competitors would make success possible.”

The reasoning of this decision, much more clearly than that of the *Standard Oil* judgment, makes it reasonably evident and probable, not to say certain, that a monopoly which has been built up by the normal methods of free competition, without any intimidation of competitors by price-cutting or threats to ruin their business and without any acquisition of control by appeals to their greed for excessive capitalization and profits, is outside the prohibitions of the Sherman Act. This decision has thus tended to remove much of the vagueness of the general prohibition of “ab-

normal business methods" in the former decision.

The grounds of Mr. Justice Harlan's dissent were the same reasons which had led to his dissent in the *Standard Oil* case, namely, he thought that the previous decisions of the Court made it necessary to construe the Sherman Act as prohibiting all monopolistic combinations and contracts, without regard to their reasonableness or unreasonableness.

"Corners" Illegal — Conspiracies which are Illegal as Combinations Contrary to Public Policy — Sherman Anti-trust Law.
U. S.

In *U. S. v. Patten*, decided last March, the United States Circuit Court for the southern district of New York ruled that "corners" are illegal, being combinations contrary to public policy. Judge Noyes said: —

"Unless and until the common law rule is changed by statute it is clear that when in either a state or a national enactment the offense of conspiracy, either general or specific, is created, the incidents of the offense at common law go with it. The term 'conspiracy' has a well defined common law meaning. Congress in using it might attach limitations and qualifications, but if it fail to do so the common law definition governs. That which completes the common law offense completes the statutory offense. 'Congress may as well define by using a term of a known and determinate meaning as by an

express enumeration of all the particulars included in that term.' (*U. S. v. Smith*, 5 Wheat., 153, 159.) . . .

"Corners are illegal. They are combinations contrary to public policy and all contracts and undertakings in support thereof are void (1 *Eddy on Combinations*, sec. 81; *Greenhood on Pub. Pol.*, p. 642, and cases cited in both treatises). But while a corner is illegal because it is a combination which arbitrarily controls the prices of a commodity, it cannot, strictly speaking, be called a combination in restraint of competition. On the contrary, the bidding up of the prices incident to the creation of a corner necessarily increases competition. Activity in trade, temporarily at least, follows increased demand. Everything tends to stimulate competition, although abnormally and feverishly. A corner is altogether wrong, both from a legal and an economical standpoint, but it would seem to be condemned by other principles of public policy than those particularly relating to combinations in restraint of competition.

"It is clear, upon the foregoing principles, that the combination described in these counts is negatively illegal without any prohibitory statute and would be positively unlawful in any state having a statute against corners. But upon equally well settled principles it is manifest that the combination is not in violation of the Federal Anti-Trust Statute unless it obstruct the current of interstate commerce."

See Immunity.

The Editor's Bag

AN "ANTIQUATED" STATUTE?

THE primary purpose of the Sherman act was to preserve the rights of free competition. That statute expressed the conviction of a people of intensely individualistic traditions that the avenues of trade must be kept open to all men on equal terms. But the act was so vaguely and uncertainly drawn as apparently to express more than simply this. Freedom of competition necessarily implies freedom to crush a weak competitor. The act, however, was not consistently interpreted as throwing the doors wide open to free competition: its protection was to be enjoyed only while a competitor continued weak and defenseless, and as soon as he grew powerful and successful it was to be withdrawn. Accordingly the doubt soon sprang up in many minds whether this clumsily drawn statute was really designed to perpetuate the *régime* of competitive business — whether, in fact, it was not intended to limit the very rights it ostensibly sought to protect. The act appeared illogical and unenforcible, and it was earnestly argued that the courts should endeavor to construe it in the light of reason so that it would no longer be hopelessly in conflict with the principles under which modern business is carried on.

Liberty is not synonymous with license, and history shows that there has been a tendency to restrict the un-

hampered exercise of almost every right, in the interest of the public welfare. Consequently, when the Supreme Court, in the *Standard Oil* and *Tobacco* cases, said that the statute must be interpreted in accordance with a rule of reason, it was narrowing the definition of industrial freedom only in response to an impulse which law-givers have acted upon from earliest times. The effect of these judgments has been to uphold freedom of competition only to the extent that normal business methods may be exercised; competition making use of abnormal and improper methods is not within the protection of the act. Freedom of competition thus requires competition to be fair and honest, and the result has been to substitute the notion of fair competition for that of free competition, the statute being interpreted as prohibiting only violations of the rights of fair trade. Consequently, the business which in the exercise of its freedom of contract has vanquished or absorbed competitors by fair and normal means is within the protection of the statute, even though it may have monopolized the industry.

We have the opinion of such acute and shrewd men as Mr. James M. Beck and Judge Gary that the Sherman law is an antiquated statute. As the real evils of unfair competition which it is designed to prevent, though closely associated with monopoly, are not one and the same thing, it is undoubtedly unfortunate that it is so worded as appar-

ently to condemn some monopolistic practices as wrongful *per se*. But this objection does not go to the root of the statute, which may perform useful service so far as it can be treated as something apart from a mere anti-monopoly law. Another objection to the act is that its vagueness leaves the task of defining the methods of improper business competition entirely in the hands of the courts, which will of necessity proceed slowly in laying down new principles, the business world, in the meantime, being kept in uncertainty as to what the law requires. This objection is somewhat serious, but it will become less important from year to year as the courts make progress in applying the statute to new groups of facts.

In so far as the act, whether on account of its phraseology or because of the construction given to it by the courts, is to be interpreted as forbidding monopoly as wrongful *per se*, in the absence of improper business practices, it is distinctly bad and merits Judge Gary's censure. The great business interests of the country must come together for mutual protection, and for the promotion, also, of the interests of the laboring man and of the consumer, and there can be no harm even in price-fixing so long as prices are adjusted on a rational basis of actual cost of production and commercial risk, and are not used as a foundation for extortionate dividends. There seems to be no real reason why the courts should not eventually develop a theory of prices analogous to the railway rate theories of the Interstate Commerce Commission. There is no need of an elaborate administrative machinery to regulate prices of monopoly articles, in the manner that Judge Gary and Mr. Roosevelt have proposed, unless the courts be found unable

to work out principles and dispense justice in any civil or criminal proceedings brought for violation of the rights of fair competition.

THE ENCOURAGEMENT OF LEGAL RESEARCH

THE *London Law Journal* apparently believes that in some respects, at least, England offers less encouragement to higher research in the law than the United States. It does not belittle what is being done at the universities of Oxford, Cambridge and London, but in America, it remarks, "post-graduate legal research is encouraged at every university."

In view of the inactivity or want of other agencies, the *Law Journal* is led by a small stipend granted by the Benchers of Lincoln's Inn to hope that the Inns of Court will do more for the promotion of scholarly studies. To emphasize the point, a quotation is made from Maitland which cannot be displeasing to American ears:—

"In the concluding passage of a famous lecture Maitland pointed to the great service which the Inns of Court had performed in the Middle Ages in preserving English law from the encroachments of foreign systems. And he drew the moral that if, in our own day, English law is to be preserved from the disintegration that threatens it in the manifold developments of various parts of the Empire, the Inns of Court, by a higher conception of their educational responsibility, must again come to its aid. 'In that case,' he said, 'the glory of Bruges, the glory of Bologna, and the glory of Harvard may yet be theirs.'"

Whether our American universities are doing as much as the *Law Journal* seems to assume is a question that might

receive some discussion. While many of them are undoubtedly liberal in their attitude toward scientific research, in the law as well as in other fields, we believe we are safe in saying that too many of our universities, particularly of the younger or smaller institutions, are handicapped by inadequate endowments or by that utilitarian spirit which hesitates to make any expenditure without the prospect of an immediate return. And doubtless there are too many professors of law in every way fitted to perform valuable research work, who are forced to spend a disproportionate share of their time in teaching and administrative duties. The American bar, while it has no institutions like Inns of Court to endow legal scholarships, may well interest itself in the cause of legal research to the extent of urging that our law schools make from time to time more liberal provision for it as circumstances may demand.

RUNNING THE COURT RIGHT

NOT long ago a country justice of the peace in a southwestern town called upon a retired attorney, and, after presenting a statement of facts, asked, as a matter of friendship, for a legal opinion upon them. This the attorney gave. When he had finished, the "squire" rose, deposited three dollars and seventy-five cents upon his astonished friend's desk, and said:—

"Well, those are just the facts in a case I am a-going to try next Thursday in my court, and I knew you would give me the right kind of an opinion, which is why I came to you. The costs in that case will be just seven dollars and a half, and I am willing to divide with you. When I was a candidate, some of the people in my county said I didn't know enough to run this office so I intend to show them that I do.

The next case I have, I will come to you again, and between us we will run that court right or bust ourselves a-trying."

THE JURYMEN'S AVERAGE

A FAMILIARITY with the simpler problems of arithmetic is desirable even in the jury box, a fact that was brought home in striking fashion to a Cincinnati lawyer not long since.

This gentleman was counsel for plaintiff in a suit brought to recover damages caused by a runaway horse. His client had been knocked down and slightly injured, just enough upon which to base a suit.

The lawyer had a very strong case. In fact, there was practically no defence, and the defendant was a rich man; so the lawyer asked for two thousand dollars, hoping to get half that amount.

When the jury came in, they rendered a verdict for the plaintiff, with damages assessed at eight thousand six hundred and eighty-seven dollars. The judge, of course, promptly set the verdict aside as excessive, and the lawyer had to begin over again.

Some days later the lawyer met the foreman of the jury, and asked how on earth the jurors had arrived at such a verdict.

"It ain't quite clear to me, myself," said the foreman. "We all agreed for the plaintiff on the first vote, but each fellow had his own ideas as to the damage. I was in favor of one thousand dollars, another man thought it ought to be two thousand dollars, and another stuck out for seven hundred dollars, and we were getting all tangled up, when some one suggested that we strike an average."

"But you couldn't have done that," said the lawyer.

"That's just what we did," said the foreman. "Each man put down what he thought right, and I added them together. I know there seems to be something wrong about the verdict, but I'll be hanged if I can see where it is!"

HUMORS OF THE LAW

IT was once remarked by a judge of one of the courts of New York City that he had "held chambers in a cab." Judge Drummond of the United States Circuit Court, was starting from Milwaukee to go to Chicago, when counsel desired to bring on a motion for a receiver in a railroad case. Accordingly the judge opened a special term in a parlor car, and heard arguments while *en route*.

But a still more remarkable hearing once took place in Sierra County, California, when Judge Searls of the District Court was on his way from Nevada to Plumas County.

At Downieville two lawyers had agreed to argue a motion when the judge arrived; but as time was pressing and both counsel were also going to Plumas, it was decided to ride along on mule-back and hear the argument on the way.

Up the mule trail from Downieville to Monte Cristo, down to Oak Ranch, and so on to Eureka the argument went on. At Eureka the case was examined and summed up, and in due time a decision was reached.

The loser consoled himself by saying that he had at least ascended the mountain without being conscious of the grade.

When the judge suggested that the *mule* might have felt it as usual, the counsel naively replied:—

"Sir, I am inclined to think from the result that he, too, was absorbed in helping to make up the opinion."

It is a curious fact that many men, level-headed enough about other things, seem to lose their wits entirely when they become involved in lawsuits. In a case recently concluded in the German courts a Berlin merchant paid out over \$900 to recover the value of a five-cent postage stamp. He had written a letter asking for an address and enclosing postage for reply. Failing to get an answer, he sued for the stamp.

The famous Missouri watermelon case was just as trifling and even more disastrous. The seed was planted on one farm, but the vine crept through a crack in the rail fence and the melon grew on the other side. Both farmers claimed it, and instead of perceiving the humor of the situation, they went to law. To add to the puzzling features of the question of ownership there was the further complication in that the fence stood on a county line, whereupon a question of the jurisdiction of courts came up. The farmers bankrupted themselves without obtaining a decision as to the ownership.

NO WAY OUT OF COURT

THERE is a lawyer in Chicago, for some years a police magistrate, who was a natural peacemaker and always endeavored to smooth over any slight differences between the persons brought before him.

Once, when the charge involved was for technical assault, it came out in the course of evidence that the parties were neighbors, and had formerly been on the best of terms.

"This is too bad, too bad!" commented the judge. "And between such old friends! Is this not a case that might be settled out of court?"

"I'm sorry to say that it can't be done, your Honor," remarked the plain-

tiff, seriously. "I thought of that myself, but the coward won't fight."

AGREEABLY SURPRISED

WHILE the jury system is imperfectly understood in many parts of our country, it is not often that the misunderstanding gives rise to so amusing a situation as that told of by an Iowa lawyer.

It appears that a suit for damages was on trial in a county court of that state, and that the principal witness was a gawky lad of seventeen. When on the stand he muttered in such fashion that the judge, pointing to the jury, said: —
"Speak up, so that these gentlemen can hear you."

The witness turned to the jury box with a half smile. "Why!" he exclaimed, surprised, "are all these gents interested in pop's case?"

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, facetiae, and anecdotes.

When Red Meets Red

BY SIRIUS SINNICUS

"A red-headed policeman, William Reilly, halted a mob of 1,000 anarchists in New York by asking the leader for his permit to parade. This leader and his assistants were afterward taken to the police station."—*News Item.*

THEY started out, one thousand strong,
With banners red and swelling song,
To free their land from tyrant's sway,
And hasten on the glorious day
When Freedom's reign shall be complete,
And kings shall grovel at the feet
Of man emancipate.

But who is this obstructs the path
And fills the leader's heart with wrath,
Demanding in the name of law,
With haughty mien and firm-set jaw,
"What permit have yez to parade?
Show up! or I will have yez made
Pris'ners at once, bedad!"

Ah! red-headed William Reilly,
Ne'er was officer so wily.
In the station safe you landed,
All alone and single-handed,
Those fierce anarchists, and scattered
All their hosts and left them shattered —
Red met red — and won.

USELESS BUT ENTERTAINING

First Lawyer — Suppose we go out and take something.

Second Lawyer — From whom?

“Fee simple and the simple fee,
And all the fees in tail,
Are nothing when compared with thee,
Thou best of fees — fe-male.”

— *The Caldron.*

A Chicago lawyer tells of a newly-elected squire in Minnesota, who was much elated by his honors, but not quite sure that he could sus-

tain them gracefully. So for some time previous to his assumption of the office, he hung about the courts to get a tip now and then as to legal procedure. One phrase struck him particularly, and it was not long before he had an opportunity to utilize it.

When, sitting in judgment on his first case, the testimony was all in and the arguments made, His Honor cleared his throat and delivered himself of the following: —

“The court takes this case under advisement until next Thursday morning, when it will render a verdict in favor of the defendant.”

— *Lippincott's.*

Correspondence

AMENDMENTS TO THE NEW YORK TORRENS LAW

To the Editor of the Green Bag: —

Sir: I have just received the current issue of the *Green Bag*, containing editorial article under the title of “The Torrens System in New York.” I did not know that this subject had created such a wide interest. But as it has taken the form of public discussion, I hope you will allow me to reply to some of the statements made.

Referring to the Torrens System of Land Title Registration in this state, otherwise known as article 12 of the Real Property Law, and the amendments thereto, passed by the New York Legislature in 1910, you say: —

“These amendments seem to have been largely the result of a compromise and not to have accomplished all that was desired by those who wished to strengthen the law. Efforts are likely to be made, therefore, to amend the law still further, to remove the apprehensions of those who believe that the law affords too great an opportunity for fraud and mistake on the part of examiners, etc.”

The bill now before the Legislature of New York to amend the law was

framed by friends of the old title insurance system or enemies of the Torrens, and the amendments proposed do not tend to strengthen the law or to simplify it, or to afford greater protection to the parties in interest, but would merely serve to make the procedure more cumbersome and expensive, and to throw additional obstacles in the path of property owners who desire to register their titles. This is more fully set forth in an editorial in the current issue of *Bench and Bar* where it is shown that these proposed amendments have never been authorized or approved by the New York State Bar Association, but are simply the recommendations of a sub-committee.

You also say in your article that “one speaker at the meeting of the New York Bar Association said that under this law a man may go to Europe for six months, and return to find that his title to property may have passed absolutely to another.” I was not aware that any lawyer had made any such stupid and absurd statement. But if he did argue thus, it is clear that the speaker had not familiarized himself with article 12

of the Real Property Law, and had failed to grasp the underlying principle of the Torrens System of Land Title Registration. If a man is the record owner of any real estate, or has any right or interest in or lien upon the same, which is of record, it is absolutely impossible under the Torrens System in this state or in any other state or country to deprive him of such ownership or lien, no matter how many months or how many years he may remain in Europe, as the law distinctly provides that the Official Examiners' Certificate must clearly set forth all instruments of records and preserve the interest of all parties, whether by way of deed, mortgage, judgment, easement, encroachment, etc., all of which are duly set forth in the "Memorials" on the back of the certificate of registration. The only people who can be affected adversely through publication of notice, etc., are those designated in the act as "All other persons, having any right or interest in, or lien upon the premises affected by this action, or any portion thereof." You will notice the phraseology of "all other persons," which is merely intended to include those who may have some intangible, inchoate or indefinite right or interest in the premises, which is not of record, and which could not be discovered by a search of the title. This merely smokes out all those individuals who seek to blackmail the true owner of property by falsely claiming an interest which they do not possess. But all parties who have any honest and legitimate right or interest in or lien upon the premises affected by the action are fully protected. If the decision of the United States Supreme Court in *American Land Company vs. Zeiss* (219 U. S. 47) is read with care, it should increase, rather than decrease public confidence and tend to

create the feeling that a title cannot be set up without adequate legal notice to all interested parties. Of course, if anyone who has an unrecorded interest in property fails to make any claim thereto, or goes away and abandons the same, then he deserves to lose the interest which he might have preserved by proper precaution.

Furthermore, the Act itself has provided for all such exigencies, by permitting the claimant of any right or interest in or lien upon any real property to file a "Caution," after which no title can be registered except upon personal notice to such person. The section reads as follows:—

Section 883. — "FILING OF CAUTION. Any person claiming to have any right of interest in or lien upon any real property or any part thereof, may file with the registrar a written notice, to be styled a 'caution,' that he requires written notice to be given to him of any application for the registration of the title of said real property. In such notice he shall show how he claims title, right, interest or lien, and shall give his own post office address, and that of a person (who may be himself or not), upon whom the notice may be served. In case of any application to register said title, service of such notice shall be made within ten days after the application is filed, by mailing said notice securely enclosed in a postpaid wrapper and directed to the person indicated at the place named. A like cautionary notice may be required by the owner of any land, as to the registration of the title of any or all of the land, abutting upon his land, with the like proceedings in all respects. There shall be kept by the registrar a locality index of the cautionary notices, in which the same shall be indexed under the name of the street or road upon which the property referred to in the notice abuts, or if it abuts upon none, under the name of the street or road which is nearest to it. In any place, however, where there is a land map giving sections and dividing the property into blocks, the index shall be made by section and block numbers and as far as convenient, by the lot numbers."

From the above you will see that what we need is not changes in the Torrens

law, which is sufficient as it stands, but protection from meddlesome interlopers who seek to emasculate or discredit the law from ulterior motives.

GILBERT RAY HAWES.

20 Broadway, New York.

June 2, 1911.

The discussion of the New York Torrens law has shown the existence of some conflict of views, but with entire respect for Mr. Hawes' sincerity, we have no hesitancy in asserting that the weight of opinion is in favor of amending the statute for the fuller protection of rights of property.

By resolution of the New York State Bar Association, the sub-committee headed by Mr. Charles A. Boston was instructed to consider amendments to add to the efficiency of the Torrens statute. This able committee unanimously urged the importance of securing amendments to guard against the danger of fraudulent or incompetent examinations of title and of inadequate notice to interested parties. Most of the work of this committee was done by its chairman, who gave the subject a great deal of time and study without thought of personal reward, and his statement in the *New York Law Journal* of May 20 is to be accepted unreservedly: "We have not sought to conciliate or promote any particular interest. We have gladly availed ourselves of all reasonable and sensible suggestions, from whatever source emanating, which were founded upon experience and good judgment."

The *New York Law Journal*, whose learned opinions are always entitled to respect, said editorially, May 11, in reviewing the proposed amendments: —

"It is a matter of much public concern that 'Torrens' systems be perfected as far as possible to the end that substantial property rights be not cut off unfairly or without due notice of proceedings. . . . An inspection of the legislative bills leads us to believe that their adoption would not only add to the efficiency of the New York 'Torrens' statute, but also diminish the opportunity for its perversion into an instrument of depriving real owners of substantial interests in property."

Moreover, it seems proper to say that the State Bar Association heartily supports the position taken by its sub-committee, judging from the fact that the committee was continued with power to recommend to the Legislature

additional amendments along the lines suggested in its report.

The statement which excites our correspondent's wonder was made by Mr. Henry C. White of New York, and will be found on page 328 of the current volume of the state bar association's Proceedings: —

"I tell you, gentlemen, I believe, after a very careful study, that the law is one of the most dangerous now on our statute books. If you say I am prejudiced I will say yes, I am prejudiced against a law so doubtful that two years' close study only shows a beginning of its dangers.

"Here is a result which can actually practically happen. A man may own a piece of vacant property, which he will naturally unfrequently visit. He goes to Europe for six months, and upon his return, he finds that some one has put a deed on record, registered the title, conveyed to a purported *bona fide* purchaser, and the title has passed out of the real owner without any recourse whatever to any fund or against anybody. That is a result that actually can happen under the law.

"With the disposition of the courts to pass applications thus practically *ex parte*, and with the statute declaring that the statements contained in the abstract and the certificate must be taken and construed as statements of fact unless therein otherwise expressly declared, although every conveyancer and every tyro at the law knows that the statements of an abstract and certificate are generally conclusions of law, or at the most are mixed statements of fact and law, this law constitutes a serious menace."

We agree with Mr. Hawes that the decision of the Supreme Court in *American Land Company vs. Zeiss* need not decrease public confidence. The only feature of that decision that can have led to any misgivings is the finding that reasonable constructive notice to absentees and unknown claimants is not repugnant to the "due process of law" clause of the Constitution. But strictly speaking, it was not a typical Torrens law that was upheld by the Supreme Court, but a statute passed after the San Francisco earthquake to meet an extraordinary public necessity. The New York statute, therefore, would not necessarily be upheld in its present form by the reasoning of this decision as to what constitutes reasonable constructive notice. It is not only to strengthen the Torrens system in New York, but to guard against the possible unconstitutionality of the law, that either the pending amendments or others of similar purport seem advisable. — *Ed.*]

The Legal World

New York Branch of American Institute of Criminal Law and Criminology Founded

Six societies joined in a Conference on the Reform of the Criminal Law and Procedure was held at Columbia University on May 12 and 13. President Taft was the most distinguished speaker, and his address, delivered at Hotel Astor on the evening of the second day, was notable. He made some striking remarks on the recall of the judiciary. Regarding the difference between criminal procedure in England and in this country, he said:—

"I believe it to exist in the character, experience and learning of the judges, in the power which they maintain and exercise in the course of the trial for the saving of time and the simplification of the issues and in the respect and obedience given to their intimations from the bench as to the proper behavior of counsel in the conduct of the case.

"I wish to comment on the effect that the change in the power of the judge in this country in the matter of the management of the trial has had upon his ability to shorten the trial and simplify the issues, and upon the methods of counsel for the defense and their conduct in the court room. One of the strongest influences for looseness in criminal trials, in my judgment, has been the presence of lawyers in our legislatures who have sought to abate and limit by statute the power of the judges and to take away from them this source of respect for their rulings which is so apparent in every English court of justice. What I believe to be an unfounded fear of judicial tyranny and an unreasonable distrust of judges have led to statutory limitations upon their power

in the conduct of criminal trials which have made the trial by jury in this country, and especially in the Western states, an entirely different institution from what it was understood to be at the time of the adoption of our Constitution."

At the opening session of the Conference Charles C. Nott, assistant District Attorney of New York County, made an address on "The Effects of the Twice-in-Jeopardy Principle in Criminal Trials." The discussion was led by Justice Francis J. Swayze of New Jersey. Other speakers at the Conference included Judge Julian W. Mack, who discussed "The State and the Child"; William M. Ivins, who spoke on the nature of crime; Prof. Franklin H. Giddings, who discussed "The Relation of the Criminal to Society"; Dr. Carlos F. MacDonald, who considered expert evidence in criminal trials, Professor Felix Adler, who talked on "The Ethics of Punishment"; Col. Nathan William MacChesney of Chicago, president of the American Institute of Criminal Law and Criminology, Francis J. Heney, Howard S. Gans, Prof. John Bassett Moore, Chief Magistrate McAdoo, Supreme Court Justice Alfred Page, Arthur W. Machen, Jr., and Edwin R. Keedy.

The purpose of the Conference was to lead the way to the formation of a New York branch of the American Institute of Criminal Law and Criminology. Professor George W. Kirchwey of Columbia will be the first president of the new organization after its incorporation.

The six societies joining in the Conference, the meetings of which were open to the public, were the Academy of Political Science in the City of New York, the American Institute of Crimi-

nal Law and Criminology, the Committee on Reform of the Law of the Association of the Bar of the City of New York, the New York County Lawyers' Association, the Committee on Criminal Courts of the Charity Organization Society, and the Prison Association of New York.

*International Arbitration—Plan of the
Carnegie Endowment*

The seventeenth annual meeting of the Lake Mohonk Conference on International Arbitration was held at Mohonk Lake, N. Y., May 24-26. President Nicholas Murray Butler, the presiding officer, for the first time made public the plans of the trustees of the Carnegie endowment for international peace. The trustees, in pursuit of their determination to organize this foundation as a great institution for research and public education, had determined, he said, to carry on its work in three parts or divisions — a division of international law, a division of economics and history and a division of intercourse and education. Otherwise stated, these three divisions will represent the juristic, the economic, and, broadly speaking, the educational aspects of the problem.

The division of international law, under the direction of Professor James Brown Scott, will promote the development of international law, and will assist in bringing about such a progressive development of the rules of international law as will enable them to meet with constantly growing adequacy the needs of the nations. The endowment will associate with Dr. Scott a consultative board composed of some of the most distinguished international lawyers in the world, every point of view being represented.

The second division of the work, that of economics and history, will be under

the direction of Professor John Bates Clark of Columbia University. This work, like that of the first division, will be scientific and scholarly in character, in organization and in method. With Professor Clark will be associated a score of the world's leading economists.

It will be the duty of the third division, that of intercourse and education, to supplement the work of the scientific divisions by making practical application of the teachings and findings of the divisions of international law and of economics and history.

Next in importance to President Butler's address, probably, was Hon. Oscar S. Straus's speech on "Business and International Arbitration." He said in part: —

"The standard of international morality yet continues to lag far behind the standard of commercial fair dealing within nations; the evidences of this are no more glaringly exhibited than in the exceptions in the laws of neutrality, which rest not on principle but on legal casuistry. As the law now stands it is entirely lawful for the subjects of neutrals to supply belligerents with arms and ammunition, as well as by public subscription or otherwise raise loans to aid belligerents; yet the fact that such loans can be legally contracted, not only makes war possible, when otherwise either or both belligerents would be prevented by economic necessities from beginning a war, or when begun from prolonging it. The Russo-Japanese War would certainly have come to an earlier end if neither belligerent could have borrowed money from the subjects of neutrals. It requires no argument to prove such acts are against the fundamental principles of real neutrality, and no more practical work can be undertaken in the promotion of peace than to hasten the day when such contraband

commerce and loans will no longer be considered lawful."

The representatives of fifty-one commercial organizations attending the Conference sent telegrams to President Taft and to the Senate Committee on Foreign Relations, saying that they "heartily indorse treaties of unlimited arbitration with Great Britain, France and other countries and wish speedy success with such treaties."

The speakers at the Conference included Hon. John W. Foster, who spoke on "Unlimited Anglo-American Arbitration," Thomas Raeburn White, who discussed "A Plan for Choosing Judges of the International Court of Arbitral Justice," Baron d'Estournelles de Constant, who warned against the dangers of popular ignorance and love of sensation, William Jennings Bryan, Senator Raoul Dandurand, LL.D., of Montreal, Professor Paul D. Reinsch of the University of Wisconsin, William Dudley Foulke of Indiana, Sir William Mullock, Chief Justice of Ontario, Governor A. O. Eberhart of Minnesota, and Dr. James L. Tryon and President Harry Garfield of Williams College.

The Conference adopted, with slight modifications, the Kirchwey resolution, creating a National Council for Arbitration and Peace.

Personal

Hon. Orrin N. Carter of Chicago has been elected Chief Justice of the Illinois Supreme Court for the year, succeeding Justice Vickers.

John Sumner Runnells, vice-president and general counsel of the Pullman Company, has been elected its president, succeeding Robert Todd Lincoln, resigned. Mr. Runnells has been general counsel of the company since 1887. He

is also senior member of the law firm of Runnells, Burry & Johnstone of Chicago.

Recent appointments confirmed by the Senate include: Charles F. Clemons, United States District Judge of Hawaii; Alexander G. M. Robertson, Chief Justice of the Supreme Court of Hawaii; James A. Fowler, assistant to the Attorney-General; Charles W. Cobb, Assistant Attorney-General for the Interior Department.

Congressman Martin W. Littleton of New York delivered the annual address before the Law Academy of Philadelphia May 5, taking as his subject, "Law and Economics." He discussed the initiative, referendum, recall and a number of other live issues of politics, speaking without partisanship and with unusual eloquence. The address was much enjoyed by the two hundred lawyers who heard it.

At the meeting of the Yale corporation held May 15, the resignation of Prof. Theodore Salisbury Woolsey, LL.D., since 1878 Professor of International Law in Yale Law School, was accepted. The corporation adopted a minute regarding his important services to the university. Professor Woolsey is the son of the late President Theodore Dwight Woolsey, and was born in New Haven, October 22, 1852.

The Justices of the Supreme Court of the United States, on the adjournment of the Court on May 29, prepared to scatter far and wide for their summer vacations. Justice Harlan usually spends his summers at Murray Bay, Canada. Justices McKenna and Holmes usually summer on the North Shore near Boston. Justice Lamar returned to Augusta, and Justice Van Devanter to Wyoming. Chief Justice White has

long been fond of the summer climate of New England. Justice Hughes will be busy with the work of the commission to inquire into the second class postal rates.

Charles Noble Gregory, dean of the law school of Iowa University, has accepted the offices of dean and professor of law in the law school of George Washington University, Washington, D. C. Dean Gregory is a graduate of the University of Wisconsin, and from that institution received the degrees of A.B., LL.B., A.M., and LL.D. For several years he practised law at Madison, Wis., and was attorney for the Chicago, Milwaukee and St. Paul Railroad. In 1894 he was made associate dean of the college of law of the University of Wisconsin, and in 1901 became dean of the law school of the University of Georgia. He is now on the staff of the *American Journal of International Law*, and is editor of the *Tariff Reform Advocate*.

Bar Associations

Arkansas.—The annual meeting of the Arkansas Bar Association was held at Hot Springs May 30–31. M. V. Tompkins of Prescott, president of the association, made the principal address. Judge U. M. Rose spoke on "Reminiscences of Early Days in Arkansas," and Judge Joseph W. House on "Personal Reminiscences of the Constitutional Convention of 1874."

Georgia.—The annual convention of the Georgia Bar Association was held at St. Simon's Island, on Thursday and Friday, June 1 and 2. The meeting was opened by an address by the president, Judge Joel Branham, of Rome. The annual address was delivered by the Hon. W. A. Blount of Pensacola, Fla.

Special addresses were made by Judge Arthur Gray Powell of the state Court of Appeals, and by Hon. Dupont Guerry of Macon.

Louisiana.—The annual meeting of the Louisiana Bar Association was held at Lake Charles, La., June 2–3. The address of welcome was delivered, on behalf of the city, by Hon. C. B. Richard, mayor, and on behalf of the bar, by Attorney U. A. Bell. The president's address was delivered by E. H. Randolph. Addresses were made on "Sources of the Civil Code of Louisiana," by Hon. Henry P. Dart, and on "The Standards of Legal Education," by Robert T. Tullis of the Louisiana State University Law School, and Prof. D. O. McGomey of Tulane University. There was a discussion of "Suggested Changes in Louisiana Pleadings," led by Charles Payne Fenner, E. T. Florance and George S. Denegre of New Orleans, P. J. Chapuis of Crowley, and A. A. Gunby of Monroe. The annual address was delivered by Congressman Martin W. Littleton of New York on "Economic and Structural Changes." Hon. R. E. Foster, federal Judge for the eastern district of Louisiana, took as his topic the history of the federal courts.

The following officers were chosen for the ensuing year: Joseph W. Carroll of New Orleans, president; Benjamin W. Kernan of New Orleans, C. A. McCoy of Lake Charles, Judge A. A. Gunby of Monroe and E. T. Weeks of New Iberia, vice-presidents; Charles Augustus Duchamp of New Orleans, secretary-treasurer.

Mississippi.—The Mississippi State Bar Association convened at Hattiesburg on May 2 for a three days' session, President W. H. Powell of Canton presiding. The address of

welcome was given by Judge N. C. Hill of the Hattiesburg bar, and the annual oration was delivered by Hon. James Weatherby of Birmingham, Ala. S. E. Travis read a paper on "Uniform Legislation by States." The election of officers resulted as follows: President, A. F. Fox; vice-presidents, Judge N. C. Hill of Hattiesburg; Sam C. Cook, R. F. Reed; secretary and treasurer, Judge Sidney Smith of Jackson.

Rhode Island. — The Rhode Island Bar Association had its annual clam-bake and outing at the Pomham Club May 26. Two baseball teams were formed, the married men defeating the single men by a score of 15 to 8. After the ball game about two hundred sat down to dinner and they included members of the executive and judicial branches of the state.

Tennessee. — The thirteenth annual meeting of the Tennessee Bar Association was held at Nashville May 24-26. Hon. G. N. Tolman delivered the address of welcome on behalf of the state, and the address of the president, Percy T. Maddin, was a review of legislation, state and federal, and an exhortation that the association make the best use of its opportunities. Ex-Secretary of War J. M. Dickinson was the chief speaker at the banquet. Hon. F. N. Judson of St. Louis delivered an address on "The Future of Jurisprudence in the United States." Other papers read included: "Needed Constitutional Amendments," by Judge D. L. Lansden; "Land Laws in Tennessee," by L. D. Smith of Knoxville; "Penal Reform," by Judge J. H. Malone of Memphis; "East Tennessee Lawyers who have been Transplanted to Higher Courts," by Col. W. A. Henderson.

An important report was presented by the Committee on Jurisprudence and Law Reform, T. M. Steger, chairman. The following officers were elected: President, L. D. Smith, Knoxville; vice-presidents, R. F. Spraggins, Jackson; George T. Hughes, Columbia; Charles R. Evans, Chattanooga; secretary-treasurer, Charles H. Smith, Knoxville.

Dates of forthcoming state bar association meetings are as follows: Maryland, at Cape May, N. J., June 29-July 1; Kentucky, at Lexington, July 12-13; Alabama, at Montgomery, July 7-8; Michigan at Battle Creek, July 6-7; Pennsylvania, at Bedford Springs, June 27-29; Iowa, at Oskaloosa, June 29-30; Indiana, at Winona Lake, July 11-12.

Workmen's Compensation.

On the eve of adjournment the New Hampshire Legislature enacted an employers' liability and workmen's compensation law similar to that of New Jersey. The act contains a sweeping employers' liability clause which abolishes the fellow-servant and assumption of risk rules. This is supplemented by compensation provisions, and employers are given the option between liability under the two clauses.

The Wisconsin workmen's compensation act lately adopted has features similar to the New Hampshire and California acts. It puts compensation on an optional basis, election to be made by the employer and employee at stated times. Since the alternative choice for the employer is liability with the defenses of assumption of risk and fellow servant's negligence removed, and for the employee the old common law liability, the same pressure as in the New Hampshire act is brought to bear upon both sides to choose compensation.

The state of Washington has passed compulsory compensation law which covers extra-hazardous industries, including practically all work except domestic service, agriculture and some forms of handwork. The plan has some features of state insurance, as the funds are to be administered by three industrial insurance commissioners, with their assistants, who shall also keep statistics of accidents. The payments are made entirely by the employer, each supplying an annual contribution, based upon the degree of hazard in his particular industry, of from one and one-half to ten per cent of his pay roll. The rates are to be readjusted from time to time by the Legislature, on the recommendation of the Insurance Department.

Miscellaneous

An important bill for the recodification of all the juvenile laws of Ohio, relating to children's courts and delinquent and dependent children, has been enacted.

The first international congress on aviation law, which was in session in Paris for several days under the Presidency of Alexandre Millerand, ended June 1. The congress adopted an agreement of seventeen clauses.

Members of the Wisconsin Supreme Court, prominent lawyers of the state, and a few personal friends of Luther Swift Dixon, Chief Justice of Wisconsin from 1859 to 1874, gathered in Forest Hill Cemetery, Madison, June 1, for the dedication of a monument to him. The presentation was made by Justice John Marshall, for the sub-committee of the Wisconsin Bar Association which devised means of erecting the memorial. The speech of acceptance was delivered by Chief Justice John B. Winslow.

The Committee on Commercial Law of the American Bar Association met at Cincinnati in the last week of May. The following addresses were made: "Progress toward Uniformity of State Commercial Legislation," by Walter George Smith; "Wisdom of the Enactment of a Federal Commercial Code," by Joseph Wheless; "A Federal Code on Bills of Exchange and Promissory Notes," by Charles A. Conant; "Defects in the National Bankruptcy Act," by Charles T. Greve; and "National Commercial Legislation" by F. I. Kent.

The New York Chamber of Commerce's new committee on arbitration, appointed to arbitrate business disputes under the provisions of the Code of Civil Procedure, was sworn in by Justice Davis of the Supreme Court June 1. It is the successor of the Court of Commerce, which was for many years maintained by the Chamber, but which lapsed after the death of Judge Fancher. The arbitration committee is composed of Charles L. Bernheimer, chairman; Henry Hentz, James Talcott, James H. Post, William Lummis, Frank A. Ferris and Algernon S. Frissell.

Obituary

Judge S. B. Pound.— Judge S. B. Pound, a prominent attorney of Omaha, Neb., and father of Roscoe Pound, Story Professor of Law in Harvard University, died of angina pectoris May 15. Judge Pound was the first president of the Lancaster County Bar Association, probate judge of Lancaster county in 1870, state senator one term and district judge for three successive terms. He was a member of the firm of Hall, Woods & Pound. The act which made Omaha the capital of Nebraska was due to the efforts of Judge Pound,

who was a powerful figure in the constitutional convention of the early seventies.

Charles F. Choate. — Charles Francis Choate, formerly counsel and later president of the Old Colony Railroad, and once a leading member of the Boston bar, died May 23 at the age of eighty-three. During his presidency of the Old Colony the policy of consolidating the lines of southeastern Massachusetts was carried out, and the consolidated property was leased to the New York, New Haven & Hartford, of which company Mr. Choate served as a director. Under his presidency the Old Colony Steamboat Company built the fleet of steamboats which have given wide fame to the Fall River line.

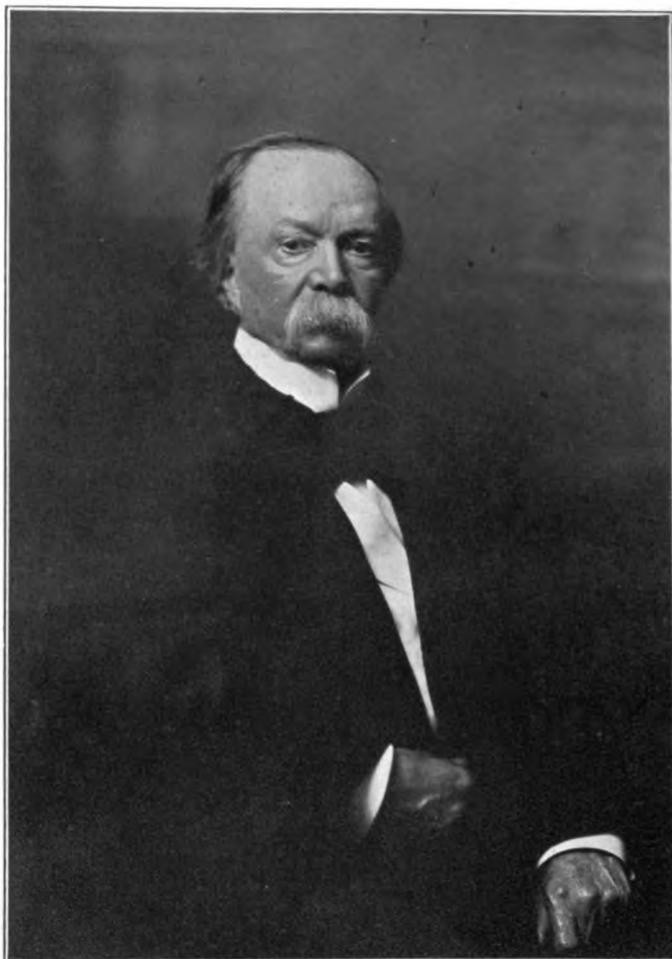
R. H. Clarke. — Richard H. Clarke, one of the founders of the Association of the Bar of the City of New York, and associated with Charles O'Connor in the case of the United States against Jefferson Davis for treason, the Jumel will case and the Forrest divorce suit, died at his home in New York May 24, at the age of eighty-four. He had known nearly every President of the United States since Jackson, and came of a distinguished ancestry. He was the editor of "The History of the Bench and Bar of New York" and the author of "Lives of the Deceased Bishops of the Catholic Church in the United States," "The Illustrated History of the Catholic Church in the United States," "Life of Pope Leo XIII," "Old and New Lights on Columbus," and "France's Aid to America in the War of Independence."

General Charles Hamlin. — General Charles Hamlin of Bangor, Me., died on May 15, at the age of seventy-three. He was United States Commissioner,

and former Reporter of Decisions of the Supreme Court of Maine. He was the son of Hannibal Hamlin, Vice-President during Lincoln's first administration. Being graduated from Bowdoin College in 1857, he read law with his father, and was admitted to the bar in 1858. Leaving the army with the rank of brevet Brigadier-General, he resumed the practice of law in Bangor after the war. Aside from the practice of his profession he found time to do some legal writing, and wrote and compiled a work upon the Insolvency Laws of Maine. He was also the author of a series of biographical articles in the *Green Bag* on the Supreme Court of Maine. (7 *Green Bag* 457, 504, 553; 8 *G. B.* 14, 61, 111.)

La Fayette Grover. — La Fayette Grover, a leading figure of pioneer history, former Governor of Oregon, former United States Senator, and one of the last surviving delegates of the Oregon constitutional convention of 1857, died at Portland, Ore., May 10, aged eighty-seven. He was a native of Bethel, Me., and was of Pilgrim descent. He studied for two years at Bowdoin College and studied law in Philadelphia, being admitted to practice in 1850. He emigrated to Salem, Ore., in a vessel which went round Cape Horn, his first position of public service being as clerk of the federal District Court at Salem. Thereafter he rose rapidly. In the Territorial Legislature he promoted the bill leading to the establishment of Willamette University, of which he became one of the trustees. He became the most important member of the constitutional convention, and as Congressman he bore a large part of the brunt of the conflict leading to the admission into the Union of Oregon by a close margin of votes in 1859.

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HON. WILLIAM P. WHITEHOUSE
CHIEF JUSTICE OF THE SUPREME JUDICIAL
COURT OF MAINE

(Photo. by Hanson Studio, Portland)

The Green Bag

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Mr. Chief Justice Whitehouse

WILLIAM PENN WHITEHOUSE, LL.D., of Augusta, the tenth Chief Justice of the Supreme Judicial Court of Maine, who has just succeeded Chief Justice Lucilus A. Emery in view of the latter's desire to lay aside active work, began his career, like many other able and successful lawyers, by teaching school.

He was born in Vassalboro, Maine, April 9, 1842, and is therefore sixty-nine years of age. His parents were John Roberts and Hannah Percival Whitehouse. Besides attending the common school of his own district, working on his father's farm and attending the high school at China, he began at the age of sixteen to fit himself for college at Waterville Academy. Here he made such rapid strides that he was able to enter Colby College in the following September without conditions. He was graduated in 1863 with first class honors, delivering the English oration at Commencement.

He began soon after graduation to teach and was for a time the principal of Vassalboro Academy. Having decided upon the profession of law, he first entered the office of the late Sewall Lancaster of Augusta, and afterwards continued his studies with Ex-Senator Hale at Ellsworth. He was admitted to the bar in Kennebec county in October, 1865. His first year's practice was

in the city of Gardiner, with Lorenzo Clay as a partner. He removed to Augusta in December of 1866, and formed a partnership with George Gifford, which lasted only until June, 1867, when the latter entered journalism on the staff of the *Portland Daily Press*, and subsequently became its editor-in-chief.

Entering upon a general practice, for which he was well fitted both by aptitude and diligent application, he soon gained the confidence of clients and the community for integrity and ability. He was elected city solicitor in 1868 and during his incumbency of that office he defended the city successfully in several important cases.

He was appointed County Attorney in 1869 by Governor Chamberlain to fill a vacancy caused by the death of the late Francis E. Webb of Winthrop and was twice elected afterwards to the same office, serving more than seven years in all. In this office he increased his reputation by his efficiency and zealous discharge of his duties. One of the most important cases tried when he was attorney was that of *State v. Edward H. Hoswell*, indicted for the murder of John B. Laffin of Hallowell, in which the late Thomas B. Reed made his first appearance for the government as Attorney-General. County Attorney Whitehouse prepared the case for trial and made

the opening argument. The trial became noted for the defense of momentary insanity urged by the counsel for the defendant. The jury finally returned a verdict of manslaughter and the prisoner served a sentence of nine years in the state prison.

He was chairman in 1873 of the commission on the hospital for the insane and wrote the report which was published by the state. He advocated the adoption of a system after careful investigation that was indorsed by the highest medical authorities. He entered in 1875 into the agitation which secured the abolition of the death penalty. The favorable result was due largely to the leading and influential part which he took in the measure and by moulding public sentiment on the subject. He was in 1879 chairman of the committee of citizens in the city of Augusta that elected the graceful and artistic soldiers' monument which adorns the public square in that city.

The Superior Court of Kennebec county was established by act of the Legislature of 1878, and on Feb. 13 he was appointed to its bench. The court sat in Augusta with five jury terms each year until the year 1889, when two sessions were held at Waterville and the Augusta terms were reduced to three. After the second year of its establishment its powers were enlarged so that it comprised the entire criminal jurisdiction including capital cases. Its civil department included divorces and all civil actions except real actions and trespass sum, exclusive up to \$500, and concurrent jurisdiction with the Supreme Judicial Court of all such actions when the damages exceeded that amount. This court had the power of trial in murder cases until 1889 when these cases were transferred to the Supreme Court. The twelve years during which

Judge Whitehouse presided in the Superior Court are remembered for the ease and urbanity with which he dispatched business. Industrious and polite, clear and interesting, he soon became popular in the best sense of the word and retained the respect and esteem of the bar.

Judge Whitehouse in the summer of 1888 in behalf of the citizens of Augusta delivered an address of welcome to the late James G. Blaine upon his return from Europe, which was widely reported and commended for its felicity and eloquence.

He was first appointed to the bench of the Supreme Judicial Court as Associate Justice April 15, 1890, by Governor Burleigh, and was reappointed in 1897 by Governor Powers, in 1904 by Governor Hill, and in 1911 by Governor Plaisted. As the senior Associate he was directly in line for appointment as Chief Justice, and his appointment was no surprise, both on account of his being in line for the position and on account of the marked judicial ability which he had shown as Associate Justice. His opinions show a full and vigorous style, which is at the same time natural and finished, and his references to the authorities and decided cases are ample and with enough of apt quotation to save the reader labor.

He married, June 24, 1869, Evelyn M., daughter of Col. Robert Treat of Frankfort, who was descended in the fifth generation from Col. Robert Treat, colonial Governor of Connecticut. Their only child is Robert Treat Whitehouse, United States Attorney of Maine since Jan. 11, 1906, residing in Portland.

Justice Whitehouse was given the degree of LL.D. from his *alma mater* in 1896. He is a lover of nature, a good hunter and fisherman, and has a genial, sunny temperament.

The Justice Court System

BY WILLEDD ANDREWS, LL.B., OF THE LOS ANGELES BAR

THE ancient English statutes relating to justices of the peace in force at the time of the settlement of this country, were adopted as a part of our common law by the colonists and the people of the original states. But the powers and duties of such officers have been so much enlarged that at present they derive their jurisdiction almost entirely from modern statutes.

In American law a justice of the peace is a judicial officer of inferior rank, holding a court not of record, and having usually civil jurisdiction of a limited nature; he presides over trials of minor cases, to an extent prescribed by statute, and for the conservation of the peace, the preliminary hearing of criminal complaints, the commitment of offenders, as a judicial officer of special and limited jurisdiction, both civil and criminal. When the history of the now famous justice court system begins, the scheming gentlemen in England were engaged in local politics of the King Edward III type. The office of justice of the peace is one of great antiquity and the jurisdiction has varied from time to time, depending either upon the terms of each commission or particular statutes. Justices were originally mere conservators of the peace, exercising no judicial functions. It is said that during the breathless stir of Edward III's reign, he passed the first statute that ordained the assignment of justice of the peace by the King's commission. At that time and age they could only gratify their sense of power by keeping the peace.

English skill in commercial life increased and with the keen competition

the conservators' power was gradually enlarged and they came to constitute a very important agency in the administration of public affairs in England. Then at last they accepted the ideas of reforming the procedure for what it was: a task of preparation in legal thought — hard, cautious plans — practicable only by mental labor and clear-headed judgment. They were invested with judicial powers for the first time, by the statute of 34 Edward III which gave them power to try felonies, but only when two or more acted together, and they then acquired the more honorable appellation of justices. According to Blackstone the statutes just cited directed them to be of the most sufficient knights, esquires and gentlemen of the law. The qualifications above mentioned are more than we require here in America. There are jurisdictions in the United States where farmers, mechanics and merchants hold court as justices of the peace. The absurdity of our system, however, will be discussed further on.

It does not appear that in England the justices ever exercised jurisdiction in civil causes. In the United States they may be said technically to have, as a part of our common law, the power granted such officers by the early English statutes; yet their powers and duties have been so enlarged and so fully defined by the statutes of the various states that they are in effect wholly statutory. This is especially true as to the jurisdiction of justices in civil causes, which, of purely statutory origin, and at first confined within narrow limits, has now grown to immense proportions.

Justices of the peace were originally county officers. It was their mission to investigate and try treasons against the peace and to inflict punishments therefor. Those who were law-breakers were not of their faith, but a better kind of criminal whom they either sent to prison or to a country more foreign.

The office of justice when created by the constitution is a constitutional one, and, whether so created or created by statute, it is considered judicial in its nature, or rather both judicial and ministerial. Sometimes the office is also political or legislative, as in cases where a justice of the peace is a member of the legislative body of his county. The old system is losing its power gradually and modern ideas are pressing forward. An age of antiquity has given place to an age of close reasoning and organization. Unless such action as above mentioned violates some constitutional provision, it is entirely competent for the legislature to invest other officials, such as mayors, aldermen, notaries-public, commissioners and the like, with the powers of justices of the peace. Within their territorial limits such *ex officio* justices have the same jurisdiction as regularly elected or appointed justices of the peace. Where the constitution creates the office, and provides for the election or appointment, number, term of office and jurisdiction, all legislation affecting the office must conform to such constitutional provisions. But where the constitution confers on the legislature the power to create the office, or to define and regulate the powers, duties and jurisdiction, and to prescribe their number in the different territorial subdivisions, or when it contains no restrictions on the subject, the legislature may make such regulations concerning the office as it may see fit, subject to constitutional provisions requiring uniformity of juris-

diction, or forbidding local and special laws. The legislature, however, cannot delegate a power conferred upon it by the constitution. The law books hold and leading cases have decided that, while it is undoubtedly beyond the power of the legislature to abolish the office of justice of the peace, when created by the constitution, it may, where the constitution contains no limitation on the power of the legislature over the office, make such regulations as to the number of justices, the mode of their election, appointment or removal as it may deem proper, although the effect of such regulations may be to abolish the office in particular instances. To be eligible to the office of justice of the peace the candidate must be of the male sex, over the age of twenty-one years, a citizen of the United States and of the state in which he seeks to hold office; a resident, and in some states an elector, of the territorial subdivision in which he seeks election. In England and Canada a justice of the peace must have certain property qualifications. In Colorado a police magistrate must primarily be a justice of the peace. In England and Canada justices are appointed to office, but in the United States the office is generally an elective one, although the constitutions and statutes of many of the states permit the appointment of such officers, either generally or under certain circumstances. A justice's title to his office is shown usually by his commission or election certificate.

It must be observed that no provision is made in a great many states for a high degree of legal ability. There is much criticism directed toward our justice court system today because so many cases are reversed on appeal. But how can you expect a farmer, merchant or business man to understand the administration of law? And yet there are states

in America where such men are holding office as justices of the peace! Can we require them to have knowledge of the law of partnership, agency, torts, corporations, negligence, contract and statutory interpretation when they have never studied law? Of course not. You may as well expect a trial lawyer to be an expert on the industry of farming. The attorney is not "in training" to give orders to farm employes, and the farmer is in the same boat when it comes to handing down legal decisions.

There is a story which has traveled through the legal profession about a fine old family of farmers living down in the state of Texas. The old gentleman was very popular with the people near by and one day they elected him justice of the peace. A friend suggested that he go up to El Paso and see how the courts were organized. He went to the city and heard one of the judges tell some lawyers during a trial, that the court would take the case under advisement and render a decision the following week. The old gentleman did not know what the word advisement meant, but he liked it just the same. There was a big crowd present when he opened court for the first time in his township. The court room crowd remarked the farmer justice, calm, dignified and judicious. When a distinguished lawyer from El Paso had finished his argument and his opponent stood up to reply in the case pending, the justice rapped for order in the court. "Gentlemen," he said courteously, "the court will take this case under advisement and will render a decision next Tuesday in favor of the plaintiff."

The California legislature has passed two excellent provisions in reference to the justice court system. Section 103 of the Civil Code of Procedure, as amended, provides that, "there shall be

at least one justice's court in each of the townships of the state, for which one justice of the peace must be elected by the qualified electors of the township, at the general state election next preceding the expiration of the term of office of his predecessor. In any county where in the opinion of the board of supervisors the public convenience requires it, the said board may, by order, provide that two justices' courts may be established in any township, designating the same in such order; and in such case, one justice of the peace must be elected in the manner provided by law. In every city or town of the third and the fourth class there must be one justice of the peace, and in every city or town of the first and one-half class there must be four justices of the peace, and in every city or town of the second class there must be two justices of the peace, to be elected in like manner by the electors of such cities or towns respectively; and such justices of the peace of cities or towns shall have the same jurisdiction, civil and criminal, as justices of the peace of townships and township justices' courts. Said justices of the peace of cities, and justices' courts of cities shall also have jurisdiction of all proceedings for the violation of any ordinance of any city in which courts are established, both civil and criminal, and of all actions for the collection of any license required by any ordinance of any such city or town and generally exercise all powers, duties and jurisdiction, civil and criminal, of police judges, judges of the police court, recorder's court or mayor's court, within such city. No person is eligible to the office of justice of the peace in any city or town of the first, first and one-half, second or third class, who has not been admitted to practise law in a court of record; and no justice of the peace is permitted to

practise law before another justice of the peace in the city, town or county in which he resides, or to have a partner engaged in the practice of law in any justices' court in such city, town or county. Every city justice of the peace in any city or town of the fourth class shall receive a salary of fifteen hundred dollars per annum, and every city justice of the peace in any city or town of the third class shall receive a salary of two thousand dollars per annum, and every city justice of the peace in any city or town of the first and one-half class shall receive a salary of three thousand dollars per annum, and every city justice of the peace in any city or town of the second class shall receive a salary of thirty-six hundred dollars per annum; and each justice of the peace shall be provided by the city or town authorities with a suitable office in which to hold his court.

"Where the compensation of the justice of the peace of any city or town is by salary, it shall be paid by warrants drawn each month upon the salary fund, or if there be no salary fund, then upon the general fund, of such city or town; such warrants to be audited and paid as salaries of other city officials. All fees which are chargeable by law for services rendered by such city justice of the peace in cities or towns aforesaid shall be by them, respectively, collected, and on the first Monday of each month, every such city or town justice of the peace shall make a report, under oath, to the city or town treasurer, of the amount of fees so by him collected, and pay the amount so collected into the city or town treasury, to the credit of the general fund thereof. Said salaries shall be the sole compensation of said city justices."

Section 86, California Code of Civil Procedure, provides: —

The supervisors of every city and county having more than one hundred thousand population, shall appoint a justices' clerk on the written nomination and recommendation of said justices, or a majority of them, who shall hold office for two years, and until his successor is in like manner appointed and qualified. Said justices' clerk shall take the constitutional oath of office, and give bond in the sum of ten thousand dollars for the faithful discharge of the duties of his office, and in the same manner as is or may be required of other officers of such city and county. A new or additional bond may be required by the supervisors of such city and county, and in such amount as may be fixed by said supervisors, whenever they may deem it necessary. The justices' clerk shall have authority to appoint two deputy clerks, for whose acts he shall be responsible on his official bond, the said deputy clerks to hold office during the pleasure of said clerk. Said justices' clerk and deputy shall have authority to administer oaths, and take and certify affidavits in any action, suit, or proceeding in said justices' court.

The citizenship of America is beginning to wake up to the value of trained officials. It can be judicially seen by the legal profession that great injustice is done to many of the inhabitants of our states as a necessary result, if we continue to have a justice court system without lawyers to serve in the courts as justices. There has been a gradual extension of civil and criminal jurisdiction in America. The tendency of modern legislation is further to enlarge the above mentioned jurisdictions so as to include prosecution for crimes not amounting to felonies. Under the earliest statutes relating to justices of the peace, the number in each county was increased from two or three to three or four and subsequently the number was increased to six or eight. The number is now regulated by statute, the common number being two for each township or district and a larger number in cities and towns. It is better practice to have uniform jurisdiction and in Georgia and Nebraska uniformity of

jurisdiction is required by the constitution.

At common law the justices of the peace held office for an indefinite time, and were subject to removal at the pleasure of the King. The term of office continued until demise of the King, or until a commission was issued removing incumbents and appointing other justices for the county. In the United States, a justice of the peace is elected or appointed for a term of years, usually fixed by the state constitution at two or four years. Another much needed reform is the introduction of a salary system as adopted by California, instead of the old-fashioned fee collection. Whenever the salary system is in use we are more likely to have an economical administration of the public finances. The fines collected go into the county treasury instead of being divided with the justice courts. California may well be followed by every state.

A vacancy in the office may be caused by the failure of the person elected or appointed to the office to qualify, where there is no predecessor entitled to hold over; by the incumbent's death, resignation, removal, conviction of a felony, or ceasing to be a resident of the township or district for which he was elected or appointed. The vacancy is usually filled by appointment by the Governor or some other designated public official or body. Vacancies are also filled in some states by a special election. A justice may be removed for malfeasance

or misconduct in office, such as intentional violations of the laws governing magistrates, disregard of legal rules, or intoxication while in the discharge of his official duties. But to warrant the removal of the justice, the acts charged against him must have been done in the discharge of his functions as a justice, and with corrupt, partial, malicious or other improper motives, and with knowledge that they were wrong.

During the past twenty years, the great tide of immigration to America has made a noticeable change in the scale and style of living. This newer blood has had its influence upon the justice court system and especially in its change of duties. A justice has many duties, from serving as a coroner to the closing of the marriage ceremony. In a large number of states, a justice is authorized by statute to hold inquests in case the coroner is absent or is unable to attend, or in cases of exigency, and in such cases is entitled to the fees of a coroner. This is true of Georgia, Colorado, Illinois, Iowa and Indiana. In New York the justice may act, if the coroner cannot be secured in twelve hours after the body is discovered. In Georgia the coroner must be absent from the county to authorize a justice of the peace to hold an inquest. It was a way of independence and mastery which caught the spirit of the American citizenship, and sooner or later the justice court system must be mastered. It means that some parts will be changed and the judicial stage reset.



The Legal Side of Aviation*

FROM THE GERMAN OF PROFESSOR HANS SPERL

AVIATION is interesting others besides the admiring public. It is giving the jurists new and difficult tasks. Such questions as we never had to answer before are coming up: To whom does the air belong? Who is ruler above the surface? Who gives laws for the aviator; who is to judge him and punish him? Who, finally, is responsible for the damage which his flights may entail? These questions suggest unlimited and difficult possibilities.

Up to our time the state was assumed to have control over the surface of the earth, with that part of the atmosphere above it in which men move about daily, and into which buildings, trees and plants project; no one could go higher, and the question of authority over the upper strata would have been dismissed as purposeless casuistry. Now it is different; military balloons, sportsmen's balloons, scientific balloons, even passenger balloons cut the ether in every direction, and the upper air is rapidly becoming a highway for the use of all peoples. All this involves the necessity for laws and government, if peace and justice are to be maintained.

The French jurists preach a doctrine which must touch the freedom-loving nature of mankind sympathetically. They say that the air is free from all control of law, a No Man's Land to which no state can lay claim; only in so far as the state lying beneath is constrained by the necessities of self-preservation can it adopt measures to

ward off dangers which may threaten it from aviators. This view must be condemned by every practical person, for if it prevailed there would be an end not only to the political and military security of a state but also to the security of the home, which would have no defense against injuries which may come from above. Dangers from this direction are of various sorts. Recall only the possibility that contagious diseases may be carried in balloons, that the throwing out of ballast, the falling of parts of the machinery or the explosion of the balloon itself may make trouble below. Wherever men meet men the restraint of law is necessary. The state must interpose, violently if need be, and impose a system, without whose salutary operation men cannot meet each other peacefully, even in the ether. For this reason another group of jurists give up the contention that all the air is a free and lawless expanse, to the extent of allowing that an airship which is near the earth belongs to the country it floats above, and is amenable to all its laws and restrictions; but that when it soars into the upper air it becomes entirely free. But how high does this lower stratum extend? On this question there is not agreement. Some say as high as the highest structures on the earth—1,000 feet, that is, or the height of the Eiffel Tower—others again, as high as a cannon ball can be shot into the air. A third says that since effective photographs can be taken from a balloon at a height of 5,000 feet, the state must have control to that height in order to protect its fortresses and military works against

*Translated by Roy Temple House, Weatherford, Okla.

spies. The uselessness of one of these limits may be shown by recalling that the Krupp Company make cannon for defense against air ships, which shoot 38,000 feet into the air, that is, far beyond the upper limit of the stratum in which men can breathe. This would make all the air which is accessible to men, the property of the state. We are brought thus to the third theory, which prevails in Germany, that the state is unrestrained sovereign over the air above. As far as the latter space is now or is destined to be capable of use by men, it belongs to the state beneath it. Thus the surface of the country forms the base of an irregular solid with perpendicular sides, and France, England, Germany, are no longer mere surfaces. The only space which is free is the space over the sea or over a possible No Man's Land. Over such districts the international law, the law of nations, prevails. In principle, then, our whole complicated network of laws and rights leaves the surface and penetrates the entire solid. I say in principle, for given the extreme mobility of the airships and the international character of aviation, it is sometimes necessary, in the interest of the maintenance of justice in another state, for example the home state from which the aëronaut has escaped, to apply foreign law.

The state will then be sovereign in its home air as on its home soil. It will put all its institutions in operation in the air. As we already have military balloons, we shall have — assuming that the air becomes a highway of any importance — in the future customs balloons, police balloons, etc. The modification of the character of law in consequence of the new domain places before us new and delicate questions of military law, with which Germany and France in particular have been very

busy of late. The full meaning of these problems will not be evident till the airships actually and seriously take part in a war.

The extension of the state's domain upward and the conception of air-boundaries brings with it new complications and difficulties. The machines of one state must in times of peace respect the aërial territory of another state. They can enter another state only under such limitations as surround the skirting of foreign coasts or the visiting of foreign ports with war ships. In case of war the airships of neutral states cannot enter the air territory of the belligerent powers without exposing themselves to the danger of being treated, in accordance with the laws of war, as the belligerent state which is visited may find it to its interest to treat them. The military airships of the contending parties must on the other hand unconditionally avoid the territory of the neutral powers. The erection of a national control over all spaces above the country, valid in peace and war, does not in any sense mean a limitation of the freedom of international aviation. It is rather a recognition and establishment of the fullest possible freedom.

Over one point there is already general agreement: all states will introduce compulsory registration, that is, every airship must have a definite home and be there entered by the authorities in a publicly accessible airship list. This list will play an important part in the numerous legal quarrels which will be constantly arising. Every ship will be compelled to carry papers, just as the ships do which sail the ocean.

Scarcely less serious difficulties meet the jurist when he considers the position of the airship with reference to the rights of the individual. The question

of the landowner's rights in the air above is not an easy one. The most reasonable position seems to be that the landowner's rights extend into the air above his holdings, but only as far as his practical interests demand, as far as he is able and willing to use the air and hence to reserve it for his own use. Higher than this he can lay no claim; his right of possession is at an end. Below this very vague and variable limit the air is his, and strange flyers are dependent on his permission.

Up to the present time the most difficult and doubtful legal questions in connection with aviation have been brought to light by suits for damages caused by flights or landings. I will cite three cases in which decisions have been rendered: On the 3d of April, 1910, the balloon *Pomerania* came in contact near Stettin with a government telegraph line and broke the wires, then bounded back against a factory building and tore down a chimney. The wind which was raging then drove the balloon out over the sea, where its inmates, Dr. Delbrück and two companions, were killed. Who was liable for the damage to the telegraph wires and the chimney? Again: On a meadow near Frankfurt a balloon was forced to land because its gas supply gave out. The inhabitants of the neighboring village swarmed out curiously to the scene of the accident, and in so doing trampled a vegetable garden to ruin. The owner brought suit against the aeronaut for the injury to his vegetables. The aeronaut replied: "I did no damage; I was a long distance away from your garden." The court, nevertheless, awarded the vegetable dealer his damages. A very remarkable case was brought up in the Belgian Chamber of Deputies in June, 1909, by the Minister of Justice, Lantshere. Near a certain small town a

balloon began to collapse from loss of gas. The pilot, seeing himself forced to land, chose for the purpose an open space beyond the town. As he flew just above the roofs of the houses, with his ropes dragging in the streets, the inhabitants, supposing that he wished to be drawn down, seized the ropes. The aeronaut cried to them to release him; his cries were not understood, were assumed to be cries for help, and the townsmen pulled the balloon to the earth. The pilot was forced to open his valve to release the gas. In the second story of a house in the narrow street a man was smoking; his cigarette ignited the escaping gas, and there was an explosion, with dead, wounded and destruction of property. The Court condemned the aeronaut to pay all damages, because he was held responsible for the accident.

The circumstances force us to call the aviator to account for damages and not leave the burden on the injured terrestrial proprietor. We are practically helpless against the dangers which threaten us from these inaccessible vehicles of unknown ownership. We cannot guard against them and we cannot escape them. The aviator has brought new perils into the world; and yet he is demanding that his fellow-man be laden with new obligations for his convenience. Thus he asks, for example, that all structures which are more than 150 feet high be lighted all night with a lantern, and that aeronauts in danger be allowed to fly and to land wherever circumstances demand.

However the laws of a particular country may regulate the matter, no one state can find an adequate solution of the problem. In order to settle the question of the securing of restitution in a fair and adequate manner, I have proposed an international juristic-com-

mercial arrangement. Every country must take measures to establish compulsory organization of aeronauts with collective security. No machine can venture into the air without having been registered, and registration must be accompanied by entrance into the aviators' organization. Each society collects dues; these dues go into damage and insurance funds which are deposited in an international central office, to be used in case of accident. A trial to determine whether the aviator is respon-

sible for injury is entirely eliminated. Nothing is necessary beyond proof of the injury. The injured person would not need even to know the name and home of the offending airship. He merely brings evidence that the harm was done by an airship. The local organization which paid the damages would be in a position to locate the ship which had caused the trouble and recover the amount from the local society where the ship was registered or from the central treasury.

Music and the Law

IT is surprising to think of any close bond between the profession of the law and that of music, but a writer in the *Juridical Review* asserts that "more great composers have left the study of jurisprudence to devote themselves to that of the 'divine art,' or combined the two, than is the case with any other profession."¹

About A. D. 1600, around which time modern music sprang into being, Heinrich Schutz, or Sagittarius, who received his legal education in the University of Marburg, became the apt pupil of the renowned Gabrieli of Venice, and was prevented only by the shrewd perceptions of his patron from becoming a lawyer on his return to Germany.

Eighty years later, Kuhnau, the fore-runner of Bach, "studied law to the extent of qualifying as an advocate"; and "when he died in 1722 Kuhnau had the reputation of being one of the most famous men of his time."

Bach was not a lawyer, but he endeav-

ored to put two of his sons into the profession, one of them, the famous Emanuel Bach, studying jurisprudence at the University of Leipsic. Likewise their English contemporary Arne, composer of "Rule Britannia," served two years' apprenticeship to a solicitor.

Handel and Holzbauer were both destined for the law. Marcello of Venice combined the practice of music with that of the law, and Rocklitz came very near entering the profession.

Coming down to more recent times, and to more familiar names in musical history:—

"Undoubtedly the greatest composer who actually entered on a study of the law — Handel, as already explained, did not — was Robert Schumann, the centenary of whose birth has just been celebrated. Between Romanticism, with its cult of pure imagination, its fondness for the supernatural, and abhorrence of formalism and precedent on the one hand, and forensic principles on the other, there would appear to be a sharp contrast, if not absolute antagonism. Schumann was the very incarnation

¹ Clement Antrobus Harris, in 23 *Juridical Review*, 65 (Apr.).

of Romanticism, and in music its 'chiefest apostle.' One is not surprised therefore to read that his entering Leipsic University as *Studiosus Juris* was solely to please his widowed mother who would not hear of his following an artist's career. Nor is it surprising that she defeated her own end, for at Heidelberg University — to which Schumann shortly transferred himself — her son made the acquaintance of Willibald Alexis, who had already trodden the path Schumann was destined to follow — that through the law to music. And the eminent jurist whose classes he attended, A. F. J. Thibaut, was an amateur musician of high attainments and the author of a work on precisely that aspect of music to which Schumann

was peculiarly sensitive, namely 'Purity in Musical Art.' Moreover, Schumann studied long enough — in all two years — and ultimately hard enough, to prove that failure was due to his utter incapacity for a legal career. . . .

"Gottfried Weber, Doctor of Laws and Philosophy, and State Attorney at Darmstadt, . . . was not only proficient on the piano, flute and violoncello, but became eminent as a musical theorist." Siegfried W. Dehn, who is remembered chiefly as a critic and theorist, and as the teacher of Glinka, Kullak and Rubinstein, studied jurisprudence at Leipsic from 1819 to 1823. And Von Bülow only after two years' study of the law at Leipsic and Berlin threw over his career as a lawyer.

Obstacles to Legal Reform

BY E. DEFORREST LEACH

MUCH criticism is being made by the press and general public because the legal profession does not reform the laws of court procedure. The need for such reform is more evident to the lawyer than to the layman, but the means of accomplishing the change is by no means so clear to him as it appears to be to his critic. Nothing appears to be easier to the lay mind, when once a change in the law is agreed to be desirable, than to prepare a new law and have it passed by the legislature. There usually being a large number of lawyers as members of each branch, the failure to pass such reform measures is taken as positive proof that the legal profession is opposed to progress and reform in these matters.

The result of an effort to pass legislation of this character in one state during the recent session of its legislature, is, I think, typical of all. The legal profession was as largely represented as it usually is in such bodies, and the reforms desired were as generally agreed upon by the state bar association and the lawyers who were in the legislature as could be expected, yet, although over thirty different bills were introduced, each directed to reforming the procedure of the courts in that particular state, only one was passed. Many of these defeated bills were of great merit and would have been of untold value to the residents of that state in improving acknowledged defects in the practice existing therein.

Why then did these bills fail to pass? Simply because they were considered to be "lawyers' bills." The average legislator is very suspicious of and bitterly opposed to supporting measures which are favored only by lawyers. The mere fact that he can see no virtue in them himself and nothing which will attract his constituents, and is obliged to rely upon a lawyer's explanation for the merits of the bill, is sufficient reason for him to oppose it. He argues that he can see no excuse for squandering the valuable time of the legislature and the money of the taxpayers in passing laws for the sole benefit of the lawyers. His patriotism is aroused when you attempt to show him that the measure is of far more importance to the state than his bill to make the birthday of Christopher Columbus a holiday or to place a tax on bachelors. If enough publicity is given to the matter, his constituents will usually ratify his position. When all, or nearly all, the lawyers combine to secure the passage of a measure, independent of party sanction, that is a signal for all the lay members to combine to defeat it, and so matters drag along from one session to another.

Of course, the spirit of party politics, which since the Civil War has largely usurped the spirit of patriotism, is often the cause for the defeat of many measures of merit in every line. That our citizens have been educated to look upon any movement receiving the endorsement of a political party other than their own with disfavor, is little short of actual disgrace. The minority party is supposed to resort to every effort, honorable or otherwise, to defeat

or embarrass the majority in the passage of any beneficial legislation. The greater the merit of the bill the greater the need of keeping the majority from passing it and getting the credit for so doing.

One other plan has been proposed by which the unsatisfactory conditions now admitted to exist may be removed, *i.e.*, by adopting a short practice act to be supplemented by a Code of Rules of Court, prepared by the judges themselves and amended by them from time to time as conditions might require. But again the legislature must be called into use, and where is the political party which would dare to father such an innovation, even if it were possible to elect a legislature favorable to such a measure? Once let such a plan be seriously considered and every socialist, labor leader, anarchist, trades-unionist, direct primary advocate, pseudo-patriot and yellow journal would excel themselves in their denunciation of the courts and the means resorted to to deprive the people of their sacred rights for which our fathers so bravely fought and bled and for which they themselves care nothing except to criticise. Such centralization of power in the courts will not be permitted until the state of the public mind has been materially altered.

In the matter of reforming the legal procedure in this country, as in most other things, it is much easier to point out defects than to suggest real remedies, and it is far easier to do both than to secure the enactment of laws by the state legislatures remedying the defects.

Moundsville, W. Va.

A Government of Laws¹

BY S. B. PETTENGILL, JR.

O GOVERNMENT OF LAWS! Thou art the fruit
Of ancient strife and immemorial wars.
Through the long-travailing years of tyranny
And greed thou'rt come to thy consummate place
Where thou dost stand — the flower of ages' growth —
Best promise of the progress of the world.
For thee the fathers left old England's shores, —
Their white sails caught the driving westward winds
And brought to this new land a stalwart race,
A mighty faith and love of liberty.
For thee strong men have died! For thee was shed
The bravest blood that ever hotly pulsed
In warriors' veins. Upon thy deathless shield
Deep-carved are thy heroes' names — Langton,
De Montfort, Cromwell, Hampden, Nathan Hale.
At Runnymede and Lewes, Marston Moor,
Naseby and Lexington, at Concord Bridge
And countless long-forgotten battlefields,
They blew the signal for the world's advance
And struck the death-knell of the right of kings.
Thou art the guardian of the State! No more
Shall whim and vile caprice of princes rule.
No more shall lords, booted and spurred, ride down
Their fellow-men. The tempest and the storm
May pierce the rude-thatched cottage, but the king
Must wait without. With Justice at thy side
Thou watchest over all. To every man
Humble or great, thou giv'st a sure defense
And citadel — the conscience of his peers.
With even scales thou weighest every right
And thou dost sternly judge of every wrong
And dost hold the balance true.

¹From the class poem of the present year at the Yale Law School, published in the *Yale Shingle*.

Battles of Great Lawyers: Patrick Henry

THE BRITISH DEBTS CASE

BY ARTHUR WAKELING

PATRICK HENRY, when he was a young married man of twenty-three years, was a complete failure. He had tried clerking, farming and keeping a country store, all with equally negative or disastrous results.

"Best of all," he said cheerfully to himself, "I will become a lawyer."

Six weeks he allowed himself, as a matter of formality, to prepare for the bar. During this time he read one book — "Coke upon Littleton" — supplemented by an equally strenuous perusal of the "Digest of the Virginia Acts."

His examiners, Wythe, Pendleton, Peyton Randolph and John Randolph, hardly knew whether to be more amazed at his ignorance of law or his profound knowledge of history. After no little deliberation, he received his license.

"Mr. Henry," John Randolph exclaimed enthusiastically after his examination of the young neophyte, "if your industry be only half equal to your genius, I augur that you will do well and become an ornament and an honor to your profession."

This was in 1760. Thirty years afterward, at the end of a long and successful career as a lawyer, statesman and executive, Patrick Henry fought the greatest legal battle of his life.

This action, known as the British debts case, was not only one of unusual importance, but it was also one of the greatest difficulty. It involved legal questions ranging from the simplest and most self-evident propositions of

common law to the most intricate and subtle points of international jurisprudence.

When the Circuit Court of the United States opened at Richmond in 1790 a number of cases were brought by Englishmen to whom money had been owing by American debtors before the Revolution.

The various defendants joined together and retained Patrick Henry, John Marshall, Alexander Campbell and James Innes as counsel. Messrs. Ronald, Baker, Wickham and Starke appeared for the plaintiff in the test case of William Jones, a surviving partner in the English law firm of Farrel and Jones, against Dr. Thomas Walker. The action was brought on a bond dated May 11, 1772.

Patrick Henry was peculiarly involved in the suit, for he had, as Governor of Virginia during the Revolution, been responsible in large part for an act of sequestration, which provided that "it should be lawful for any citizen of this commonwealth, owing money to a subject of Great Britain, to pay the same or any part thereof, from time to time, as he should think fit, into the loan office of the state; taking thereout a certificate of the same in the name of the creditor, with an endorsement under the hand of the commissioner of the loan office, expressing the name of the payee, and delivering such certificate to the governor and council, whose receipt should discharge him from so much of the debt."

The defendant held that debts were

as properly subject to confiscation as any other property, and that the last clause of the above quoted portion of the act was ample protection in any legal action.

The defendant had, in reality, paid almost \$11,000 into the state treasury under the sequestration act, for which the governor's receipt had been duly given.

British creditors were empowered by the treaty of 1783, however, "to recover debts previously contracted to them by our citizens, notwithstanding a payment of the debt into a state treasury had been made during the war, under the authority of a state law of sequestration."

The plaintiff's case seemed to be further strengthened by a paragraph of Article VI of the Constitution, which reads:—

This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding.

This, in brief, was the case for the plaintiff, although in its many ramifications it embraced complicated points of municipal, national and international law.

The defendant contended that the treaty had been rendered null and void by violations on the part of Great Britain in carrying off negroes belonging to Americans, in continuing to occupy the forts of Niagara and Detroit, in supplying hostile Indians with arms, and in holding some American prisoners. In short, England was classified as an "alien enemy," and was therefore deprived of any recourse in the courts of United States.

The case was to be argued at the

November (1791) term of the Circuit Court at Richmond before Judges Johnson and Blair of the Supreme Court and Griffin of the District Court. For several weeks before the case was to be reached, Patrick Henry devoted himself to a close and detailed study of the action. When he found he would require a copy of Vattel's "Laws of Nations," he sent his grandson, Patrick Henry Fontaine, who was a young law student, sixty miles to get the book.

In spite of the fact that the argument was purely technical, on the day that Patrick Henry was to speak the large court room of the capitol was crowded long before eleven o'clock. Even the windows were occupied when all the seats had been filled. And no small portion of those who could not get into the court itself, remained standing in the portico or near the building.

The speaker of the legislature, which was sitting at the time, found himself without any house. The desire to hear Patrick Henry speak in so notable a case had been stronger than any demand of routine business.

As Patrick Henry rose, the crowd in the court room became quiet with the deep, tense silence of eager attention. Yet there was nothing ornate, nothing spectacular about the beginning of the lawyer's argument.

"I stand here, may it please your honors," he said simply, "to support, according to my power, that side of the question which respects the American debtor."

He showed clearly and concisely, quoting Grotius and Vattel as his authorities, that debts were a just object of forfeiture during a common war.

"But call to your recollection our situation during the late arduous contest. Was it not necessary in our day

of trial to go to the last iota of human right? The Romans fought for their altars and household gods. By these terms they meant everything dear and valuable to men. Was not our stake as important as theirs? But many other nations engage in the most bloody wars for the most trivial and frivolous causes. If other nations who carried on war for a mere point of honour, or a punctilio of gallantry, were warranted in the exercise of this power, were not we, who fought for everything most inestimable and valuable to mankind, justified in using it? Our finances were in a more distressing situation than theirs at this awful period of our existence. Our war was in opposition to the most grievous oppression. We resisted, and our resistance was approved and blessed by Heaven."

The wonderful power of Patrick Henry's oratory was shown in a particularly vivid and striking manner by two contrasting portions of his speech.

"The consent of Great Britain was not necessary to create us a nation," he asserted. "Yes, sir, we were a nation long before the monarch of that little island in the Atlantic ocean gave his *puny* assent to it."

He drew himself up to his full height, motioning away as to an infinite distance. For an instant it seemed as if he were trying to catch a glimpse of some minute, faint object far off in space. His lips curling with contempt, he uttered the words "*puny assent*" with such emphasis that in the minds of his auditors Great Britain was reduced to the merest shadow of a nation.

Later on he had occasion to show the power of England.

"The fact was," he contended, "that we were attacked by one of the most formidable nations under heaven, a nation that carried terror and dread with its thunder to both hemispheres."

And just as he had pictured England a little speck of an island, almost beneath contempt, he swept on to such an overpowering picture of the immensity of her power and the mightiness of her resources, that his audience responded with a startled murmur to the thrilling vehemence and sheer force of his description.

Briefly summarized, Patrick Henry's argument was that debts were subject to confiscation in common wars; that they were much more so in a war like that of the Revolution; that Virginia, as an independent nation, could exercise the right of eminent domain in the sequestration of the debts of her enemies; that she had done this, legally discharging the debtors of all obligation; that, since Great Britain had violated the treaty of 1783, the treaty did not revive any claims of the English creditors; that these debts did not come within the scope of the treaty in any event; and that the court had full jurisdiction upon the subject of the treaty.

He had been speaking three days before he finished his argument and rebuttal, and during all that time the court room remained crowded with legislators, lawyers, business men and society women. Not until he had finished could a quorum of the House of Delegates be collected to transact official business.

The case was argued again before Chief Justice Jay and Judges Iredell and Griffin in 1793.

Jefferson, who was not prone to praise Patrick Henry, said: "I believe he never distinguished himself so much as on the question of British debts."

This, the most brilliant of his legal battles, came practically at the end of his career, although he was afterward offered the position of Chief Justice by Washington. He declined this honor.

At his home at Red Hill, June 6, 1799, he died. One sentence was inscribed on the simple marble slab that marked his grave, an apt commentary on his life — "His fame is his best epitaph."

Nutley, N. J.

A Conscientious Juryman

BY EDGAR WHITE

"GENTLEMEN, are your opinions such as would preclude you from returning a verdict of guilty where the punishment would be death, although justified by both the law and the evidence?"

Talesman Crafton looked around loftily at his fellows to see if any showed the white feather at the sinister question of the court. One kindly featured, white-haired gentleman raised his hand.

"What's the matter, Mr. Jones?" asked the judge.

"I couldn't do it, your Honor," said the old gentleman; "my conscience is against it."

"Although justified by the law and the evidence?" said the judge.

"Although justified by the law and the evidence," repeated the talesman, with solemn finality.

"Stand aside."

Talesman Crafton smiled sneeringly at the brother's weakness and timidity. He had no such scruples. He would track the law to the bitter end. Courts were instituted among men that criminals might be punished and society protected. He gloried in the opportunity the trial would give him to vindicate the majesty of the law. According to his way of thinking the country was going to the dogs because of the absence of vertebræ in jurors.

Had the defense known the workings

of Mr. Crafton's mind at that stage of the game it would probably have blotted out his name. But mental telepathy not having reached the stage of practical application, the stern talesman had the grim satisfaction of answering to his name when after twenty-four hours' careful winnowing by both sides the twelve were called.

The defendant was a young man of unattractive personality. His lips were thick, and he constantly moistened them. Out of the sallow face gleamed two restless black eyes, shaded by midnight brows. Beside him was a light-haired, girlish creature, who chatted vivaciously with the lawyers, and seemed to enjoy the unusual prominence the trial gave her.

She was the defendant's wife, and the tragedy occurred in the protection of her honor, the lawyer for the defense said.

The state proved by a score of witnesses that Charles Montgomery, the slain man, bore an irreproachable reputation, that he was happily married and that he wasn't at all the sort of man who would offer an insult to a woman. The testimony showed that on the night of the killing Montgomery had been to an ice-cream social with his wife and children, and had strolled out of the park to enjoy a cigar, intending to return shortly and take his folks

home; he was not acquainted with defendant's wife, and didn't know she was on earth until a man in shirt sleeves ran out of a house and commenced shooting at him.

Then the girlish looking wife, all a-quiver like a bird, took the stand and told of a "great, strange looking man who had pursued me to my very door," and then she rushed in and told her husband of the "villain."

The state's lawyer wanted to know if she was acquainted with the deceased. She said she had heard of him, but had never spoken to him; no, he didn't speak on the night in question, but he acted like he wanted to; it was after dark and she was afraid something might happen if she did not tell her husband; she was a dutiful wife and kept nothing from him; no, the deceased had not tried to touch her, but no telling what he would have done if she hadn't run; no, sir, she had never been intimate with men other than her husband! It was an insult to ask such a question. Y-e-s, she had known Tommie High-flyer — just slightly, but that was long ago; she didn't see what that had to do with the case. Not a bit of it! Tommie had never been her lover — that is, not since she married Ben Beverly. She was positive she had walked circumspectly during her married life. She had a vague recollection of being with Jack Rounder one night during the carnival, but that was a time of unconventionality and everybody did as the pleased, and thought nothing of it. Jack may have kissed her on that occasion, but she was not certain; it was too trifling a matter to remember.

At proper intervals the golden-haired witness allowed her blue eyes to become suffused with tears, which had a charming effect, and did much to rebuke the cold-blooded impertinence of the spec-

tacled prosecutor. When she left the stand Beverly's lawyers told her she did finely, and her innocent face glowed with pleasure.

It was about somewhere along here that Juryman Crafton began to experience a change of heart. He realized that there might be two sides to the case, after all. The loyal little wife was too sweet and innocent to try to deceive him; that man Montgomery was certainly traveling outside of his bounds. This process of reasoning received powerful aid when the big lawyer for the defendant got up and painted pictures about the sanctity of the home and the warrant for the "Unwritten Law." Juryman Crafton came near clapping his hands several times, and was somewhat astonished to find his comrades in the box did not appear to be similarly affected; perhaps they were, but they were diplomatically restraining their impulses. Before the big attorney was half through Juryman Crafton's head was set; he would turn the defendant loose and make the little girl happy. One should do all the good he could; there was sin and suffering enough in this old world, goodness knows!

"By your verdict of acquittal, gentlemen," thundered the big attorney, "you serve notice on every seducer in the land that he must except to reap the awful consequences of his unholy passion. I am confident you will release this poor boy, and let him return home tonight with the devoted little woman whose honor he has so manfully protected. I thank you, gentlemen."

Juryman Crafton mopped his dewy eyes and bit his lips to restrain his emotion. As far as he was concerned the case was over. His verdict was ready.

The prosecutor, cold, impassive, incisive, reviewed the evidence. He maintained that it showed clearly the life

of a good citizen had been taken on the unsupported word of a giddy, foolish, gum-chewing girl, and that the prisoner should not be permitted to escape the proper consequences for his murderous action, which was absolutely without foundation in reason. He said the "Unwritten Law" had been invoked so often and on such shadowy pretexts that he thought the more proper name would be "The Right of Murder Without Excuse." He didn't see how — even the greatest latitude — the "Unwritten Law" could be stretched to apply to a case where there was an absolute want of proof that the man had attempted a wrong.

Of course to Jurorman Crafton, in his new frame of mind, such argument was mere sophistry. The state's attorney had to earn his salary, and naturally was putting up the best fight he could in the circumstances. He had the wrong end of the case; that was all.

In the seclusion of the jury room a foreman was elected, and a ballot taken. The result was eleven for guilty of murder in the first degree, and one for acquittal. The amazement of Juror Crafton at the imbecility of his comrades was boundless. Nothing but rank prejudice or pitiable ignorance could explain such conduct. He begged and pleaded with them to throw aside their bias, and reason the thing out like fair-

minded men. So earnest was he that he mounted a chair and argued like an advocate in order to prevent them from staining their names with the infamy of convicting an innocent man.

They listened to him with stony faces. In all the hours of his laborious effort he had made not the least impression; there were eleven mulish men on the jury. At last, worn completely out, the crusader for mercy sat down.

"You want to acquit that man?" said the foreman, calmly.

"I certainly will never be a party to the shedding of innocent blood," retorted the juror.

"There's no likelihood of your coming over to our side?"

"I cannot vote against my oath and my conscience."

The foreman smiled wearily.

"Then we might as well go in and report, boys," he said.

The jury filed back into the court room and ranged in front of the judge. After the clerk had completed the roll call, the judge said: —

"Gentlemen, I regret to inform you that owing to the misconduct of one of your number there has been a mistrial in this case. I was just about to send for you. Mr. Sheriff, you will please take in custody Juror Jonas Crafton, against whom an information has just been filed charging bribery."

Macon, Mo.

Why Will They Do It?

BY HARRY R. BLYTHE

STONE walls do not a prison make,
Nor names a corporation.
I think this rule can be laid down
Without elaboration.

Yet some good men have thought they were
 Just what the name connoted —
 A corporation — just because
 High sounding names were floated.

The tailors three of Tooley street
 (Their nerve was most astounding)
 Thought they could England's people be
 By just that fact propounding.

What England's people did to them
 Has long ago been famous,
 The word that fits their sorry case
 Is that word — ignoramus.

Yet spite of their unhappy fate
 In falsely thus parading,
 Men still adopt the ruse they took
 As modern means of trading.

This phantom of false unity —
 Oh, why will men pursue it?
 Are not our laws quite plain enough?
 Great Coke! Why will they do it?

Reviews of Books

DILLON ON MUNICIPAL CORPORATIONS

Commentaries on the Law of Municipal Corporations. By John F. Dillon, LL.D., author of "The Laws and Jurisprudence of England and America"; president of the American Bar Association 1891-2; formerly Circuit Judge of the United States for the eighth judicial circuit, Chief Justice of the Supreme Court of Iowa, and Professor of Law in Columbia University. 5th edition, thoroughly revised and enlarged. 5 v., pp. lxi, xiii, xii, xiii, 3064 + table of cases and index in one vol. (\$32.50 net, delivered.)

DILLON on Municipal Corporations has long ranked as one of the

ablest of American law treatises. Its reputation has been of the character expressed in the remark of Mr. Justice Bradley of the United States Supreme Court that it is "really one of the legal classics." It has now just appeared in a new fifth edition, but the work in its new form is much more than a revision — it is virtually a new book. The treatise now fills five instead of two volumes, nine new chapters have been added and the old ones greatly length-

ened, and more than half of the material is entirely new, the length having been increased from 779,000 to 2,035,000 words.

The appearance of the new Dillon on Municipal Corporations is thus an event of signal and profound importance. The work at once claims a position for itself among the half-dozen leading text-books dealing with American law ever written, if, indeed, not as the most important produced in this country since Kent's Commentaries and Story on the Constitution.

It would be hard to find a more striking monument to the industry of a single man, or to the protracted labor of a life now nearing its eightieth milestone. It was in the well-supplied law library of James Grant of Davenport, Iowa, that Judge Dillon fitted himself for the bar, and he has said that it was in this library that the desire to write a treatise on municipal corporations must have been first aroused. While an occupant of the Supreme bench of Iowa, he became possessed with the wish to write a legal work which might serve the needs of judges and practitioners alike, and he could not have made a happier selection of a subject, for the law of municipal corporations was then in a state of much uncertainty, and no other branch either of public or of private law touches more closely the lives of American citizens. In the Grant law library he found complete sets of the state reports, and the intervals between terms of court were devoted to a laborious and systematic exploration of the trackless wilderness of case-law of whose formidable proportions Judge Dillon has written elsewhere with a vividness born of personal experience. Beginning with the state of Maine, he set out to examine all the cases in the reports dealing with the

law of municipal corporations, and this research, in which he had the services of neither stenographer nor assistant, occupied all his available time for about six years. Besides consulting hundreds of volumes of reports, he investigated every English publication relating to the subject. There was little to guide the author in the arrangement of his materials, and his task was thus the more difficult. Filled with the desire to give his treatise the greatest possible practical utility, and realizing that the greater portion of those who would use his work would not have ready access to large law libraries, he voluntarily shouldered the labor of setting out in extended footnotes the general facts underlying the adjudications. In the course of time, in 1872, the work appeared and at once met with a favorable reception from bench and bar. The treatise soon came to be frequently cited by the courts as a standard authority. Succeeding editions saw it enlarged and brought up to date, and in the present edition all the decisions since the fourth of 1890 have been examined, resulting in the citation of many thousand new cases and a great amplification of the text in which their doctrines are expounded.

The accuracy of Judge Dillon's methods and his gift for exposition are well known through the former editions. The most striking characteristic of his work is the wonderful thoroughness with which it has been done. This great law book has been erected on a firm foundation of painstaking attention to the smallest details and finest ramifications of an intricate subject. Not the method of easy generalization, but that of patient and tireless dissection, has been followed. The result is a structure exceptionally firm in its masonry, analytical rather than specula-

tive, impregnably built up around the existing law, rather than around the author's opinion of what the law ought to be. America may have produced jurists of keener insight into the abstract principles of the law than Judge Dillon, but it has not produced any one his superior in the indefatigable zeal which performs the irksome labor essential to a sound and applicable interpretation of the law that is.

It is a truism that no man can produce above his own level, and a corollary of this is that no one but a great jurist can write a great treatise on the law. Judge Dillon modestly attributes such merits as his work may possess largely to the fact that it was written by a judge and practitioner, but that is only half the story. No one but a jurist of the highest attainments could treat the disputed and more shadowy problems of the law with such admirable judicial moderation and such sane self-restraint. The very caution of his utterances lends them an added authority, for if he ventures to criticise or to correct a debateable doctrine, such as that, for example, that land may be taken by eminent domain only for a necessary public use, the contrary view is suggested only with prudent circumspection. Conservative yet permeated with good sense, his elucidation partakes of the majestic impartiality of the law itself, reflecting in the mirror of his erudition its inherent reasonableness and plastic continuity.

The new chapters added deal with Constitutional Prohibition of Special Legislation, Constitutional Limitations and Restrictions on Power to Incur Debt, Amotion or Removal of Officers, Ordinances Exercising the Police Power, Warrants on Municipal Treasury, Municipal Bonds, Street Franchises, Public Utilities, and Special Assessments. These new chapters exhibit but a small fraction

of the enlargement of the work. The most important topics brought down to date are possibly the regulation of public utilities and their charges, constitutional limitations on municipal indebtedness, and special and class legislation. The sections dealing with these topics embrace a great wealth of new material.

RECENT WORKS ON POLITICAL SCIENCE

Organismic Theories of the State: Nineteenth Century Interpretations of the State as Organism or as Person. By Francis W. Coker, Ph.D., Instructor in Politics in Princeton University, Sometime Fellow in Political Philosophy in Columbia University. Columbia University Studies in History, Economics and Public Law, v. 38, no. 2. Pp. 204 + 5 (bibliography). (\$1.50.)

Introduction to Political Science; a treatise on the origin, nature, functions and organization of the state. By James Wilford Garner, Ph.D., Professor of Political Science in the University of Illinois. American Book Company, New York, Cincinnati, Chicago. Pp. 606 + 10 (index). (\$2.50.)

American Government and Politics. By Charles A. Beard, Associate Professor of Politics in Columbia University. Macmillan Co., New York. Pp. viii, 753 + bibliography 5 and index 12. (\$2.10 net.)

Principles of Politics, from the Viewpoint of the American Citizen. By Jeremiah W. Jenks, Ph.D., LL.D., Professor of Political Economy and Politics in Cornell University. Columbia University Press, New York. Pp. xviii, 175 + index 11. (\$1.50 net.)

The People's Law; or Participation in Law-Making from Ancient Folk-Moot to Modern Referendum; A Study in the Evolution of Democracy and Direct Legislation. By Charles Sumner Lobingier, Ph.D., LL.M., Judge of the Court of First Instance, Philippine Islands; Commissioner to Revise and Edit Philippine Codes; Member National Conference of Commissioners on Uniform Laws; Formerly Professor of Law in the University of Nebraska. The Macmillan Co., New York. Pp. xxi, 394 + appendix 35. (\$4 net.)

The Old Order Changeth: A View of American Democracy. By William Allen White. Macmillan Company, New York. Pp. 254 + appendix 12. (\$1.25 net.)

THE so-called organismic theory of the state is adversely criticized by so many distinguished writers that one is almost tempted to say that the current orthodox theory of political science is that the state is an aggregate, not an organism, and that its juristic personality is a legal fiction and not a reality. The adverse critics include sociologists

of the eminence of Giddings, Jellinek, Tarde, Leroy-Beaulieu, Gumpłowicz, Willoughby, and Edmond Kelly, not to mention many others. On the other hand, this sentiment is by no means unanimous, and the distinguished advocates of the organismic theory, in some one of its phases, have included writers like Gierke, Blutschli, Spencer and Comte. Of these Gierke is living, and his theories are marked by such contemporary vitality and importance as hardly to be capable of receiving adequate treatment in a two-hundred page monograph making a general examination of nineteenth century doctrines. While the writer has hardly underrated the organismic theory in its extreme forms, he has possibly failed to pay due respect to some of its later, saner manifestations. Moreover, there are some elements of truth in the organismic theory, as society is always struggling to attain a closer correlation of its parts, and the danger lies in the assumption not that society has unity, but that this unity is absolute. If we go too far in denying the organic or quasi-organic unity of society we are apt to fall into the error of propounding a doctrine just as artificial and visionary as that from which we seek to escape. The author, in conveying the idea that every phase of the organismic theory is subject to criticism, tends to align himself with an individualistic school unlikely to survive late into the present century.

The importance of the subject would have rendered a more extended treatise profitable. With the help of a fuller exposition of the views of the writers treated, their doctrines might have received more luminous discussion. With most of the author's general observations we agree, our complaint being that he has not been sufficiently copious and specific in his criticisms of particular

theories. In the main the treatment, however, is cautious and scholarly, and the book is a useful one in a new and important field.

Professor Garner has supplied an introductory text-book of such high excellence, on political science, that our only regret is that his abilities should have been concentrated on the preparation of an elementary work, rather than of that scientific treatise for scholars which he shows himself so well qualified to write. This book has the merit of viewing a wide range of topics and giving a symmetrical exposition of the rudiments of political science, studied in proper perspective by a mind fully in touch with the advanced tendencies of contemporary investigation. The writer has an admirable mastery of the subject, and the style of the book is marked by clearness and precision of statement and acuteness of analysis. In the conclusions submitted we find nothing of material importance to invite criticism.

The book, fortunately, does not encroach upon the field either of descriptive or of applied politics, confining itself to the purer and higher side of the science, and the advantages of this mode of treatment are sufficiently obvious. Another advantage is found in the method adopted, of setting forth, by means of numerous excerpts, the views of leading writers on the questions discussed. The student is thus enabled to familiarize himself with the discussion that the principal problems have called forth, and with the history of leading theories. He is thus placed in a better position to understand the more important issues than he would be by a treatise simply setting forth the views, however sound, of a single writer. The only drawback to this method of discussion is the self-effacement it enforces

upon an author whose independent opinions would be serviceable, but a different method of presentation would have necessitated, in a treatise of this length, the suppression of a great deal of material helpful to the student, and Professor Garner's modesty is not a serious defect. Not the least merit of the work is its full collection of quotations and bibliographical references, which make it a splendid guide-book to the literature of political science, not without usefulness to the more advanced student.

Professor Garner's work reflects the high character of the teaching at Columbia University, of which he is a graduate, and of the same type of admirable scholarship is Professor Beard's more concrete treatise on a branch of what we may call descriptive political science. It aims to be nothing more than a description of a highly complex political mechanism, for students of government. The method is largely historical, and a luminous exposition is given of the most recent developments of a constantly changing political system. The book is constructed upon an independent plan of its own, attention being paid to colonial origins and the functions of both federal and state governments, while the political parties receive full consideration. The book will serve as a most useful companion to Professor Beard's "Readings in American Government and Politics" (reviewed *22 Green Bag* 244). Facts rather than deductions make up the greater part of its bulk, and because of its orderly marshaling of facts, and its concise summaries of the experience of the American people with their problems of organization and administration, the work can hardly be secondary to Ambassador Bryce's "American Commonwealth" at least with respect to the skill with which it delineates our political institutions.

Professor Jenks' "Principles of Politics" is a work of a different type, and its title is inapt, as it is not a scientific treatise on fundamental principles but simply a collection of loosely discursive lectures or essays on selected topics, such as the nature of the state, political motives, the suffrage, political parties, representation, legislation, administration, the judiciary, constitutions and international relations. The treatment is unsystematic, and follows the method of applied common sense rather than of applied science. The author professes himself to have secured more material from men engaged in the practical work of politics than from scientific treatises. The book is not a text-book, but is addressed especially to younger citizens. Its tone is one of moderation and impartiality, and its interpretations exhibit good sense and are frequently suggestive. It is hardly to be characterized, however, as a striking or important group of lectures.

Judge Lobingier's book is of an entirely different type from the three already noticed. The first feature to attract attention is an elaborate history of the popular framing, amendment, or ratification of constitutions in the United States. On the thoroughness with which this special topic of American political history is worked out rests its chief claim to be taken seriously, and the work is undoubtedly an important contribution to the history of popular legislation. Apart from the attention given to American history, not enough study is bestowed upon popular law-making in other countries or in earlier ages to round out a symmetrical treatise on "the evolution of democracy and direct legislation," to quote from the sub-title. The treatment of the Teutonic folk-moot and of other primitive popular assemblies leaves

something to be desired. Moreover, while the author does not openly express *doctrinaire* opinions, the tone of the book is one of implicit faith in popular legislation as a panacea for political ills, and it is difficult to imagine why such a historical topic should have been chosen unless with a doctrinal purpose. Consequently, though he has done well in forbearing to propound radical views, we find it hard to credit him with absolute disinterestedness, and as a work evidently designed to assist in the solution of contemporary problems of direct legislation, his book certainly lacks the value which it might easily have had if he had permitted his critical faculties a wider range.

Mr. White's book, "The Old Order Changeth," is an account of tendencies which the author professes to see at work in American society, written for popular consumption in a style which is more animated than judicial. The substance of this book has already been published in a popular magazine, and as might have been expected, the writer is an unconscious demagogue, prudently refraining, it is true, from taking issue with competent observers of political conditions, but losing no opportunity to have his fling at the greed of corporations or the power of political bosses. "There is grave danger," he himself says, "that the advocate of fundamental democracy will make a fetish of it." From this danger this thorough-going radical does not escape, and his blindfold optimism is a trap for the unwary. He holds up for our admiration all the doctrines of a radical democracy which at best represents but a transition phase of American politics, and for him the direct election of Senators, municipal government by commission, the initiative and referendum, and the recall all have a peculiar virtue. His conception

of democracy is not that of a government by highly equipped officials chosen by processes carefully safeguarded from popular caprice and ignorance, but of a government in which the people directly rule through their passive agents. He even looks forward to the time when the government will itself own and operate all public utilities. All that we can say in commendation of this book is that the reader may find in it an explanation of the psychology of a radical movement which is making rapid headway, and might be an alarming phenomenon were it not certain to be held in check by the hard-headedness of the Anglo-Saxon race and their innate distrust of charlatanism in every guise.

COLONIAL LEGAL HISTORY

The Early Courts of Pennsylvania. By William H. Loyd of the Philadelphia bar, Gowen Fellow in the Law School of the University of Pennsylvania. Boston Book Co., Boston. Pp. 273 + 14 (appendix and index). (\$3.50.)

Legal Development in Colonial Massachusetts, 1630-1686. By Charles J. Hilkey, Ph.D., sometime University Fellow in Constitutional Law. Columbia University Studies in History, Economics and Public Law, v. 37, no. 2. Pp. 145 + 3 (bibliography). (\$1.25.)

MR. LOYD'S work had its origin in a series of lectures given at the law school of the University of Pennsylvania, and while the author modestly disclaims any opportunity for a thorough treatment of the history of the earlier Pennsylvania courts, his work is much more than an exploration of buried records and forgotten statutes, having the strong interest of an animated, readable piece of historical writing, and being executed after the fashion of a fair-minded, intelligent study of earlier institutions by a mind capable of perceiving their important bearings and of presenting them in correct perspective.

In consequence of this scholarly breadth of treatment, the book is more than a history of early courts and juris-

diction, but has value because of the light thrown on the vicissitudes of the English common law in America. Colonial legal history is a rich field, and Pennsylvania, if not wholly typical of the thirteen Crown colonies, was one of the most important of them. Of particular interest is the treatment of the prolonged efforts to introduce a court of chancery and equity pleading and practice, and of the curious manner in which common law forms of action were stretched to meet the requirements of equity jurisprudence. Gradually, by a series of statutes, equitable jurisdiction was conferred upon the state courts, though Pennsylvania, unlike some of the other states, never established a court of chancery.

The book is full of the quaint and curious, and instead of appealing to a limited circle should attract every one in any way interested in American legal history.

Dr. Hilkey's book covers a more restricted field, dealing with the legal history solely of the period from 1630 to 1686 in Massachusetts, during the life of the first charter of the colony. The first part treats of the "law-making powers," under this rather inapt heading the legislature, the courts, the church, lawyers and law books being considered. The second part deals with the law, with chapters on civil procedure, criminal procedure, criminal law, torts, contracts, property, family and succession. The writer has carefully explored old records and the numerous citations of old cases show how the law was administered in the colony. The matter is clearly presented, but much of it lacks any intrinsic interest. The influence of the church, however, receives due recognition, and it is interesting to read:—

"The colonists united three elements

in their legal system: (1) They brought with them, in a general way, English institutions, judicial procedure, legal forms, and to a certain extent personal and property rights. (2) They drew from the Mosaic code and other portions of the Bible certain notions of theocratic government, moral and religious duties and criminal liability. (3) To these they added a Colonial element, made up of laws and customs that were in part somewhat archaic and in part far in advance of the times. These three elements, the English, the Jewish and the Colonial, were curiously blended, producing in effect what was largely a new legal system. Notwithstanding opposition from a minority, which demanded the adoption of English law, the Puritans successfully maintained their position until the government under the first charter came to an end."

HISTORY AND BIOGRAPHY

Historical Essays. By James Ford Rhodes, LL.D., D. Litt. Macmillan Company, New York, 1909. Pp. viii, 323+index 11. (\$2.25 net.)

Lincoln, Lee, Grant, and Other Biographical Addresses. By Judge Emory Speer. Neale Publishing Co., New York and Washington, 1909. Pp. 269. (\$2 net.)

READERS of Mr. James Ford Rhodes' fascinating essay on Gibbon will feel the force of what the writer says about the value of the intellectual discipline of the study of history, and will feel it the more acutely because Mr. Rhodes' manner of writing is itself such conclusive proof of the indefinable charm which ripe historical scholarship may impart to pages that would otherwise be dull and heavy. We have long been reviewing legal and scientific books — books which deal with broad subjects by no means devoid of so-called human interest, many of them excellent alike in substance and in form — but writers

on legal and social science rarely succeed in cultivating an irresistible literary charm and distinction, so in making the acquaintance of this work we experienced a sense of refreshment altogether unusual. But as we read on, this pleasant sensation was succeeded by a feeling of poignant regret and even of shame not unmixed with envy that contemporary writing on the subjects most worth while should be so closely wedded to prosiness and banality.

With the mortifying admission that few of us have leisure for the study of history, it must be acknowledged that vividness of literary style is to be acquired only by that ripeness of knowledge which is ever ready with apt illustrations to support every matter-of-fact statement. Mr. Rhodes' talent for illustration is extraordinary. As his eighteen essays cover not simply a historical field, but the field of literary criticism and political discussion as well, his style has an amplitude and a fullness instructive not for the historical specialist alone, but for every writer on social institutions. By making use of the accessories of rhetorical skill, wit and the facility of a *raconteur*, a writer may no doubt do much to "popularize" the treatment of a heavy subject, but this is not easily accomplished in a dignified manner, and an unbecoming meretriciousness is so apt to be the result that scientific writers shrink from these artifices and are commonly content with a dry-as-dust exposition. Mr. Rhodes, on the other hand, has pointed out the path to literary distinction. There is hardly a subject within the lawyer's horizon which may not be revived by drawing upon a plentiful fund of historical and biographical knowledge, and a writer may thus win the attention of cultivated lay readers without striving for the vacuity of

substance which is the reproach of some of our literary magazines.

Among the essays are estimates of Gardiner, Lecky, Green, Sir Spencer Walpole, Godkin, and others, while those on "The Presidential Office" and "President Hayes' Administration" have special interest for the American lawyer. Throughout are exhibited a ripeness and candor of critical judgment and a mastery of literary expression which will make the volume a dearly prized acquisition of imperishable worth.

Another work of great "human interest" is the collection of addresses, largely of an occasional nature, delivered by Judge Emory Speer, a federal judge who is well known to readers of the *Green Bag*, and who yields to no one, unless to his friend Mr. Justice Lamar, in the esteem in which he is held by the bar of Georgia. The subjects of the biographies are "Abraham Lincoln," "Robert E. Lee," "Ulysses S. Grant," "James Edward Oglethorpe," "Alexander Hamilton," "John Marshall," "Thomas Lord Erskine," and "Joseph Emerson Brown." As the papers were written for oral delivery, they are not to be approached purely as literary essays, but can best be appreciated by having in mind the occasion which called them forth. They are well calculated to appeal to the feelings of an audience, and are eloquent of the patriotic spirit of the newer South. With the utmost deference to Judge Speer, we must confess that we find his diction sometimes a bit too florid to be pleasing, but there can be no questioning the vividness with which he unfolds the inner history of the lives of great men, or of the fascination with which a generous heart and ready pen endue the noble qualities of those of whom he speaks. We have found the book thoroughly readable.

JAPANESE COMMERCIAL CODE

The Commercial Code of Japan. By Yang Yin Hang, Graduate in Law of the Waseda University, Tokyo, Japan, Master of Law, University of Pennsylvania. University of Pennsylvania Law Series, no. 1. Boston Book Co., Boston. Pp. xxiii, 295 + 23 (index). (\$3.50.)

IN the course taken by the University of Pennsylvania and some other prominent agencies, in assisting American readers to a knowledge of the jurisprudence of other countries, there seems to be a recognition, perhaps, of the fact that the American lawyer is really curious to learn more about the laws and institutions of the rest of the world. Undoubtedly, with the progress of the world and the unquenchable thirst for knowledge which is growing universal, the insularity of the American lawyer is passing. He is coming to seek broad general information on subjects of no immediate usefulness in the practice of his profession.

Mr. Yang's translation of the Japanese Commercial Code is the work of a scholar whose English shows skill in finding correct and concise equivalents for the juridical concepts of what is really nothing more than an Oriental adaptation of a European system. The translator, who is a Chinese, is a thoroughly trained civilian who also has an intelligent knowledge of the English common law. The text is printed in clear, legible type, and the book is typographically satisfactory. To the sections of the code are appended the translator's annotations, which are most helpful from the standpoint of comparative jurisprudence, as showing the sources of the material, most of which is derived from the German Commercial Code of 1897, though some of it is peculiar to Japan, and a part of it, including the law of business associations, follows the French Commercial Code. Mr. Yang also writes a valuable historical intro-

duction, which gives a general account of the various modern commercial codes of the civil law.

The first Japanese Commercial Code, which was promulgated in 1890, was repealed except as to the law of bankruptcy, the present code becoming effective in 1899. It is to be hoped that Mr. Yang, who is so well equipped to enlighten English-speaking lawyers, may be induced to extend his labors to their great benefit in the interesting fields of Chinese and Japanese jurisprudence.

OBSCENITY A CONSTITUTIONAL RIGHT?

"Obscene" Literature and Constitutional Law: A Forensic Defense of Freedom of the Press. By Theodore Schroeder, legal counselor to the Medico-Legal Society of New York. Privately printed, New York. Pp. 439 (index).

THIS book is largely made up of articles which the author had previously written and which had appeared in the *Albany Law Journal*, *Truth-Seeker*, *Alienist and Neurologist*, and other similar periodicals. Some of the articles are revised while others are merely reprinted. The finished product bears out the author's own statement at page 278, where he says, "I tried hastily to make a book by the use of a paste-pot and some magazine articles, where I should have rewritten the whole." If it had been entirely rewritten we feel sure that its length would have been only a fraction of its present 439 closely printed pages and much tiresome repetition would have been avoided.

The book is intended to be an argument in favor of greater freedom in the dissemination of information, discussion and literature upon topics relating to sex and sex functions. In support of his contention the author urges that no book, idea, speech or action can be legally "obscene" because "to the pure are all things pure" and a thing is

obscene or pure solely according to the point of view of the particular reader or hearer. Such point of view he says cannot be known or foreseen in advance. It is therefore impossible to define "obscene" or any similar word in any penal statute establishing a penalty for doing or writing anything obscene, and so any such statute ought to be regarded as void for uncertainty, and as contrary to the "due process" and "*ex post facto*" clauses of the United States Constitution. It is admitted that courts are not in accord with the author upon his general propositions, but he cites many cases to support the various details from which he works out his main propositions. Regarding the courts, he says at page 163:—

If we may determine the intellectual bankruptcy of our American judges by their utter incapacity for using logical processes in the presence of slight emotional irritation, then I fear that our courts must be adjudged to have assumed obligations largely in excess of their intellectual resources.

The author heavily condemns the United States postal authorities for refusing to carry through the mails the so-called sexology books, or any magazines advertising them, and he intimates that their general sale and distribution is thereby prevented. He is apparently ignorant of the fact that such books are now on sale in many book stores in New York and other cities and are being regularly advertised in our monthly magazines that have free use of the mails. In view of these facts, the unrestrained language about the United States Post-office and Mr. Anthony Comstock and similar people whom he calls "professional purists," and "moralists-for-revenue" seems to lose force.

It would be out of place in this review to try to refute or controvert any of the author's many statements and

principles. It is sufficient to say that we find ourselves unable to accept Mr. Schroeder's premises, or to follow his logic, and we find his conclusions vague. By these remarks we imagine that we will qualify in the author's classification as "intellectual bankrupts." We are somewhat comforted, however, when we consider that we will be in good company when we are thereby placed with the many illustrious jurists whose opinions seem to be contrary to our author's contentions.

LOMBROSO'S CRIMINAL MAN.

Criminal Man: according to the classification of Cesare Lombroso. Briefly summarized by his daughter, Gina Lombroso Ferrero. G. P. Putnam's Sons, New York and London. Pp. 332 (appendix and index). (\$2 net.)

THIS book is not in any sense a translation of Lombroso's principal work "*L'Uomo Delinquente*" (*Criminal Man*). That book has reached its fifth edition and has been translated into French, German and Spanish, but it has never been translated into English. And the present small volume of a little more than three hundred pages is merely a brief summary of the ideas set forth at length in that great work, together with an appendix in which we are given the briefest possible summary of Lombroso's chief writings.

The merits of the present volume are that it gives us in a brilliant and compact form an authoritative statement of the theories of the great Italian criminologist and in a few pages gives us a glance at all his principal writings. The very brevity of the work, which is one of its chief advantages, is also its defect, for in such a short book it is impossible to argue sufficiently fully the theories that are much controverted. For instance, Lombroso's theory that there is a type of born criminal that can be

identified by purely physical characteristics capable of observation and measurement is so contrary to general ideas that it needs considerable argument and many examples to be very convincing, and to prevent our feeling that the generalizations are based on insufficient observations or are the conclusions of an over enthusiastic advocate. And again we would like some further information or definition of terms before agreeing with the author that so many phenomena of criminality and genius are due merely to different forms and degrees of epilepsy. We will, of course, disagree with certain of the theories, but that is not for lack of a clear statement of what they are, and if the controverted theories were more fully argued and demonstrated the book would no doubt have to be so long that it could not be very widely used by the general readers. No matter how full the statement or complete the argument, we would still no doubt have to conclude that Lombroso exaggerated the importance of merely physical defects as a cause of crime and that he applied this explanation of criminal acts altogether too widely. But the service that he rendered and the truths that he elucidated give Lombroso a high place among criminologists and it would probably be impossible to make a better or more usable summary of the results of his long studies and many writings than the present volume.

The authoritative character of the summary is well shown by Professor Lombroso himself in the preface, where he says: "I welcome with pleasure this summary, in which the principal points are explained with precision and loving care by my daughter Gina, who has worked with me from childhood, has seen the edifice of my science rise stone upon stone, and has shared in my

anxieties, insults, and triumphs; without whose help I might, perhaps, never have witnessed the completion of that edifice, nor the application of its fundamental principles."

MUNICIPAL GOVERNMENT

The Government of American Cities. By Horace E. Deming. G. P. Putnam's Sons, New York and London. Pp. 304 + index 19. (\$1.50 net.)

The Government of European Cities. By William Bennett Munro, Ph.D., LL.B., Assistant Professor of Government in Harvard University. Macmillan Company, New York. Pp. 409, including index. (\$2.50 net.)

MR. DEMING'S book on municipal government was evidently written with a propagandic purpose, to assist in popularizing the program of the National Municipal League, and offers a strong argument for a higher type of city government governed by a few responsible officials. Emphasis is laid on the fact that the administrative functions of the city government occupy nine-tenths of its attention, as compared with the one-tenth concerned with legislative or policy-determining functions. Consequently the administrative system must be taken entirely out of politics, and appointments must be made solely for merit. The failures of municipal government in the United States, in the opinion of the author, have largely been due to ignoring the fact that only a very small part of the problems of the city are political.

The writer also thinks home rule is essential, and contends that the interference of state legislatures has done much to weaken and to oppress the cities. He is not wholly successful in proving this contention, nor in stating cogent reasons for the view that a sufficiently ample measure of home rule is impossible under a system of liberal legislative supervision of charters and electoral methods. This portion of the book is consequently a little out of perspective,

the benefits of municipal home rule being sufficiently obvious without argument.

The examination of the principles applied in successfully governed European cities is rather superficial, but the book makes some sound and practical suggestions. The author's conclusions, in fact, are often better than the grounds assigned for them, and his book is of little value as a scientific document. He sets out with the rather ambitious aim of proving that the faults of municipal government, in the United States, are due rather to failure to apply the principles underlying successful national and state government than to more deep-seated difficulties, and it cannot be said that he succeeds in proving this, or that the problem of good city government is as free from intricacy as he assumes.

Professor Munro's book is a painstaking and thorough account of municipal government in France, Prussia and England, describing with considerable detail the systems of those countries and contrasting, wherever possible, their structure and functions with those of the United States. While the work does not pretend to be exhaustive, but aims only to serve as an introduction to fuller study of the subject, it is sufficiently elaborate to win approval for its scholarly and serviceable qualities.

Professor Munro is concerned rather with structure and administration than with functions of local government, and in its field his treatise is the most complete and instructive accessible to American readers. A conspicuous merit is found in his use of the comparative method, and the discussions of the workings of the various systems are so full as to give the reader something more satisfying than a bare statement of

facts. Citations are frequent, and there is a useful bibliography.

THE BINDING FORCE OF INTERNATIONAL LAW

The Binding Force of International Law. By A. Pearce Higgins, M.A., LL.D., of Lincoln's Inn, Barrister-at-Law, Lecturer in Clare College, Cambridge, Lecturer on Public International Law at the London School of Economics and the Royal Naval War College. University Press, Cambridge, and G. P. Putnam's Sons, New York. Pp. 48. (50 cts. net.)

THIS brochure contains the inaugural lecture delivered by a well-known English scholar in connection with the opening of a course in international law at the London School of Economics last autumn. In general, it is a discussion of the basis of international law and a reply to the arguments that such law has no binding sanction, in which the subject of international arbitration is considered in the light of recent developments in international affairs. The writer does not weaken his argument by claiming too much; he recognizes that existing international law largely partakes of a customary rather than of a positive character, but that it is gradually, by the process of definition by treaties and international conferences, acquiring more and more of the attributes of positive law. Moreover, there is sufficient evidence of its binding power in the fact that its mandates are respected by nations entering upon war, and there are numerous indications of the latent yet commanding force of international public opinion.

The eminently sane view is expressed that while the settlement of international questions by the application of the rules of law will tend to reduce the possibility of war, "even this advance in civilization will not necessarily mean the advent of an era of perpetual peace."

Index to Periodicals

Articles on Topics of Legal Science and Related Subjects

Agency. "Compensation of Unfaithful Agents." By S. R. Wrightington. 72 *Central Law Journal* 396 (June 2).

"Among the frauds of modern commercial life, which impose on the honest members of the community a serious addition to their already heavy expenses, one of the most insidious and dangerous is that of the secret discount, or rake-off, obtained by an agent in transacting the business of his principal. . . .

"The general rule is well settled that a broker must act with entire good faith towards his principal, and he is bound to disclose to his principal all facts within his knowledge which are, or may be material to the matter in which he is employed, or which might influence the principal in his action and if he has failed to come up to this standard of duty he cannot recover. . . .

"The English decisions appear to have drawn this distinction, that where the transactions are separable and it can be determined as to which of the transactions the agent has obtained a secret profit or commission, such transactions are to be separated from those in which he has dealt fairly with his principal, and that the agent will not be deprived of his commission on all such transactions. . . .

"It is to be hoped that the stringent rule applying to all fiduciaries will not be weakened in this way in this country."

"An Agent's Right to Sue upon Contracts, II." By Floyd R. Mechem. 59 *Univ. of Pa. Law Review* 587 (June).

Continuation of article noticed in 23 *Green Bag* 355, *supra*.

Attorney and Client. "The Trust Company — Not a Competitor of the Lawyer." By William T. Abbott. 6 *Illinois Law Review* 73 (June).

"In this age the trust companies, both in their financial and trustee aspects in mutual co-operation with the lawyer, are moving spirits, not to say controlling factors, in helping to prevent that threatened division of society into two great antagonistic classes, one of which seeks with the keenest ability, vigilance and manipulation to secure and hold all it can safely get, and the other, with less education and skill, but equal ferocity, to take all that it may dare seize. The social and legal problem cannot be separated from the economic, and as neighbors and co-workers we should unite to maintain that reasonable (not necessarily equal) distribution of advantages, opportunity and profit which alone can forestall and prevent a compulsory readjustment through revolutionary methods."

Contracts. See Agency.

Corporations. See Interstate Commerce, Public Service Corporations.

Court of Claims. "The United States as Defendant." By Lincoln B. Smith. 72 *Central Law Journal* 455 (June 23).

"The magnitude and importance of the work of the court of claims is not generally realized. Although the claimants are scattered from Maine to California, the practitioners, because it is a specialized practice, are largely from the bar of the District of Columbia; the consequence being that the court of claims is not well known except in Washington. The court consists of a chief justice and four associate judges, appointed for life. It is an able and hard-working court, sitting continuously from October to June, and it has, without doubt, a greater variety of questions of law to consider than any other court in the United States, excepting the Supreme Court."

Criminal Procedure. "Appeals in Homicide Cases in Pennsylvania." By Edward Lindsey. 59 *Univ. of Pa. Law Review* 623 (June).

A painstaking and valuable statistical examination of appeals in homicide cases in this state from 1905 to 1910.

"The most difficult information to get in connection with these cases was the length of time consumed by the trial. Sometimes the minute dockets would show it clearly and sometimes they would not. However it was ascertained for thirty-seven of the cases. In only one of these cases did the trial exceed eight days. . . .

"From the figures given it appears that the average time that elapses from the arrest of the defendant to the decision of his appeal by the Supreme Court in capital cases is a little over eleven months. A little over three months of this time is consumed by the appeal, eight months being the average time elapsing from the arrest to the appeal. . . .

"The length of time elapsing from trial to appeal seems excessive. It was suggested that the length of time is due to the consideration of motions for new trial and the care taken in their consideration, the decision on such motion being the final decision on practically all except purely legal questions. Nevertheless an average of over four months seems unnecessarily long. In practice the argument of the appeal does not seem to take place as speedily as is contemplated by the rules of the Supreme Court; presumably, however, this must be due to sufficient reasons in each case. In view of the fact that it is the duty of the Supreme Court to examine the evidence, the disposition of appeals by that court may be fairly characterized as prompt, the average being thirty days. Here, too, it should be noted that two-thirds of the cases are decided practically within the average period. . . .

"The largest number of assignments of error seem to be to the admission or rejection of evidence, as is perhaps natural. Almost as many

are criticisms of portions of the judge's charge or of his answers to requests to charge. In many, especially of the latter class, the criticisms are captious and the errors alleged trivial. . . . The doctrine of 'harmless error' seems well established in Pennsylvania. The prisoner must show that a substantial error was committed on the trial by which he has been injured; it is not sufficient that an abstract or technical error has taken place."

Criminology. "The Crime Problem." By Hon. Frank H. Norcross, Justice of the Supreme Court of Nevada. *20 Yale Law Journal* 599 (June).

"In addition to doing everything that can reasonably be done to remove the causes of crime, we must improve our system of dealing with the convicted criminal. If he is a confirmed criminal we may not be able to accomplish much for him in the way of reformation, and society has a right to protect itself from individuals of this class the same as it has from the insane. Society has no right to provide and cannot justify means and methods of punishment that in themselves are debasing. Such methods of punishment are not only a wrong to the prisoner but they are an absolute injury to society.

"Our present prison and jail system, generally speaking, is at least a century behind our civilization in other respects.

"Delays and occasional miscarriages of justice in the courts have had the effect of creating the impression that in our court procedure lies the great fault of our penal system, largely from the fact that such defects are obvious and are so frequently magnified by the press. This conclusion, I am firmly convinced, is not only a mistake, but I am of the opinion that by far the greater number of miscarriages of justice have been and are buried from the knowledge of the general public behind the stone walls and iron bars of our prisons."

See Detection of Crime, Domestic Relations, Penology.

Detection of Crime. "Detective Burns and his Psychological Method." *Current Literature*, v. 50, p. 601 (June).

"Burns's method, which we have called the psychological method, is, of course, one form of what has come to be known, more or less opprobriously, as the 'third degree.' But . . . Burns secures confessions by his headwork and his skilful study of a man's mentality. The one is psychology, the other is brutality."

Direct Government. "The Federal Guarantee to the States of a Republican Form of Government." By William D. McNulty. *Editorial Review*, v. 4, p. 531 (June).

"The essential characteristic of a republican system is believed to be the administration of the government through representatives of the people, as opposed to the direct administration of the government by the people, as in a pure democracy. This was, undoubtedly, the meaning of the term, as understood by the founders of the Republic."

"The Initiative and Referendum and How Oregon Got Them." By Burton J. Hendrick. *McClure's*, v. 37, p. 235 (July).

Describing the way in which the popular measures dealt with came to be adopted, with side-lights of William S. Uren and other prominent personalities.

Domestic Relations. "Social Control of the Domestic Relations." By George Elliott Howard, University of Nebraska. *American Journal of Sociology*, v. 16, p. 805 (May).

"It seems almost certain that the powers of the juvenile court will be increased. No doubt there is some danger in the process. As a safeguard, should not an organized effort be made to develop a thought-out policy and more uniform laws among the states? In particular, should not the precedent set by Kentucky in 1906 and by Colorado in 1909 be followed throughout the land? These states have provided for the enforcement of the obligations of delinquent parents in the chancery rather than the criminal branch of the juvenile court. . . .

"Good marriage laws are more effective in checking divorce than are good divorce laws. They help to prevent the formation of bad marriages; and bad marriages are the only marriages which divorce dissolves."

Examinations before Trial. "Examinations before Trial." By Raymond D. Thurber. *25 Bench and Bar* 62 (May).

This topic of New York law, last treated in *19 Bench and Bar* 20-7 (Oct., 1909) is now brought down to date.

Executive Organization. "The Organization of the State Executive in Illinois." By Henry Bixby Hemenway, M.D. *6 Illinois Law Review* 112 (June).

"This fundamental principle of individual responsibility, organized into a system, demands readjustment of our state executive business in several radical features.

"1. The Governor must appoint, and be responsible for all executive subordinates.

"2. Each separate office, or department, must be managed by one man.

"3. Each responsible officer should be a permanent expert, paid by an adequate salary, not by fees.

"4. The various departments should be organized systematically, so that the responsibility of each is made exclusive, definite and tangible."

Executors and Administrators. "Powers of Sale in an Executor in Pennsylvania." By Roland R. Foulke. *59 Univ. of Pa. Law Review* 597 (June).

"Since the jurisdiction of the Orphans' Court in Pennsylvania to authorize an executor to sell the real estate of his testator is purely statutory, is limited to the cases specified, and will not be exercised when the power conferred in the will is sufficient, it follows that it is often important to determine whether the executor has power

under the will to make the sale in question. This question is frequently of extreme difficulty, and the law in Pennsylvania on some of the points involved is in a most unsatisfactory condition. The particular point for discussion will be the question whether the executor can confer a good title on the purchaser."

Federal and State Powers. See Waters.

Federal Courts and Jurisdiction. "The Genesis of the Supreme Court." By Hon. Hannis Taylor. 18 *Case and Comment* 3 (June).

"The unique creation, without a prototype in history, known as the Supreme Court of the United States, is the joint product of Pelatiah Webster and John Marshall *par nobile fratrum*."

"The Reorganization of the Federal Judicial System." By Hon. Reuben O. Moon. 18 *Case and Comment* 13 (June).

"The reorganization of the courts as provided by the new act substitutes for the present cumbersome, impracticable, confusing and expensive judicial system a simple, concrete, elastic and logical one; it eliminates a court of original jurisdiction wholly unnecessary and in practical operation long since fallen into disuse. It does not displace a single judge or change the present general practice of the courts. It simplifies the proceedings by consolidating jurisdictions and by having all cases in courts of first instance and all pleadings filed therein brought and filed in the district court, and preserves the same plan of judicature originally designed by the framers of the Constitution and adopted by most of the states, to wit, one court of original jurisdiction, an intermediate court of appellate jurisdiction — final in many cases — and the Supreme Court as the court of last resort."

"When Does a Case 'Arise' under Federal Laws?" By Charles A. Willard. 45 *American Law Review* 373 (May-June).

"The Constitution declares (art. 3, sec. 2), that the judicial power shall extend 'to all cases in law and equity arising under this Constitution, the laws of the United States,' etc. When does a case arise under the Constitution and laws, as those words are here used?"

See Court of Claims.

Forensic Oratory. "Forensic Eloquence." By Hon. A. W. Wilkinson. 20 *Yale Law Journal* 620 (June).

"If you don't love a fight, you will be very apt not to love the law. The shrinking from entering upon trial, the dread of its responsibilities, the apprehension for its results have been, with many practitioners, sufficient to render their calling positively distasteful and odious; and among the number of these might be counted many whose bearing in the court room and whose success as advocates were such that none would suspect their inward reluctance at entering on its controversies."

General Jurisprudence. "The Scope and Purpose of Sociological Jurisprudence; I, Schools

of Jurists and Methods of Jurisprudence." By Professor Roscoe Pound. 24 *Harvard Law Review* 591 (June).

The first of what promises to be a noteworthy series of papers, in which we shall look for an exposition of the tendencies now visible in the scientific investigation of fundamental problems, and of the present status of legal science in its higher forms. In this introductory portion, the schools heretofore existing are divided into three principal groups, each of which is discussed. These are the Analytical, the Historical and the Philosophical schools. Of late there have been many indications of an approach to a new position, and of the rise of a so-called Sociological school.

The Analytical school at first adhered to the analytical method exclusively, but later its method became historical as well as analytical.

"The analytical jurist pursues a comparative study of the purposes, methods and ideas common to developed systems of law by analysis of such systems and of their doctrines and institutions in their matured forms." This school considers developed systems only, it regards the law as something consciously made, not found, it lays emphasis on the sanction of judicial enforcement, and it is usually utilitarian or teleological in its philosophical views. The imperative theory overlooks the need of squaring the law with the demands of reason and exigencies of conduct on one hand, and with the demands of social progress on the other. It is a doctrine well suited to the administration and exercise of legal functions, "but it is not expedient that law-makers adhere to and be governed by it."

The Historical school really began with Savigny. Both the historical and the philosophical jurist agree that law is found, not made. The Historical school considers the past rather than the present of law, it sees chiefly the social pressure behind legal rules, its type of law is custom, and its philosophical views have mainly been Hegelian. Like the Analytical school, it is open to the objection of working *a priori*. It is a theory which tends to re-action and stagnation in the actual process of law-making. The movement, however, led naturally into what Kohler styles universal legal history, and it was not long "in assuming the name and something of the character of a sociological jurisprudence."

"The philosophical jurist studies the philosophical and ethical bases of law, legal systems, and particular doctrines and institutions, and criticizes them with respect to such bases." This school has held very diverse philosophical views. First came an eighteenth century law of nature school, which was followed in the first half of the nineteenth century by a metaphysical school which has prejudiced contemporary lawyers against philosophical jurisprudence in any form. "It is," however, "as unfair to identify the philosophical method absolutely with Krause or Ahrens or Röder or Lorimer as to identify analytical jurisprudence absolutely with the text of Austin." We are not bound to accept *Naturrecht* as the philosophy of law. Thus has arisen a Social-Philosophical school, of which

there are several varieties. Dahn said emphatically in 1878 that a "scientific philosophy of law must be based upon comparative legal study." This latest phase of the philosophical school "presents three types, the so-called Neo-Kantians, who, on the whole, are philosophical and sociological in tendency, the teleologists or social utilitarians, whose tendency is analytical and sociological, and the Neo-Hegelians, who may be described as historical and sociological in tendency. . . .

"Just as historical jurists are now of two types, the one historical in the older sense, the other sociological, philosophical jurists are to be recognized as natural-law or metaphysical on the one hand, or social-philosophical (sociological) on the other hand. It is not easy to perceive any real distinction between the advanced types of the two schools."

Government. "Government by Judiciary."

By L. B. Boudin. *Political Science Quarterly*, v. 26, p. 238 (June).

The writer considers that "the most important question before the people of this country today is undoubtedly the question of the limits of the power of the judiciary to annul legislation for alleged unconstitutionality." Mr. Roosevelt's criticisms of some of the decisions of our courts are treated with respect, and much attention is given to constitutional history. The author evidently is out of sympathy with the doctrine enunciated in *Marbury v. Madison*. "As a matter of legal reasoning" that case "has been pronounced by many eminent thinkers unsatisfactory." In *Lochner v. New York*, the Supreme Court "assumed the distinctively legislative function of deciding whether circumstances existed which required remedial legislation.

"This position is opposed to that which the Court took in *Munn v. Illinois*. Even in that comparatively late case the Supreme Court held that such an inquiry was part of the functions of the legislature, and none of the Court's business. It said: 'For our purposes we must assume that if a state of facts could exist that would justify such legislation, it actually did exist when the statute under consideration was passed.' . . .

"To say, in the face of these decisions and the many more that could be cited but for lack of space, that our courts do not exercise any legislative power, seems like adding insult to injury."

Australia. "The Labor Party and the Constitution in Australia." By Victor S. Clark. *Journal of Political Economy*, v. 19, p. 479 (June).

"The rise to power of the labor party, and the platform it proposes to make into law, are sufficient indication that the people of Australia have so far retained confidence in government regulation as a palliative for social ills, and intend to continue this method of treatment. The arbitration system has encountered some humiliating defeats. . . . The puzzling thing about the present public policies of Australia and New Zealand is that they have in the course of the past twenty years encountered so little reaction. Positive and radical programs, when actually

carried out, usually meet a cumulative opposition that soon becomes strong enough to bring them to a standstill, and often causes some withdrawal from their point of farthest advance. So far we have no evidence of such a gathering resistance in Australia — though it possibly may appear when the proposed amendments to the federal constitution are put to popular vote."

Canada. "Canada's System of Responsible Government." By Senator Albert J. Beveridge. *McClure's*, v. 37, p. 330 (July).

"Our fundamental law is based on the non-party concept. . . . The legislative and executive branches of our government are decreed to be separate and independent, thus preventing any united party government. . . . *Speaking exclusively from the practical point of view*, the Canadian legislative and executive branches are inextricably mingled."

Great Britain. "The Constitutional Revolution, II." By Prof. J. H. Morgan. *Nineteenth Century*, v. 69, p. 993 (June).

"The reform of the House of Lords should be preceded by the reform of the House of Commons. Before we can decide what the powers of the Upper House are to be we must know what are to be the powers of the Lower House. . . . A reform of the House of Commons by devolution would, by restoring the control of the House over Bills, put a limit to the necessity of legislation by the departments and of revision by the House of Lords. It would also diminish the area of conflict between the two houses by removing out of the sphere of contention bills — the Scottish Land Bill, for example — which, although commanding the almost unanimous support of the community for which they are intended, are at present treated as mere pawns in the party game between the two houses."

"The Royal Prerogative." By C. Harvard Pierson. *Fortnightly Review*, v. 89, p. 969 (June).

Describing the nature of the royal prerogative, its sources and its limitations.

India. "The Government of India." By Theodore H. Boggs. *Political Science Quarterly*, v. 26, p. 290 (June).

A detailed description of the mechanism of the administration of India. The writer is of the opinion that "the reforms, both executive and legislative, introduced under the act of 1909, mark a real advance toward the goal of intelligent self-government by native Indians."

See Executive Organization, Direct Government, Federal and State Powers, Federal Courts and Jurisdiction, Local Government.

International Arbitration. "The Outlook for Arbitration." By Sir John MacDonell, C.B. *Contemporary Review*, v. 99, p. 687 (June).

"It is worth while noting how many questions in which it was said national honor was involved have in fact been successfully settled by arbitration or by like means. The opposition to the arbitrations conducted under the Jay Treaty

came from those who thought that the matters at issue affected the honor of the two countries. In the long dispute as to the Oregon boundary there was the same talk of honor. President Polk declared that 'he did not believe the territorial rights of the nation to be a subject for arbitration.' 'All Oregon or none.' 'Fifty-four forty, or fight,' was the popular cry. In the end the forty-ninth parallel was accepted with no loss of honor and dignity. The sticklers for the honor of this country pressed Lord Salisbury to meet President Cleveland's demand — for such it was — that England should submit to arbitration the dispute between her and Venezuela as to the boundary line of British Guiana. Lord Salisbury, who understood honor as well as any statesman, did not yield to this pressure. The matter was referred to arbitration, and resulted in a decision, on the whole, in favor of England. A famous American statesman once declared that he would as soon cut off his right hand, as agree to the contention of England with respect to the North American fisheries; a contention which his country lately submitted to the Hague Tribunal, with no loss of prestige or honor. In truth all the great arbitrations of the past, certainly the most successful, have turned upon questions which the litigants at one stage in the controversies declared involved vital interests and points of honor.

"One remark as to the draft of the Anglo-American treaty of arbitration. It is proposed to refer certain questions to a Commission of Inquiry, which will report without deciding. It might have been better to treat all questions alike. But, at all events, the scheme provides for old international disputes what is so much needed, a refrigerating chamber in which heated passions may cool down."

"The International Prize Court and Code." By James L. Tryon. 20 *Yale Law Journal* 604 (June).

"What now does all this legislation mean? It means that when the International Prize Court and Code come into use there will be a single system of law among the signatory nations with respect to prizes. Each signatory nation will no longer have the exclusive right to be its own judge of correct principles in a historic and important department of International Law, but will be subject to a higher sovereignty, the self-imposed order of a quasi-international union, of the gradual growth of which the court and code are both expressions. It is another step forward in the limitation of war by the development of international justice. It is therefore a notable advance in the evolution of the peace movement."

"Compromise — The Great Defect of Arbitration." By William Cullen Dennis. 11 *Columbia Law Review* 493 (June).

"It is submitted that with care in the framing of the terms of submission, direct agreement as to the selection of the judges, a simple, clear code of arbitral procedure, maintenance and amplification of the right of revision, and the right to set aside an award which disregards the

terms of submission, together with provision for appeal in proper cases for the correction of error, compromise may be largely banished from international arbitration, even before the establishment of a permanent court of arbitral justice."

Interstate Commerce. "The Source of Authority to Engage in Interstate Commerce." By Frederick H. Cooke. 24 *Harvard Law Review* 635 (June).

"The fundamental right of transportation between points in different states is not derived from the Commerce clause, having been in existence long before the Commerce clause, and is one not merely against interference by individuals, but against interference under governmental authority, whether that of Congress or of the states.

"But this statement applies only to the bald right of interstate transportation, as distinguished from such transportation *under conditions of special privilege*. For this purpose governmental authority is necessary. Such authority may be derived either from Congress or from the states."

Judicial Powers. See Government.

Juvenile Delinquency. See Domestic Relations.

Labor Problems. "The Railroad Riots of 1877." By James Ford Rhodes. *Scribner's*, v. 50, p. 86 (July).

"From the close of the Civil War to the end of the century the gulf between labor and capital was constantly widening; the difficulty of either workman or employer putting himself in the other's place increased. This tendency was much accelerated by the autocratic reduction in wages in 1877 and by the strikes and riots which ensued. It is true that victory rested with the railroad companies, but it was a Pyrrhic victory."

Legal Education. "Instruction in Statute Law." By Horace A. Davis. 6 *Illinois Law Review* 126 (June).

"The end to be sought is instruction in the proper method of interpretation. That the materials necessarily used may prove valueless in later professional life is unfortunate; but it does not mean that the work has been wasted. The same methods applied in discovering the real meaning of the New York Highway or Lien Law will be used in interpreting the federal statutes on taxation and the New Jersey corporation laws. A mental attitude and accurate methods of work are the lessons to be learned; not an intimate acquaintance with any given statute, no matter how important. The answer is in effect the same as is made to the objections against certain courses in mathematics, and even against a liberal education as a whole — that its purpose is to teach the student how to think."

Legal History. "The Origin of the Peculiar Duties of Public Service Companies, I." By Charles K. Burdick. 11 *Columbia Law Review* 514 (June).

"It seems safe to believe that originally any one who held himself out to serve all who might apply was conceived of as assuming a public or common calling, and by force of this *assumpsit* was held to obligate himself to serve all who should apply and to serve with care. In a state of society so primitive as that of the time of which we are speaking, the kinds of things which a person would be likely to hold himself out to do for all applicants would be few. . . . However, as a result of the rapidly changing economic conditions it soon became more and more usual for persons to hold themselves out to serve the public generally in all lines of commercial activity, so that such a holding-out lost any distinctive significance which it earlier had; and as a result of the rapid development of legal science and the clarification of legal ideas, breach of legally-imposed rather than self-imposed duty came to be conceived of as the basis of tort liability, and the *assumpsit*, so important in earlier actions on the case, and implied in the case of one engaged in a common calling from the holding-out, was no longer recognized as a necessary element. What effect had this upon the liabilities of those engaged in 'common callings'? . . . A person no longer became liable to an action on the case simply because he held himself out to serve the public generally and then refused to serve some member of the public who applied—this obligation now attached only to common carriers by land and water (including ferrymen) and innkeepers. . . . Perhaps several reasons may be hazarded for the survival of this peculiar liability of the carrier and innkeeper, even when the reasons in which it originated would no longer be recognized as sufficient basis for a tort action. . . . Thus survived the common law duty of common carriers and innkeepers to serve, according to their holding-out, those who might apply, though the original reason for the imposition of the duty, no longer sufficient in itself to justify its imposition, was forgotten, and new reasons had to be found for its justification."

Local Government. "Political Innovations." By Hon. Robert W. Bonyng. *Forum*, v. 45, p. 645 (June).

"The adoption of the 'short ballot' offers the simplest and most complete remedy for the defects in our present system of representative government. It does not involve any radical change in the form of the government, but, on the contrary, would be a return to a truly representative government. Its reinstatement would mean the application to political affairs of the methods that are so successfully employed by all the great industrial corporations of the country for the transaction of their business."

Marriage and Divorce. See Domestic Relations.

Monopolies. "The Unreasonable *Obiter Dicta* of Chief Justice White in the *Standard Oil Case*." By Albert H. Walker. 72 *Central Law Journal* 413 (June 9).

The writer takes the preposterous position that as "the decision of the *Standard Oil case* did not depend in the slightest degree upon the

presence or absence of any such limitation upon the statutory word 'restraint' or the statutory word 'monopolize,' as Chief Justice White, in his five-thousand word argument, sought to place upon those words, . . . all those portions of his written opinion which appear to be intended to operate to thus limit those statutory words are *obiter dicta*."

Penology. See Criminology, Probation and Parole, Prison Labor.

Prison Labor. "Something for Nothing." By Julian Leavitt. *American Magazine*, v. 72, p. 351 (July).

"It is safe to say that 1,500 convicts have displaced at least as many free workmen permanently and reduced the wages of ten thousand others to starvation point."

Probation and Parole. "The Constitutionality of the Federal Parole Law." By Agnes K. McNamara. 45 *American Law Review* 401 (May-June).

"The United States Supreme Court has upheld specifically two state parole laws — that of Illinois in *Dreyer v. Illinois* (187 U. S. 71), and that of Michigan in *Ughbanks v. Armstrong* (208 U. S. 481) — but in both cases the point decided is that a state parole law does not violate the fourteenth amendment of the federal Constitution, and in both cases the Supreme Court declines to review the state court's decision that the parole law in question did not violate the state constitution by infringing on the judicial or executive powers.

"Reasoning both from the analogy of state parole laws and the general trend of federal decisions on the president's pardoning power the probabilities are that the federal parole law supported, as it is, by public policy, will be held constitutional."

See Penology.

Procedure. "Delays and Reversals on Technical Grounds in Civil and Criminal Trials." By E. J. McDermott. 45 *American Law Review* 356 (May-June).

"(1) It should be possible to prosecute a criminal (a) by indictment, and in misdemeanors at least (b) by information on the part of the public prosecutor with the concurrence of some magistrate or judge.

"(2) An indictment should be short and simple. It should briefly state the nature of the crime and only such facts as are necessary (a) to enable the accused to know what the offense is and where and when it was committed and (b) to enable the court to enter such a judgment as will prevent a second prosecution for the same offense. All of that could be stated in any case in five or ten lines.

"(3) The prosecutor should have the right to amend the indictment at any time, provided the whole character of the crime is not changed and the accused is given the right to a continuance, when necessary, to get new proof for his defense.

"(4) The rules of procedure should be held

to be directory, not mandatory. In the appellate court, the accused should be allowed to complain only of an abuse of the trial court's discretion in passing upon such questions. Even if the trial court erred in preventing him from producing proper evidence or in admitting incompetent evidence or in giving an erroneous instruction, a new trial should not be ordered, unless the court has a reasonable doubt of his guilt or unless the trial court abused its discretion.

"(5) The press should be allowed to publish only a report of what actually occurs in court. It should not be allowed to exploit, in a sensational way, the anticipated evidence in cases to be tried or to publish exaggerated or biased accounts or to express opinions of a case actually on trial.

"(6) Jurors should not become disqualified because they have read of the crime in the newspapers or heard rumors about it or formed hasty opinions on such newspaper reports or rumors, if they can still, in the opinion of the judge, give the accused a fair and impartial hearing. The present method of allowing lawyers to spend days and weeks and months in the interrogation of jurors should be forbidden. It is an abuse that makes a fair trial almost impossible, that eliminates the most competent jurors and that brings the courts and the law into contempt. At common law, in olden times, juries were selected from the neighborhood because they were presumed to know some of the facts at least.

"(7) Expert testimony should be carefully regulated; hired partisan experts should be carefully tested and scrutinized by the court; their number should be limited; and their fees regulated. They should not be allowed to have big fees or contingent fees to warp their sworn opinions.

"(8) Nine or ten jurors should be allowed to render a verdict. Unanimity is obtained only by a compromise of conscience in most cases. One or two corrupt or stubborn or ignorant jurors should not be allowed to prevent a verdict. The appellate court can protect the innocent. A majority verdict was allowed by the ancient law of Rome and is allowed now by the modern law of Germany.

"(9) The accused should be allowed to remain silent, but his silence ought to be a fair subject for comment. The state should have the right, in an orderly way, to compel him or any one else to produce any paper or thing that may be important in the trial.

"(10) Perjury should be more promptly prosecuted and punished. It is a growing evil and an awful hindrance to justice.

"(11) Jury service should be exacted of our best citizens; but the jurors should be treated with more consideration.

"(12) The state should have the same number of peremptory challenges as the accused and the number should be smaller. Either party should have a right to a change of venue when a fair trial can not be obtained in the county where the accused was first charged with the offense.

"(13) A transcript of the evidence of a dead,

insane or unavoidably absent witness of a former trial should be competent evidence in a second trial."

Public Service Corporations. "State Control of Public Utilities." By Bruce Wyman. 24 *Harvard Law Review* 624 (June).

"As time goes on, one finds himself almost among the conservatives in standing by the original program for state control. And yet one may still hope that the state will as far as possible confine itself to regulation, leaving the companies to work out their own problems of management. State control need seldom go further than regulation in this sense. Whatever the companies may do should be subject to immediate revision by the constituted authorities. There should be swift reparation provided for any individual who has suffered harm in the meantime. And that should be the full extent of governmental regulation, generally speaking. When the state goes further, and attempts to dictate as to the policies which the companies shall adopt, it usually goes too far. Legislation going to this extent really crosses the line which divides state control from state operation."

"Nine Years' War with Privilege." By Tom L. Johnson. *Hampton's*, v. 27, p. 3 (July).

"Private ownership not only operates to exclude a comparatively small group of able men from public service, but it extends its influence to that larger body — the electorate, the people as a whole. . . . Municipal ownership will work betterment in service, reduce its cost to the people and purify politics by extinguishing a powerful interest hostile to good government. Only through municipal ownership can the gulf which divides the community into a small dominant class on one side and the unorganized people on the other be bridged."

See Legal History, Interstate Commerce, Railway Rates.

Railway Rates. "The Legal Basis of Rate Regulation, I." By Edward C. Bailly. 11 *Columbia Law Review* 532 (June).

"It has been said that, 'There has been no agreement of all the authorities on this question.' This statement, though literally true, is substantially inaccurate. In practice it is well settled that the value upon which a public service company is entitled to a fair return is the *present value* of its property devoted to the public use. This rule, properly applied, is sufficient for the determination of every question that arises in connection with rate regulation. Difficulties arise principally with respect to the weight to be given to the various factors in the problem."

Religious Freedom. "Religious Liberty and Bible Reading in Illinois Public Schools" (conclusion). By Henry Schofield. 6 *Illinois Law Review* 91 (June).

"The principle of non-divisive, non-denominational or united-Christian Bible reading in the public schools always has been tolerably satisfactory to the members of most Protestant

churches or sects. . . . The precise constitutional effect of the opinion of the majority of the Supreme Court [in the case in 245 Ill.] is, then, to change the principle of secularism, excluding the Bible from the public schools, from a principle of state governmental *policy* to a principle of state governmental *power*, *i.e.*, to a rule of fundamental organic state law, expressed by the people in the state constitution, cutting down the scope of the power of the legislature over the subject of public education. The opinion makes Illinois the only state in the Union, I think, that puts a *constitutional* padlock on the Bible in public schools."

State Insurance. "A National Insurance Scheme in Practice." By George P. Forrester. F.C.S. *Fortnightly Review*, v. 89, p. 995 (June).

"Britain's scheme has the advantage of being based on experience observed abroad, and on the working of an admirable system of voluntary assistance of the kind it is intended to provide, backed by that shrewd common sense with which we are credited. Its reception in the pioneer country of this class of social legislation augurs good for its future, but the proof of the pudding is in the eating, and here the supreme test will be in its actual application."

"A National Health-Charter." By Harold Spender. *Contemporary Review*, v. 99, p. 654 (June).

"Above all, Germany, which, even if happily it should never prove to be our military rival, is of necessity our chief commercial competitor, has maintained the full physical vigor of her race. That result is largely due to her great system of insurance. Mr. Lloyd George now proposes to lead the British nation along the same tried and beaten track. Will the nation rise to the opportunity?"

"The Government Scheme of National Insurance." By A. Carson Roberts. *Nineteenth Century*, v. 69, p. 1141 (June).

The writer is in sympathy with the general purpose of the scheme, but offers some criticisms of details.

Taxation. "The Corporation Tax Decision." By Charles W. Pierson. *20 Yale Law Journal* 636 (June).

"The Supreme Court holds, and in its opinion reiterates many times, that the tax is upon the *privilege of doing business in a corporate capacity*.

"Right here is the crux of the matter. Corporate capacity is not a right granted by the national Government. It is something which Congress can neither give nor take away. In the division of powers which marked the creation of our dual government the power to confer corporate capacity was reserved to the states. The decision, therefore, comes to this: Congress can by taxation burden the exercise of a privilege which only a state can grant. And the power to tax, it must be remembered, involves the power to destroy."

"The Things that are Cæsar's, VI: Why Nature's Way is Best." By Albert Jay Nock. *American Magazine*, v. 72, p. 335 (July).

The town of Lloydminster lies half in Saskatchewan, half in Alberta. Saskatchewan taxes improvements, Alberta taxes only land values. Lloydminster, Saskatchewan, cannot compete with Lloydminster, Alberta. Everything that can move into Alberta without sacrificing more than the difference in taxation moves across the boundary. "Alberta has got hold of the method of *natural taxation*. . . . In the province of Alberta, under the land-value tax, no man will hold more land than he can use; and thus the simple free competition with natural opportunity holds industrial conditions at a normal level."

Uniformity of Laws. "Four Uniform Commercial Acts." By George Whitelock. *45 American Law Review* 327 (May-June).

"The present paper does not purport to be a philosophical analysis of the new acts, nor to trace the evolution of their various provisions. Its purpose is briefly to indicate certain divergencies from the rules prevailing in Maryland and to show that in most instances the new provisions are but embodiments of familiar principles, supplemented occasionally by reasonable rules of sound mercantile usage."

United States Supreme Court. See Federal Courts and Jurisdiction.

Waters. "The Law Governing Diversion of Interstate Waters." By Carman F. Randolph. *Engineering News*, v. 65, p. 670 (June 1).

An opinion rendered to the Merchants' Association of New York City on the question whether the city can obtain an additional supply of water from interstate rivers.

"Were the states of the Union independent nations, each would be in a position to use the waters within its territory without regard to the effect in other states, and it is inconceivable that great states would abuse their power to the detriment of weak neighbors. But were the states independent, it is to be presumed that generally each would observe the principles of international law in this as in other respects. . . ."

"At present the international law of waters relates chiefly to navigation, but whenever the use of water-courses for drainage, or their diversion for canals or for consumption, irrigation or power causes injury in another country, controversies will arise, and from these controversies we must look for the formulation of principles for their adjustment.

"Surely the pollution of a river to the serious detriment of a neighboring country would be a substantial grievance. If works in one country should impair navigation or flood property in another there would be just cause for complaint. (Vattel, I., ss. 271-3.) The United States once complained of an obstruction to the flow of a stream in Maine caused by acts done in Canada. (Wharton's International Law Digest, s. 20.) . . ."

"When international controversies over water supply become sufficiently frequent to attract the sustained attention of publicists we shall have a general declaration that a nation is not justified in dealing with international waters in

entire disregard of its neighbor's welfare. In respect of diversion, we may anticipate the presumption that a nation is not justified in diverting the entire flow of a stream from its neighbor. . . .

"An equitable distribution of interstate waters under the high and impartial auspices of the Supreme Court would be a novel, but not a startling proceeding. This principle commended by the law of nations should find readier acceptance in the jurisprudence of our fraternal states, and its application is better assured among these states whose justiciable controversies are determinable by a constitutional court than among the nations, whose differences are adjusted by force or diplomacy or by voluntary submission to an arbitral tribunal."

Workmen's Compensation. "Workmen's Compensation for Injuries." By Leonard J. Tynan. 34 *New Jersey Law Journal* 164 (June).

A very able article. The author summarizes his conclusions as follows, and it seems to us that the soundness of the first five contentions below stated, may possibly be approved: —

"1. A workmen's compensation act that is devoid of mutuality, to wit, that binds one of the parties to accept its provisions while it leaves the other party free, after an accident, to elect, will be more strenuously opposed than will be one that is mutual, and in which the obligation of the one party to pay is balanced, as a consideration, by the obligation of the other party to accept.

"2. Under a state constitution which guarantees to the citizen that his property shall not be taken without due process of law, the enforcement of a mandatory workmen's compensation act would be such a taking; and as the subject is not one which concerns the public 'health, safety, comfort, morals, peace or order,' the police power of the state cannot be invoked to read such a provision into contracts of hire, and deprive the citizen of the property right to contract.

"3. A statute which, as that of New Jersey, enforces the compensation provision on all who fail to reject it, but gives all the power to reject it, is a trap for the unwary, and is probably invalid as to those who know nothing of its provisions, for, despite much that is said and written to the contrary, there is a very fair argument to sustain the proposition that all persons are *not* presumed to know the law.

"4. The amending of a state constitution in an attempt to make lawful the enactment of a compensation statute, embodying, as such proposed constitutional amendment necessarily will, an absolute exception to the constitutional provision which now safeguards the right of private property, is repugnant to the sense of justice and right, and is a violent trespass upon 'those ancient and fundamental principles which were in existence when our constitutions were adopted.

"5. The suggestion of Mr. Justice Werner in the New York decision that "due process of law" as spoken of in the Federal Constitution in fact merely means 'due process of law' under the constitution of the particular state, is probably not well founded, and, in case of mandatory legis-

lation of this character, even though it be in accord with the provisions of a state constitution, the employer will be likely to find protection in the Fourteenth Amendment of the Federal Constitution.

"6. The statutory abolition of the doctrine that the employer shall not be liable for accidents caused through the negligence of the injured servant's fellow-servant, but that, under an extension of the doctrine of *respondet superior*, the employer shall answer for the negligence of his servants toward each other as well as towards strangers, will do much to put employers in a frame of mind to accept the provisions of a reasonable compensation act.

"7. The placing upon the defendant, in accident litigation, of the burden of proof of contributory negligence (which is already the case in some of the states) will also tend to induce the employer to accept the provisions of a reasonable compensation act.

"8. The best public opinion of the day is undoubtedly in favor of a system of workmen's insurance or compensation to cover accident losses, the entire cost of which should be a charge upon the industry in which the workmen are employed.

"9. Reasonable legislation upon the subject will merely outline a suggestive form of compensation agreement to be 'read into' the contract of hire, with a fair schedule of compensation and a mutuality of obligation, which form, at any time before an accident, the parties to the contract may, by mutual agreement, adopt or reject at will. The labor unions, public opinion, the abolishing of the fellow-servant rule, the limitation of common law defenses, and the desire to avoid litigation, will all tend to make it to the interest of the employer to adopt a statute with a reasonable schedule of compensation."

"New York Workmen's Compensation Act." Comments on *Ives v. South Buffalo R. Co.* By Charles C. Moore. 15 *Law Notes* 44 (June).

Replying forcefully to Mr. Roosevelt's *Outlook* article.

"Judge Werner's opinion dodges nothing. Now, we hold that the burden of proving error rests heavily upon those who differ with the court, and that this burden is in no material degree supported by showing that the court's description of due process of law is not exactly correct, or by baldly asserting a duty to provide for 'orphans, widows and cripples.' . . .

"By reflex mental operation the dispassionate observer is compelled to recollect the futility of similar efforts of the liquor interests to stay the steamroller advance of the 'police power,' which, in some states, with the assent of the United States Supreme Court, almost utterly destroyed valuable brewery and distillery properties, and everywhere firmly established stringent civil damage acts, so called, and the like. At the same time, this brings us around in the neighborhood of our first reply to the *Outlook's* criticisms of the *Ives* case. Has the public an unrestrained liberty to execute its will on behalf of employees against employers in precisely the

same spirit as it has proceeded against common rum-sellers?"

See State Insurance.

Miscellaneous Articles of Interest to the Legal Profession

American Traits. "American Affairs." By A. Maurice Low. *National Review*, v. 57, p. 649 (June).

"When the Ferrero of the twenty-first century comes to exhume the long forgotten past of the American people and reconstructs their history he will doubtless be puzzled to find adequate explanation for the *weltschmers* that possessed the Americans in their youth. . . . Not to hear the still small voice of reform is to be guilty of mortal civic sin. Not to take part in some movement for reform, not to join a club or organization or society whose mission is reform, is to earn the contempt of one's fellow-citizens. . . . The tariff has made the American people rich and powerful, therefore it must be reformed; in the teapot lurks poverty and disease, therefore it must be regulated by the reformer. The police force is trying to reform the burglar, and the burglar is preaching reform to the police force. In the wide field of reform there is work for every man, therefore every man is happy in his misery pursuing reform with a zeal that the world has never before known."

Biography. "Chief Justice White." By Richard Henry Jesse. *American Law Review* 321 (May-June).

"Johnson, A Governor who has made Good." By William E. Smythe. *Hampton's*, v. 27, p. 91 (July).

The immunity of the judiciary from the recall "is the very citadel of the Interests. But Hiram

Johnson and his cohorts are thundering at the gate. They know that they must prevail in this struggle if California is to be won for men — and stay won."

China. "The Struggle for Existence in China." By Prof. Edward Alsworth Ross. *Century*, v. 82, p. 430 (July).

"A Western firm that wishes to instil the masses with its wares must make a grade of extra cheapness for the China trade. The British-American Tobacco Company puts up a package of twenty cigarettes that sells for two cents. The Standard Oil Company sells by the million a lamp that costs eleven cents and retails, chimney and all, for eight and a half cents."

Prof. Ross gives a most interesting description of China life, especially of the domestic system. The extreme poverty of China is due chiefly to overpopulation, and "in forty or fifty years there will come a powerful outward thrust of surplus Chinese." What we shall do with these people will then become a world problem.

Fiction. "The Wine of Violence." By Katharine Fullerton Gerould. *Scribner's*, v. 50, p. 75 (July).

The motive of the story, which is told with great charm and with keen insight into character, is the conviction, on circumstantial evidence, of one Filippo Upcher of the murder of his wife. The supposed murderer is executed, and the story-writer pleads his cause.

Party Politics. "The Battle of 1912." By O. K. Davis. *Hampton's*, v. 27, p. 77 (July).

"Mr. Taft will have back of him all the weight and influence of the cold-blooded and well calculated plans of the national Republican machine. The mere inertia of the reactionary element still counts for much in a convention, and in this case it will count for the President's renomination."

Latest Important Cases

Food and Drugs Act. "Misbranding" *Narrowly Construed — Misrepresentation Permitted so Long as There are No False Statements About Ingredients of Drugs.*

U. S.

The federal Food and Drugs Act has been construed in such a manner as not to apply to quack medicines sold under labels representing them to be effective cures when as a matter of fact they are not. This was the result in *U. S. v.*

Johnson, decided May 29 (L. ed. adv. sheets, no. 13, p. 627), Mr. Justice Holmes writing the opinion, but three of the Justices (Hughes, Harlan and Day, JJ.), dissenting.

By section 8 of the statute, the term *misbranded* "shall apply to all drugs or articles of food. . . . the package or label of which shall bear any statement, design, or device regarding such article, or the ingredients or substances con-

tained therein, which shall be false or misleading in any particular. . . ."

The Court said regarding the interpretation of this phrase: —

"We are of opinion that the phrase is aimed not at all possible false statements, but only at such as determine the identity of the article, possibly including its strength, quality and purity, dealt with in §7. . . . It was natural enough to throw this risk on shippers with regard to the identity of their wares, but a very different and unlikely step to make them answerable for mistaken praise. It should be noticed still further that by §4, the determination whether an article is misbranded is left to the Bureau of Chemistry of the Department of Agriculture, which is most natural if the question concerns ingredients and kind, but hardly so as to medical effects.

"We shall say nothing as to the limits of constitutional power, and but a word as to what Congress was likely to attempt. It was much more likely to regulate commerce in food and drugs with reference to plain matter of fact, so that food and drugs should be what they professed to be, when the kind was stated, than to distort the uses of its constitutional power to establishing criteria in regions where opinions are far apart. See *American School v. McAnnulty*, 187 U. S. 94, 47 L. ed. 90, 23 Sup. Ct. Rep. 33."

Mr. Justice Hughes, in the course of his able dissenting opinion, said: —

"The argument is that the curative properties of articles purveyed as medicinal preparations are matters of opinion, and the contrariety of views among medical practitioners, and the conflict between the schools of medicine, are impressively described. But, granting the wide domain of opinion, and allowing the broadest range to the conflict of medical views, there still remains a

field in which statements as to curative properties are downright falsehoods and in no sense expressions of judgment. This field I believe this statute covers. . . .

"The question, then, is whether, if an article is shipped in interstate commerce, bearing on its label a representation that it is a cure for a given disease, when, on a showing of the facts, there would be a unanimous agreement that it was absolutely worthless and an out-and-out cheat, the act of Congress can be said to apply to it. To my mind the answer appears clear. . . .

"Nor does it seem to me that any serious question arises in this case as to the power of Congress. I take it to be conceded that misbranding may cover statements as to strength, quality and purity. But so long as the statement is not as to matter of opinion, but consists of a false representation of fact — in labeling the article as a cure when it is nothing of the sort from any point of view, but wholly worthless—there would appear to be no basis for a constitutional distinction. It is none the less descriptive — and falsely descriptive — of the article. Why should not worthless stuff, purveyed under false labels as cures, be made contraband of interstate commerce, as well as lottery tickets? *Lottery Case (Champion v. Ames)* 188 U. S. 331, 47 L. ed. 497, 23 Sup. Ct. Rep. 321, 13 Am. Crim. Rep. 561."

Motor Vehicles. *Whether Speeding Constitutes an Offense Depends on Reason and Attendant Circumstances — Burden of Proof is on State to Prove the Offense — Making Certain Rates of Speed Prima Facie Evidence of Violation Does not Shift Burden of Proof.* Mass.

The Massachusetts Supreme Judicial Court took a liberal view of the meaning of the statute (St. 1909, c. 534, s. 16) prohibiting the operation of an automo-

bile "at a rate of speed greater than was reasonable and proper, having regard to traffic and the use of the way and the safety of the public," in *Commonwealth v. Cassidy*, 209 Mass. 24, decided May 18. The Court said:—

"The section in question, after creating the offense, goes on to provide that in certain localities therein described 'a speed exceeding 20 miles per hour for the distance of a quarter of a mile' shall be '*prima facie* evidence of a rate of speed greater than is reasonable and proper,' and it contains a similar provision as to a rate of speed 'exceeding 15 miles per hour for the distance of one-eighth of a mile' in certain other localities.

"Shortly stated, the statute forbids the running of an automobile at a rate of speed greater than is reasonable and proper, and declares what rates of speed shall be *prima facie* evidence of the rate forbidden.

"The real question in all these cases now is whether the speed is greater than was reasonable and proper, having regard to traffic and the use of the way and the safety of the public, the burden being on the commonwealth to show that it was. If the speed was such as to make out a *prima facie* case for the prosecution, still the burden does not change.

"The jury are to give due weight to the *prima facie* case taken in connection with the other circumstances disclosed by the testimony, whether coming from witnesses called by the government or by the defendant, and if they are satisfied that the speed is greater than was reasonable and proper, having regard

to traffic and the use of the way and the safety of the public, they should convict the defendant; otherwise they should acquit him."

Statute Requiring Registration and License Fees Constitutional—Interstate Commerce. N. J.

An important decision bearing upon the right of a state to demand registration and license fees of non-resident motorists was recently handed down by the Court of Errors and Appeals of New Jersey. The Frelinghuysen automobile law of 1906 was held constitutional.

To test the law Frank J. Kane of New York brought a proceeding after he had been fined for attempting to run his car from Jersey City to Pennsylvania without payment of the established fees. Kane held that the statute was invalid because it was not merely a revenue measure and that it violated the federal Constitution because, as applying to non-resident autoists, it was a regulation of interstate commerce.

The opinion, written by Chief Justice Gummere, held that the legislature, in regard to the first contention, was clearly within its power as reserved to it under the Constitution. As to the second point, he held that the automobile fees, while affecting interstate commerce, are a legitimate exercise of state powers. He decided that the use by swiftly moving automobiles of roads in New Jersey causes their rapid deterioration and that the Frelinghuysen law simply imposes a charge for the raising of revenue to be applied to the upkeep of these roads.

The Editor's Bag

CLOTHES

IN an editorial on the subject of proper regard for the etiquette of dress in the court room, the *New York Law Journal* remarks:—

“We believe that the wearing of robes by the judges of this state is approved by a decided preponderance of professional sentiment. Although lawyers are also officers of the court, some of them try cases in clothes that no judge would have had the face to wear on the bench before the advent of the gown. While we would not advocate the adoption of robes by members of the bar, we do say that their attire when actually engaged in their professional office should not suggest that they are devoid of respect for the institutions of justice as well as of personal dignity and seriousness.”

In the United States we attach less importance to formalities of dress than people in European countries. We have evolved simple, comfortable fashions of dress well suited to a work-a-day existence, and the frock coat is generally looked upon as a necessary evil and one to be avoided as much as possible. Our business and professional men do not dress for the drawing room, but work early and late, and make no social engagements as a rule before the hour of the evening meal. The Londoner's formalities, which have doubtless grown

conventionalized to the extent of having lost their original significance, probably had their source in a strict official etiquette and to the desire to emphasize the fact that one moved in high social circles. In time the clerk copied his employer and ceremonial degenerated into convention. In our country public officials have not been recruited from leisured classes, and social life has been relegated to a subordinate position by the intensity of the struggle for the conquest of our material resources. Consequently it has come about that Americans seek to assert their social position only through the dignity and taste of their dress, rather than through that scrupulous observance of formalities which distinguishes foreigners.

The topic is sufficiently frivolous for this season of the year, so we may be permitted to offer some suggestions regarding the proper garb of the legal profession. There are judges who wear sack suits beneath their judicial robes—is this right? We must decline to be drawn into the discussion of such a trivial question. We rejoice, however, in the many indications that the prejudice against robes seems to be dying out, and doubtless the time will soon come when there is no court of high standing in any of our states dispensing with these insignia of a noble office. It is also becoming in our judges to garb themselves in sombre frock coats outside the court room, except during the intervals between their official labors.

Were it feasible to introduce the English custom requiring barristers to wear gowns, our courts of law would gain in dignity, but this is not practicable without a division of the profession into barristers and solicitors, nor would it help matters if every rogue were allowed to assume a hypocritical garb. The barrister's robe might well be awarded to a select few as a badge of distinction, and this would be fortunate, but how would the prejudice be overcome, and by whom could the innovation be carried out? Much more is to be hoped for, from a wider diffusion of the etiquette of the United States Supreme Court, before which solemn tribunal none may appear to plead his cause except in a seemly frock coat.

In the trying heat of our summer climate a latitude in dress should be conceded to the bar, but the bench may properly be permitted to swelter in robes, for theirs is an occupation requiring calmer deliberation. Let no lawyer, however, appear in the halls of justice coatless or tennis racket in hand, lest the Court grow envious and uncomfortable. And what about waist-coats? They are, it seems to us, a necessary instrumentality in the administration of justice. But crash suits may in extreme circumstances be worn, though flannels are at all times most improper.

If lawyers will give heed to these suggestions the future cannot fail to bring forth a more decorous, if slightly less comfortable bar.

THE great majority of the 16,000 lawyers in New York City are said to make not over a thousand dollars a year. If they made more there would be much more trouble in the world, so honors are even.

—*Schenectady Union.*

REVISED EDITIONS

A SUGGESTION offered by Mr. Carlo P. Sawyer, librarian of the Chicago Bar Association, in favor of the substitution of a system of supplemental volumes for periodical new editions of law treatises, meets with the approval of the *National Corporation Reporter*, which says:—

If the author of a one or two-volume text book would get out a supplemental volume at the end of say, ten years, the text and citations being distributed, by numbered paragraphs, according to the scheme of the original work, and at the end of another ten years would get out a second supplemental volume, embracing both the material in the first volume and subsequent decisions, there would be no reason for revising the book more than once in a generation and the cost of the supplemental volume would be trifling compared to the cost of a second edition.

The law publishers and text writers no doubt have their own side of the question, and while the mercenary advantage of disposing of a new revised edition may count for something with them, the existing practice exists primarily as a matter of custom, no new method of keeping text-books up-to-date having yet been devised, and also, undoubtedly, as the result of a conviction that the needs of the practitioner are best served by placing at his disposal a complete volume rendering reference to earlier editions unnecessary.

In revising a law book to keep it abreast of the times, it is frequently necessary not simply to add new citations and make minor alterations, but to rewrite large portions of the text, or even to recast much of the original material. In such cases a supplemental volume would obviously be a disadvantage rather than an advantage. The object, of course, should be to provide a labor-saver, and a supplemental volume which would require diligent

comparison with the original one to be fully understood could not attain any real utility.

On the other hand, there are undoubtedly many examples of new editions issued merely to include latest citations and record minor changes in the law, entailing few radical changes in the original text. In such cases the supplemental volume would be a boon to many practitioners not caring to spend too much for new law books, but it is evident that it would not be a time-saver, as it would be necessary to consult both the supplemental volume and the original edition.

Moreover, there is always a definite market demand for the late revision of a standard work, and there is the important element to be considered of those who would prefer, in stocking their libraries, to buy new editions, rather than old. A publisher cannot afford to run the risk of being outclassed by competitors, and an author will naturally take a selfish interest in keeping his book before the public in the most up-to-date form possible.

The solution seems to be that it is hopeless to think of driving the new revised editions from the market and substituting for them thin volumes of annotations. Within narrow limits, however, there may be a field for the annotation system; it might be tried in the case of a few books which after five years need to be brought up-to-date yet do not call for revision throughout. It might thus supplement the system now in vogue without seeking entirely to supplant it.

LAWYERS IN CONGRESS

ACCORDING to figures published by the *St. Paul Pioneer-Press*, three hundred and four of the four hundred and eighty members of both houses

of Congress are lawyers. In the Senate there are thirty-two Republican lawyers and the same number of Democratic lawyers. In the House the Republicans have ninety-nine lawyers and the Democrats one hundred and forty-five. Thus seventy per cent of the Senators are members of the bar, and sixty-three per cent of the Representatives. The representation of other occupations in Congress is so small as to be insignificant as compared with the army of lawyers.

SIR WILLIAM GILBERT

THE death of Sir William Gilbert, as the result of a manly attempt to rescue a young girl from drowning, was, as the coroner said, "a very honorable end to a great and distinguished career." We take pleasure in quoting from an article in the *London Law Journal* the following references to Sir William's satires of the profession to which he had belonged:—

"Sir William Gilbert was never happier than when aiming his shafts of wit at the members of the profession of which he was once a practising member.

The Law is the true embodiment
Of everything that's excellent.
It has no kind of fault or flaw,
And I, my lords, embody the law —

so sings the Lord Chancellor in 'Iolanthe,' perhaps the best of all Sir William Gilbert's legal characters. Who but a legal dramatist could have created the problem which vexes a 'highly susceptible Chancellor' who falls in love with a ward of Court? 'The feelings of a Lord Chancellor who is in love with a ward of Court are not to be envied. What is his position? Can he give his own consent to his own marriage with his own ward? Can he marry his own ward without his own consent? And if he marries his own ward without his

own consent, can he commit himself for contempt of his own Court? And if he commit himself for contempt of his own Court, can he appear by counsel before himself to move for arrest of his own judgment? Ah, my lords, it is indeed painful to have to sit upon a Woolsack which is stuffed with such thorns as these.'

"Upon the Bench itself Sir William Gilbert seldom allows his satire to play, though Ko-Ko, in 'The Mikado,' includes in his famous list of social offenders who never will be missed, 'That Nisi Prius nuisance, who just now is rather rife, the Judicial Humorist.' The judges of the Savoy operas are much given to indulging in reminiscences of their forensic days, and Sir William Gilbert is accustomed to make the Bench the vehicle of his satire on the Bar. It is, for instance, the Lord Chancellor, in 'Iolanthe,' who recalls the 'new and original plan' on which, 'when he went to the Bar as a very young man,' he determined to work:—

Ere I go into Court I will read my brief through
(Said I to myself, said I),
And I'll never take work I'm unable to do
(Said I to myself, said I).
My learned profession I'll never disgrace
By taking a fee with a grin on my face,
When I haven't been there to attend to the case
(Said I to myself, said I).

"Even the judge in 'Trial by Jury'—one of the most delightfully whimsical of the Gilbertian plays—is mainly concerned to show how he reached the bench. Somebody once observed that one of three things was essential to a barrister's success—he must choose an attorney for his father, or marry an attorney's daughter, or be a miracle. It is the second of these things of which Sir William Gilbert chose to make fun. The judge in 'Trial by Jury' fell in love with 'a rich attorney's elderly, ugly

daughter,' who might 'very well pass for forty-three.' In the dusk with a light behind her and the rich attorney, faithful if ungallant, promised that he should 'reap the reward of his pluck':—

The rich attorney was good as his word,
The briefs came trooping gaily,
And every day my voice was heard
At the sessions or Ancient Bailey.
All thieves who could my fees afford
Relied on my orations,
And many a burglar I've restored
To his friends and his relations.

"Apart from the counsel in 'Trial by Jury,' who do not take a conspicuous part in the amusing proceedings, 'Sir Bailey Barre, K.C., M.P.,' in 'Utopia,' is the only member of Sir William Gilbert's branch of the profession who appears in his plays, and even here it is not the honorable and learned gentleman himself who says most of the satirical things of the Bar. It is Princess Zara who makes this interesting contribution to the ethics of advocacy:—

A complicated gentleman allow me to present,
Of all the arts and faculties the terse embodiment,
He's a great Arithmetician who can demonstrate
with ease
That two and two are three, or five, or anything
you please;
An eminent Logician who can make it clear to you
That black is white—when looked at from the
proper point of view;
A marvelous Philologist who'll undertake to
show
That 'Yes' is but another and a neater form of
'No.'"

ADVERTISEMENT

IN OUR May issue we published a letterhead used by an Iowa Justice of the Peace in collecting delinquent insurance premiums. It will interest our readers to learn that this limb of the law has gone out of the insurance business, and if any one is in need of a marriage license, hunting license,

legal blanks, job of printing, or magazine subscription, doubtless A. M. Floyd, Justice of the Peace, will be able to supply his wants. Justice Floyd's professional card, sent us by a correspondent, reads:—

A. M. FLOYD

Justice of the Peace

LISBON - - - IOWA

Located at the Sun Printing Office

Hunting or Marriage License from any
County

Complete Line of all kinds of Legal
Blanks

Also a specialty of Job Printing at right prices

Subscriptions taken for any Newspaper or Magazine at Low Cut Prices

WE HAVE OFTEN HELPED OTHERS, AND PERHAPS WE CAN HELP YOU

Should you want us to help you, in any branch of our several lines, come and see us and we will be glad to talk the matter over with you and give such assistance that is at our command.

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, facetiae, and anecdotes.



PHRASES THAT HAVE GONE WRONG

"AS GRAVE AS A JUDGE"

DRAWN BY GEORGE MORROW

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USELESS BUT ENTERTAINING

When Justice Buffum opened court in a small town in southern Georgia, one morning last week, he called loudly, "Jones against Johnson!"

A dignified gentleman came to bar and said: "I am Doctor Jones, your Honor, the complaining witness. My chickens were stolen and found in the possess'on of —"

"One moment, Doctor," the Judge interrupted. "We must have the defendant at the bar. Jones against Johnson! Jones against Johnson! Is the defendant present? Is William Johnson in court?"

A tall and shambling negro shuffled to the bar, ducked his head, pulled his woolly forelock in token of respect, and grinned a propitiatory grin.

"Ah's Willyum Johns'n, please suh, Jedge," he said. "Ah doan' know nuffin 'bout no 'fend-

ant, suh. Ah'm jes' the man wot took de chick'ns."

"Don't talk like that," the Court warned William. "You ought to have a lawyer to speak for you. Where's your lawyer?"

"Ah ain' got no lawyer, Jedge —"

"Very well, then," said his Honor. "I'll assign a lawyer to defend you."

"Oh, no, suh; no, suh! *Ple-e-ase* don' do dat!" William begged.

"Why not?" asked the Judge. "It won't cost you anything. Why don't you want a lawyer?"

"Well, ah'll tell yo', suh," said William, waving his tattered old hat confidentially. "Hit's jes' dia-a-way— ah wan' tuh enjoy dem chick'ns mase'f."
— *Harper's Weekly*.

The Legal World

Equity Pleading and Practice in Federal Courts

The important announcement was made June 3 that Chief Justice White had appointed a committee to change and revise the rules of practice in the equity courts of the United States. The committee is composed of Justices Lurton and Van Devanter, and the Chief Justice, *ex officio*. It will report to the full court, probably next winter, such changes and revisions in the present rules as it believes should be made. William J. Hughes of Washington, of the bar of the Supreme Court, who for years has been recognized as an authority on practice and procedure in that court, has been selected to act as secretary of the committee, which has issued a circular in part as follows:—

"The Supreme Court of the United States desires to consider the subject of revising the equity rules, and in connection with that subject the reformation of pleading and practice in equity cases

in the courts of the United States. Desiring to have the benefit of every possible suggestion from all sources, the committee earnestly requests the co-operation of the several circuit courts of appeal of the United States. To this end it ventures to suggest that each of those courts appoint a committee of at least three from their respective bars to prepare and suggest such changes in pleading and practice in equity in the courts of the United States as such committee may deem it would be wise to adopt, and when the changes are put into definite shape, to file the same with the secretary of this committee at the earliest possible moment, certainly on or before the first day of November next. While not desiring to exclude any definite suggestion from any judge or from any member of the bar, the committee hopes, in order to avoid complexity, that any suggestion which it is thought best to make may be forwarded through the instrumentality of the committee of the

bar to be appointed by the respective circuit courts of appeal, as above requested."

Personal

John Marshall Gest, Esq., of Philadelphia, has been elevated to a vacancy in the Orphans' Court in Pennsylvania.

Hon. E. DeForest Leach of Moundsville, W. Va., a member of the late Congress on Uniform Divorce Laws and a frequent contributor to the *Green Bag*, has been elected President of the National Divorce Reform Association.

The following nominations have been confirmed by the Senate: Frank A. Youmans, United States district judge for the western district of Arkansas; John R. McFie, Associate Justice of the Supreme Court of New Mexico; Arthur J. Tuttle, United States Attorney for the eastern district of Michigan.

After a fight waged by Southern Senators for more than two months the Senate on June 14 confirmed William H. Lewis, the Boston negro attorney, to be Assistant Attorney-General of the United States. Mr. Lewis is a graduate of Amherst College and Harvard Law School, and at Amherst was football captain and class orator. He was a member of the Massachusetts legislature in 1902.

President Taft, speaking before the Commercial Club of Cincinnati June 19, lightly referred to the possibility of "going back to a less active life," away from the Presidency, as having both welcome and unwelcome phases; and said that in the absence of any provision for former Presidents he would open a law office in his old home city,

and that he was determined his son Robert should work out his life amid those surroundings.

In a speech to the St. Louis Law School Alumni Association June 7, Secretary Nagel of the Department of Commerce and Labor said: "President Taft has entirely eliminated politics from the United States Supreme Court. He has shown in all his judicial appointments that he considered politics of no moment in the selection of United States judges. He has appointed Republicans and Democrats with utter impartiality, considering only fitness. The esteem of the federal Supreme Court may be attributed in great measure to this policy of President Taft."

For the nomination of Justice of the Louisiana Supreme Court to succeed Chief Justice Joseph A. Breaux, the retiring Chief Justice, Attorney-General Walter Guion, Judge L. F. Caillouet of the Court of Appeals and Edward N. Pugh have already offered themselves as candidates. These announcements are deemed encouraging by the New Orleans *Times-Democrat*, "as showing that the elective system of choosing our judiciary does not, as its opponents predicted, drive away able and capable men, and put a premium on demagogues, and that the primary is now inviting candidates of merit and of the highest standing."

Bar Associations

American Bar Association. — The annual convention of the American Bar Association will be held in Boston August 29-31. The Massachusetts Bar Association will act as hosts of the national

body. Edgar H. Farrar of New Orleans will preside and deliver his address as president. Another speaker will be William B. Hornblower of New York.

Arkansas. — The newly elected officers of the Arkansas Bar Association are: President, Ashley Cockrill, Little Rock; vice-president, James D. Shaver, Mena; secretary, R. R. Lynn, Little Rock; treasurer, J. Merrick Moore, Little Rock.

Georgia. — The following officers were elected at the recent annual meeting of the Georgia Bar Association: President, Alexander W. Smith, Atlanta; first vice-president, W. C. Bunn, Cedartown; second vice-president, J. R. L. Smith, Macon; third vice-president, R. D. Meador, Brunswick; fourth vice-president, L. W. Branch, Quitman; fifth vice-president, T. J. Brown, Elberton; secretary, Orville A. Park, Macon; treasurer, Z. D. Harrison, Atlanta; executive committee, W. W. Gordon, Jr., Savannah; I. J. Hoffmayer, Albany; W. H. Barrett, Augusta; H. C. Peeples, Atlanta.

Kansas. — President Harry B. Hutchins of the University of Michigan, former dean of the law department of that university, has consented to deliver the annual address before the Kansas State Bar Association, at its annual meeting, January 30, 1912.

New Jersey. — Discussion of the revision of the state constitution occupied a prominent place in the debates of the New Jersey Bar Association, which held its annual meeting at Atlantic City June 16-17. The proposition was finally laid on the table by a decisive vote.

President Howard M. Carrow of Camden called the convention to order, and Charles S. Moore of Atlantic City then introduced a resolution calling for a

constitutional convention. "Every one," he said, "must concede the absolute necessity of a more up-to-date judicial system. Our constitution deals with matters that might be much better left to the wisdom of the Legislature." He criticized the imposition of the duty on the Governor to appoint a greater number of minor officials than any other state executive in the country. The reform was also favored by George A. Heaney of Atlantic City, and Senator Osborne, and opposed by Edward Q. Keasby of Newark, former Senator William M. Johnson of Hackensack, and Charles Hartshorne of Jersey City. When the vote was taken, nearly all the prominent members of the judiciary were opposed, including Samuel Kalisch of Newark, who had been sworn the day before into the Court of Errors.

The association took a somewhat different position, however, on the following day, voting that the proposition for a constitutional convention be considered at a special meeting of the association to be held in Trenton in January, 1912.

A resolution was also adopted for the appointment of a special committee to consider plans for improving the administration of justice in the state.

Governor Woodrow Wilson made a forceful address at the thirteenth annual banquet which aroused much discussion. He said in part: —

"It is true that the legal profession, as a profession, does not enjoy the confidence of the people. I am surprised, and I must say disappointed, that the legal profession of this country has not undergone the same change and liberalizing that has characterized its progress in other countries.

"The community no longer regards you as legal guides. You have withdrawn from statesmanship and lowered

the profession to a strictly business basis.

"The ambush of technicalities you have drawn around the corporations makes it necessary to enact drastic legislation to tear away the shell and get at the heart.

"If you want to restore your profession to the confidence of the people you can do it in a single year by following the method of simplicity. The change can be wrought, but if it is wrought without your support and assistance it will be wrought to your discredit.

"The United States is in a very critical mood in regard to its courts. You must regard the constitution on the same level as statutes, because you can't read anything into the constitution that was not meant to be read there."

"I take it the Constitution of the United States is at any particular time what the people who live under it want it to be. From age to age it has worn the aspect of youth. It is shot through and through with the virility of the common law. Only one kind of men should be judges — men who have the elasticity of youth. The energy of the American must be relieved by the courts and if it is not relieved it will break through the sacred fibre. I am not suggesting sinister possibilities but speak of the future in the hope that the future may not break with the past. Are you or are you not going to be instruments in that great irresistible process by which the human race is struggling forward to higher institutional levels?"

Other speakers at the banquet were Congressman L. Irving Handy of Delaware, Judge Peter F. Daly of Middlesex, George L. Record, and former Judge John W. Westcott of Camden.

On the second day, Chief Justice James F. Pennewill of Delaware spoke on "The Spirit of Unrest." He admitted

that there is just complaint of the delays of the law, that there are well-founded criticisms of the cost of litigation and of the other features of the courts, but that as a whole the system is sound and effective, with nothing suggested to replace it for its betterment. He said the law's delays are due almost wholly to the rights of appeal, and he suggested that a single appeal might act as a remedy for this defect. He admitted that there should be a material reduction in the costs of litigation so that the criticism that "the law is not for the poor man" may not go unchallenged. The Justice's concluding thought was that the United States, now one of the greatest Powers of the world, should be a force for the establishment and maintenance of the peace of the world.

The following officers were elected: president, W. M. Johnson, Hackensack; vice-presidents, James M. Hildreth, Cape May; Edward G. Bleakly, Camden; I. W. Carmichael, Ocean; Frank Katzenback, Camden; George Silzer, Middlesex; Hugh K. Gaston, Somerset; Edw. Q. Keasby, Newark; Chas. E. Hendrickson, Jr., Jersey City; Theo. Simonson, Newton; secretary, William F. Kraft, Camden; treasurer, Lewis Starr, Woodbury.

Law School Graduations

Attorney-General Wickersham delivered the Commencement oration at Yale Law School June 19, his subject being "New States and Constitutions."

Governor Harmon addressed the graduating class of the law school of the University of Notre Dame, at South Bend, Ind., June 11. He discussed professional ethics and declared that the desire for wealth was the chief source of danger to the profession.

Thirty-one graduates of the New Jersey Law School, Newark, N. J., received their degrees on June 14, two being women. Judge William P. Martin, of the Court of Common Pleas, told the graduates that the cardinal virtues of a lawyer were honesty, industry and common sense.

Judge Thomas C. T. Crain of the Court of General Sessions made the address of the evening at the Commencement Exercises of Brooklyn Law School June 8. The degree of Bachelor of Laws was awarded to seventy-four graduates, that of Master of Laws to fourteen, and that of Doctor of Jurisprudence to three.

There were 122 graduates from the Chicago-Kent College of Law June 8, and three young women received the master's degree for postgraduate study. Of these three one has served as a legislative clerk for the two recent sessions, and another will make a specialty of probate law. Five women were graduated with the ordinary degree.

Thirty-eight members of the senior class of the Benton Law School of St. Louis, Mo., were awarded the degree of Bachelor of Law at the Commencement exercises June 2. Twelve members of the postgraduate course received the degree of Master of Law. Alonzo K. Vickers, Chief Justice of the Illinois Supreme Court, delivered an address on "The Constitution and its Builders."

State's Attorney John E. W. Wayman gave the address to the graduating class of the Chicago Law School June 11, and made some remarks about the social standing of lawyers which have widely been discussed in the press. "The lawyer's lack of social standing is felt when-

ever a lawyer is introduced to the elect," he said. "Instinctively men clasp their pockets, and then say, 'I am glad to meet you.' Don't talk law business in elevated trains, street cars or railroad trains. Gabbling in public is one reason why lawyers have lost their social position." The degree of LL.D. was conferred on Mr. Wayman by the school.

Fifty-nine degrees were awarded to graduates of the Boston University Law School June 7, Hamilton W. Mabie of the *Outlook* giving the Commencement address. On the evening before, the alumni dined in Boston, and Judge Dodge of the United States District Court predicted that the merging of the federal courts next January 1 would work a great benefit. Moorfield Storey spoke of the need of reforming procedure to lessen delays. Others who spoke were Justice Arthur P. Rugg of the state Supreme Judicial Court, Dean Melville M. Bigelow of the law school, President Hemenway of the Massachusetts Bar Association, and President Joseph J. Feely of the association, who was toastmaster. These officers were elected: President, Fletcher Ranney; vice-president, Judge John D. McLaughlin; secretary, Daniel T. O'Connell; Executive committee, Merrill E. Boyd, Joseph J. Feely, Bert E. Holland and W. J. C. Sullivan. About 100 were present.

Miscellaneous

The Imperial Conference, holding its sessions at the British Foreign Office in London, on June 2 approved the Declaration of London and passed a resolution favoring its ratification. Sir Edward Grey and Sir Wilfrid Laurier both urged that refusal to ratify the Declaration would be detrimental to the cause of international arbitration.

An enormous task is before the commission which is codifying the canon law of the Roman Catholic Church. The first portion to be completed deals with impediments to the marriage tie. The subjects covered by laws which are the accumulation of centuries include the entire administration of the church on its legal side, especially relating to central administration.

It is gratifying to note that some progress is being made in raising funds for a new law school building for the University of Maine, to replace the building destroyed by the Bangor fire. The Maine Law School Alumni Association considered the matter at its June meeting, at which the following officers were elected: Frank D. Fenderson, Limerick, president; Freeland Jones, Bangor, vice-president; Benjamin W. Blanchard, Bangor, treasurer; Neil V. McLean, Bangor; financial secretary; George H. Worster, Bangor, corresponding secretary; C. P. Conners and D. F. Snow, Bangor, and J. P. Dudley, Houlton, executive committee.

That time-honored personage, the Justice of the Peace, is extinct in many of our states, where minor courts have been established which are administered by thoroughly competent judges occupying a dignified place in the judiciary system. In some parts of the South there are signs of dissatisfaction with the justice courts, and indications that the system is likely to be reformed. The Bar Association of Baltimore, for example, is supporting a bill for the establishment of a People's Court for minor civil actions, the bulk of the business of the justice courts being thrown into the new central court. Moreover, the Atlanta Bar Association has drawn up an amendment to the constitution of

Georgia, which authorizes the large cities of the state to vote on the question of abolishing justice courts.

New rules for admission to the bar in New York State became effective on July 1. The amended rules are the result of conferences by committees of the New York County Lawyers' Association and the Association of the Bar, with the Justices of the Appellate Division and the Court of Appeals. Francis Lynde Stetson, President of the Bar Association, and John R. Dos Passos, Chairman of the Committee on Admissions of the County Lawyers' Association, gave much time to revising the rules. The amended rules lengthen from three to four years the time to be spent in apprenticeship, credit of one year being given to graduates of colleges and universities. It is expected this rule will reduce the number of candidates for admission to the bar and raise the standard of those who are successful. Applicants who are not graduates of colleges or universities must serve a clerkship for one year continuously before examination by the State Board of Bar Examiners or after a successful examination, before being admitted to practice. Graduates of colleges and universities are privileged, under the amended rules, to serve their full apprenticeship either as clerks in a law office, or as students in a law school, or half time in each.

Obituary

Judge Martin E. Gill. — Martin Edward Gill of the District Court at San Juan, Porto Rico, who died in June, was born in Somerville, Mass., on February 13, 1870, and was graduated from Harvard in 1890, and from the Harvard Law School in 1894, winning honors in all his studies. When the present Gov-

ernor of Porto Rico, Regis H. Post, was made secretary of Porto Rico, he urged Mr. Gill to go to the island, and in October, 1904, appointed him assistant secretary of Porto Rico.

D. Frank Lloyd. — D. Frank Lloyd, assistant United States Attorney-General, died June 6 in New Haven, whither he had gone to recuperate from an illness. He was about forty-eight years old, and had been in the federal service since 1897, when he became an Assistant United States Attorney. When he joined the Attorney-General's office he was placed in charge of all the government's customs cases at this port and had marked success, winning more than 60 per cent of the cases in the customs court.

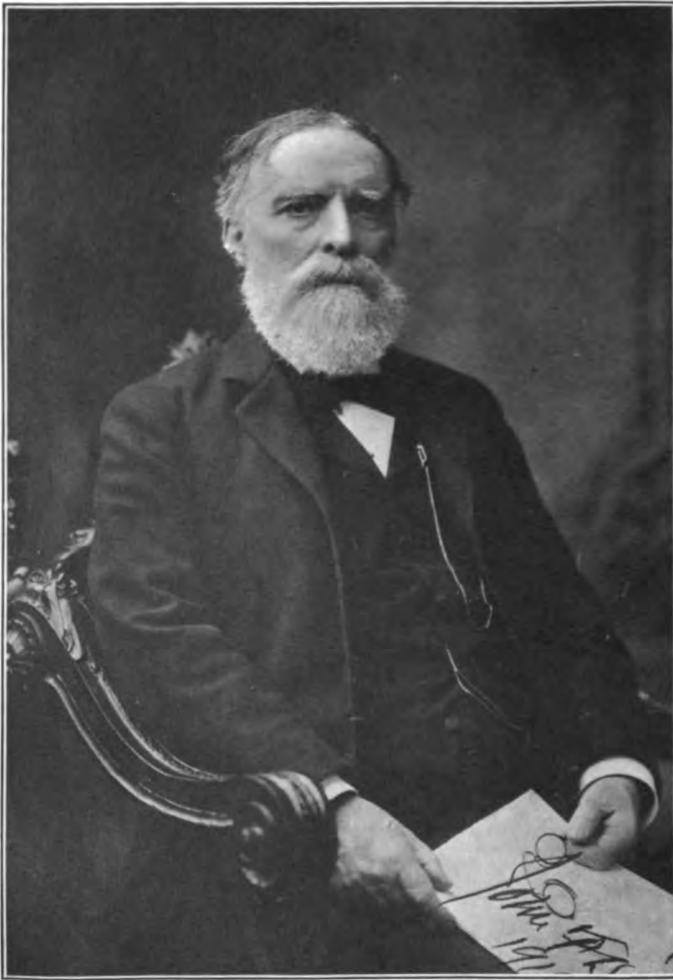
Gen. R. B. Brinkerhoff. — Gen. R. B. Brinkerhoff, who had an international reputation as a prison reformer, died at his home in Mansfield, O., early in June, aged 84. He was a former president of the Prison Congress. He was born in Owasco, N. Y., on June 28, 1828. He organized and was first president of the Ohio Archæological and Historical Society, in which office he was succeeded by Rutherford B. Hayes. He was the author of "The Volunteer Quartermaster" and "Recollections of a Lifetime."

J. Proctor Knott. — Former Governor Knott of Kentucky died on June 18, aged 81, having had a distinguished career. Before the Civil War he was a member of the Missouri Legislature and Attorney-General of the state. He was imprisoned for refusing to take the test oath, and was afterward sent to Congress from Kentucky, serving for sev-

eral terms. He became Governor of Kentucky in 1883. Later he was Professor of Civics and Economics at Centre College, Kentucky, and dean of the law faculty.

Godfrey Morse. — Godfrey Morse, a prominent Boston attorney, died in Dresden June 23, aged 65. Born in Bavaria May 19, 1846, he was educated in the Boston public schools, and was graduated from Harvard College and Harvard Law School. In 1882 he was appointed by President Arthur a member of the court of commissioners on the Alabama claims, in recognition of his services in mercantile law. He served on the Boston School Committee and on the Common Council, and also became a trustee of the Boston Public Library. He practised law in partnership with Lee M. Friedman, the firm having a large practice.

Judge John J. Jenkins. — Judge John J. Jenkins, federal judge of Porto Rico, who died June 11 at Chippewa Falls, Minn., was born in Weymouth, England, in 1843, and came to Wisconsin before the Civil War, serving in most of the battles in Virginia. He formed a law partnership in 1870 at Chippewa with R. D. Marshall, now Chief Justice of Wisconsin. He was elected to the state assembly and was United States Attorney for the territory of Wyoming. Returning to Wisconsin he was made county judge and afterward served for fourteen years in Congress, being for the last eight years Chairman of the Judiciary Committee of the House. He was appointed federal judge of Porto Rico in May, 1910, but worked too hard and returned home ill last April.



JOHN F. DILLON, LL.D.

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John Forrest Dillon

BY GEORGE S. CLAY OF THE NEW YORK CITY BAR

A YOUNG man, native of New York State, by name John F. Dillon, a doctor of medicine, then just graduated and barely twenty years of age, left his home in Davenport, Iowa, in 1850, to engage in the practice of his profession at the little town of Farmington, Iowa, on the Des Moines river. Fortunately for the legal profession, which now claims him as one of its most learned and illustrious members, the conditions surrounding the practice of medicine at that time in the western country were too strenuous and exacting for his physical constitution to endure and he decided to return to his home in Davenport.

He left Farmington with his mind made up as to his life work. During the few months of his residence there he made the acquaintance of a young lawyer, to whom he said one evening, "Howe, I have made a great mistake. I cannot practise medicine in this country without being able to ride horseback, which I am utterly unable to do. I might as well admit the mistake and turn my mind to something else. I shall read law. Tell me, what is the first book that a student of the law requires?" He answered, "Blackstone's Commentaries." "Have you got them?" Howe replied, "Yes, I have them and the Iowa Blue Book of Laws and those are the only books I have." The books

were loaned and his study of the law commenced.

On his return to Davenport he found it necessary to keep a drug store, and in his leisure continued the study of law. He had no instructor or aid in his studies. As a law student he was never in a law office or a law school. But he was soon admitted to the bar, became in 1852 prosecuting attorney of the county, and at the age of twenty-seven was elected judge of the district court of the seventh judicial district of Iowa. He afterwards became judge of the Supreme Court of the state and was Chief Justice of that court when appointed in 1869 by President Grant judge of the United States Circuit Court for the eighth judicial circuit.

Judge Dillon was endowed by nature with all the qualities requisite to a great lawyer. He has a strong memory, concentration, industry, clearness of judgment, and the ability to take a common-sense practical view of a case. A prominent banker who frequently has occasion to obtain Judge Dillon's opinion of the legal aspects of his financial transactions is always desirous to know what the Judge thinks of the matter in hand from the business side. "Ask the Judge," he would instruct his representative, "what he thinks of the 'deal' as an investor; would he put his own money in the venture?"

Whenever preparing a case for trial or argument or a question for the purpose of giving an opinion, no detail escapes his attention. He never ceases sounding until he reaches the very bottom of the question. His power of concentration and retentive memory enable him to grasp the facts and assimilate them with remarkable ease. In the discussion of legal questions, the Judge will frequently say: "I decided that point when I was on the bench," and send for the particular volume of his Circuit Court Reports where the case was reported. All through his professional career he has devoted himself to his work as judge, author and lawyer with untiring industry. If he has an appointment for a conference on a particular day that requires preparation in advance and if time does not permit him to make the necessary study during office hours he will take the papers home with him and come to the conference prepared to discuss all the points involved. It is said that during his early career on the bench he devoted so much time at home to his legal work that his wife felt he did not give enough attention to social affairs, and she said to him one day, "Why do you work so hard? Don't you think you ought to give more time to your family and friends?" The Judge's reply was that he had a reputation to make. And years afterwards when he had achieved fame as a great judge, author and lawyer engaged in general practice his answer to the same question was, "I have a reputation to keep." And he has always guarded that reputation with most scrupulous care, giving to every subject most diligent and careful attention, no matter whether the fee be large or small. In fact, the question of compensation never influences his judgment or conscientious consideration of the case in

the slightest degree. His professional honor has never been measured by him in dollars and cents.

One of the interesting things about Judge Dillon is the respect he shows for the opinions of others. If a suggestion be made by the humblest clerk in his employ it will receive as careful attention and consideration as if made by the ablest lawyer. He is a man of great modesty and kindly disposition and a charming companion. His loyalty to and affection for friends are unbounded. He always has time to see his old contemporaries, and no one was ever turned away from his office with the statement that the Judge "is engaged and cannot see you." But he will interrupt the most important conference and excuse himself for a few minutes to see personally any old friend or contemporary of his western life who calls to pay his respects, and then with his characteristic hospitality insist upon his friend making him a visit at his home.

Judge Dillon has a beautiful home in the "Bernardsville region" in New Jersey. There in the house planned by his lamented wife, a woman of great talent and beauty of character, he spends the summer months with his children and grandchildren, entertaining his friends, and reading his favorite authors. He has a general library of about ten thousand volumes, and can tell in a moment whether he has a particular book that may be mentioned and go to the spot in his library where it may be found.

Judge Dillon has argued hundreds of important cases, among which may be mentioned the following: *Astor and Bailey v. Arcade Railway Company* (113 N. Y. 93), in which he appeared for the property owners who brought an action to restrain the defendant from constructing a railway beneath certain streets of the city of New

York. The Court of Appeals decided that the act under which the company claimed the authority to construct the railway was unconstitutional. The *New Park* cases (99 N. Y. 569) in which the Court held that the act of the Legislature providing for the acquisition by the City of New York of land in Westchester County for a public park was constitutional. *Burton v. United States* (196 U. S. 283, 202 U. S. 344). This case was twice before the Supreme Court. On the first appeal the judgment of the lower court was reversed and a new trial ordered, and although on the second appeal the Court upheld the conviction of Senator Burton, there was a strong dissenting opinion by Mr. Justice Brewer concurred in by Justices White and Peckham. *Ames v. State of Kansas* (111 U. S. 449), involving the validity of the Union Pacific Railroad Consolidation. *Tompkins v. Little Rock & Fort Smith Railway Company*, known as the *Arkansas State Aid Bond* case (125 U. S. 109), in which it was held that the acts of the Legislature in question authorizing the State Aid bonds did not create any lien upon the property of a railroad company for the benefit of which the bonds were issued. *Reagan v. Farmers Loan and Trust Company*, known as the *Texas Railway Commission* case (154 U. S. 362), in which was involved the constitutionality of the Texas Railway Commission Act. The argument of Judge Dillon in this case is one of his ablest and most elaborate and the general views expressed in his argument were sustained by the Court. *Fallbrook Irrigation District v. Bradley* (164 U. S. 112), establishing the validity of the California Irrigation Laws. *Waite v. Santa Cruz* (184 U. S. 302), holding that the city was estopped to dispute the truth of the recitals in its re-

funding bonds, and *Gunnison County v. Rollins* (173 U. S. 255), holding that there might be an effectual recital in municipal bonds against a constitutional provision. The latest case argued by Judge Dillon is that of *Los Angeles Farming and Milling Company v. City of Los Angeles*, decided April 4, 1910, by the Supreme Court of the United States (217 U. S. 217), in which the city asserted a paramount right to the waters of the Los Angeles river, and was upheld by the Court.

It is interesting to notice the fact that Judge Dillon who argued for the defendant freight association the case of *United States v. Trans-Missouri Freight Association et al.* (166 U. S. 290) presented the point that the Sherman Anti-trust Act was intended to apply only to such contracts in restraint of interstate or foreign trade or commerce in which the restraint is unreasonable, and after the lapse of fifteen years the Supreme Court has adopted the rule of reason so strongly urged in the earlier case.

When he first began the reading of law he found that from the books he did not get a clear idea of what a mortgage was and, in order to do so, he went to the courthouse and asked permission to look at the register of mortgages and to copy one. He copied it in full and then he says: "I knew what a mortgage was; I have read it and handled it."

Col. J. H. Benton of Boston related this incident, and in commenting on it said: "This impressed me very much and I used it in my lectures in the law schools as an illustration of the qualities of mind which make a man a great lawyer; that is what I call the *instinct of the concrete*." This habit of mind has been ever present in his practice, and in many cases where the rights of railroad or telegraph company or other

litigant were involved and the facts could be made clearer by illustration, he would have large wall maps made showing the *locus in quo*, and these he would use in his study of the case, as well as in his arguments before the court.

Judge Dillon's literary work has not been confined to writing opinions and briefs, but he has prepared many addresses which he delivered before bar associations all over the country. He made a notable address at the dedication of the Free Public Library in Davenport, Iowa, in May, 1904. Among the subjects of his bar association and other addresses are — "The Inns of Court and Westminster Hall"; "Iowa's Contribution to the Constitutional Jurisprudence of the United States"; "Early Iowa Lawyers and Judges"; "Chancellor Kent: His Career and Labors"; "Uncertainty in Our Laws"; "Law Reports and Law Reporting"; "American Institutions and Laws"; "Commemoration Address on Chief Justice Marshall"; "Opening Address, First General Meeting New York County Lawyers Association"; "Address of Welcome at Banquet of New York County Lawyers Association"; "Bentham and His School of Jurisprudence"; "Our Law: Its Essential Nature, Ethical Foundations and Relations"; "Bentham's Influence in the Reforms of the Nineteenth Century."

He was Storrs Professor at Yale University in 1891-92 and delivered a series of lectures to the students in the Law School. He afterwards published his lectures under the title of "The Laws and Jurisprudence of England and America." The work shows the scope of his study of the history and literature of the law and his fine literary style. It is fitting to quote the dedicatory note in this book to his wife:—

"A. P. D.

"The years of professional studies, circuit journeyings, and judicial itinerancies, whereof this book is in some measure the outcome, as well as the time required for its preparation, have been taken from your society and companionship. The only reparation possible is to lay these imperfect fruits upon your lap. As to you indeed they justly belong, this formal dedication serves alike to accredit your title and to manifest my grateful sense of obligation and affectionate regard."

The most beautiful tribute to the memory of his wife is the "Memoirs and Memorial of Anna Price Dillon," which was printed for private circulation. Mrs. Dillon lost her life on the ill-fated *La Bourgogne* in July, 1898, and soon after Judge Dillon commenced the collection of letters which his wife had written to friends and relations and published them with a sketch of her life. Mrs. Dillon all her life had been active in works of charity and for the advancement of learning, and these and other incidents in her life are lovingly commented on by Judge Dillon in the book.

On "John Marshall Day," February 4, 1901, an address was delivered at Albany, New York, by Judge Dillon. His interest in the celebration of the centennial of the appointment of Chief Justice Marshall led him to undertake the work of collecting and editing the hundreds of addresses that were delivered throughout the United States on that day. This work is composed of three volumes, aggregating about sixteen hundred pages, with an introduction. Judge Dillon's willingness to undertake any work which he thought would be of interest or value to the profession, notwithstanding the sacrifice of his leisure time, is

well displayed in the introduction, where he says:—

“My relation as editor of these volumes came about in almost an accidental way. A distinguished Justice of the Supreme Court of the United States (Mr. Justice Shiras) concluded a letter acknowledging a copy of my Albany address saying: ‘A collection of the addresses delivered on John Marshall Day, if put in a permanent form, would, I think, be very interesting as showing a consensus of opinion concerning Marshall on the part of eminent lawyers in all parts of the country.’ Just after the receipt of the letter it chanced that I had occasion to write to the publishers of this work, and I inclosed the letter of the learned Justice and asked them to undertake the publication, even though the enterprise might prove unprofitable. With characteristic liberality they acceded to the proposal, annexing the single condition that I should collect, arrange and edit the addresses, with a suitable introduction. Having suggested that they should make any pecuniary sacrifice which the publication might involve, I felt estopped to make the objection, however well-founded, of want of time. And so I consented.”

But the pride of his heart, the literary work which has given him the greatest pleasure and satisfaction, is “Municipal Corporations,” which Mr. Justice Bradley termed “a legal classic.” This great and imperishable treatise (for a classic cannot die) has but recently reached its fifth revision, and is now a work of five volumes in which forty thousand cases are cited and the whole law of the subject fully presented. The first edition was published in 1872 and is a one-volume work of about eight hundred pages, a large book when one considers that it was prepared by the author without any aid whatever. What it cost him

in time and labor is well told in his Davenport Library address, when he said: “Now it so chanced in the course of time that I found myself on the bench of the Supreme Court of the state of Iowa with an ambition, not unnatural, to write a work upon some subject that I hoped might be useful to the profession. The first and indispensable requisite to such an undertaking was access to a full law library. Judge Grant’s library in this city (one of the largest private law libraries in the country) supplied this condition. The next requisite, equally indispensable, was the needed leisure for study and research, and the only time possible to a judge was in the intervals of uncertain length between the terms of court. The library being at hand in my own city enabled me to do what otherwise I could not have done, that is, utilize the days snatched from judicial labor by working in the Grant library, collecting material for my projected book. I selected my subject, ‘Municipal Corporations,’ and entered upon the work of thorough and systematic preparation. Without the aid of stenographer or typewriter, and with no previous American treatise to guide me, I began an examination, one by one, of thousands of the law reports, commencing with volume one of the State of Maine and continuing through successive reports in that state to date. In like manner the reports of every one of the states and of the federal and English courts were examined, occupying all my available time for about six years. The result of this research I have never had occasion to regret. The book was successful, and it has profoundly affected my whole professional career.”

The development of the law in the past forty years has been such that it now requires a work of four thousand pages

(exclusive of index and table of cases, which fill a volume of over seven hundred pages) to put the subject properly before the profession of the present day.

In 1891-92 Judge Dillon was President of the American Bar Association, and to mark his sense of the value and usefulness of that organization as the accredited representative of the Bar of the United States and of the honor of having been one of its presidents, he dedicated the fifth edition of "Municipal Corporations" to that association. Judge Dillon telegraphed to the president of the association, then in session, asking permission to make this dedication, which was unanimously granted. The Hon. P. W. Meldrim of Georgia, speaking on the subject, said:—

"In regard to the telegram from Judge Dillon, it occurs to me that it would be proper for us to take some special notice of it. No living American lawyer has contributed more to the sum of our information than he. His great work on Municipal Corporations will live after many of the existing corporations themselves shall have perished. Great as has been his service, yet this association loves him most because he has always been with us the charming companion and friend. It seems to me, therefore, that a resolution should be passed to this effect: 'That the American Bar Association appreciates the high courtesy of Judge Dillon in dedicating to it the new edition of his great work, and expresses its appreciation of his courtesy and extends to him its very best wishes.' I move, sir, the adoption of the resolution."

The importance and value of his judicial and professional labors are well expressed in an excellent article by Hon. Edward H. Stiles, an eminent lawyer of Kansas City, published in "Annals of Iowa," from which is extracted:—

"After a decade of the most distinguished service on the federal bench, in the fall of 1879, he tendered his resignation, to accept the position of Professor of Real Estate and Equity Jurisprudence in the Law School of Columbia College, and that of general counsel of the Union Pacific Railroad tendered him at the same time. This resulted in his removal to New York and thus ended his official and professional career in the state which he so deeply loved and had so highly honored. Let us briefly review it before touching upon subsequent events.

"For the repeated honors which had been bestowed upon him he was indebted to no political strategems. His rapid advancements did not spring from that source. They were gained by the steady display of those superlative qualities that inhere in and, as it were, create great lawyers and judges, and of which the instinct of unremitting toil is the greatest. He recognized with Carlyle that 'there is a perennial nobleness and even sacredness in work,' and that rare excellence can be attained *only* by its exercise. A more constant observance of these principles has rarely been so well exemplified in any other public man.

"Of his labors on the state district bench and the superior abilities he there displayed as a *nisi prius* judge, no attestation need be added to those carried in what has already been said. While judge of that court he prepared and gave to the profession the first digest of Iowa reports, known as "Dillon's Digest." How this came about he once related to me, and as it illustrates the searching industry and thoroughness he gave to every undertaking, I give that relation. He told me that when he was elected district judge he entered upon the careful study of each and every case that had been before

decided by the Supreme Court, as they appeared in the reports, making notes as he proceeded and placing each under its appropriate head; that his sole purpose in doing this was to familiarize himself with what the court had decided, in order that he might not run contrary thereto, and be in harmony therewith; that he kept this up and added to it as additional reports appeared; that it then occurred to him that by a little remoulding and enlarging it might be useful to the profession. This he did, and that is the way the lawyers of Iowa came to have what at that time was of the greatest convenience to them. I cannot refrain from remarking as I pass that if all our judges would so qualify themselves we should have far less incongruity in our jurisprudence.

"When at the age of thirty-three he came to be judge and afterward Chief Justice of the Supreme Court, he brought to that bench, notwithstanding his lack of years, equipments of the highest order; his fitting experience on the district bench; a thorough knowledge of the state, her history and people; a virile and well-poised intellect; a thoroughly judicial temperament; a keen and unerring sense of justice; a mind disciplined by years of the closest legal study, and, as the result of scholarly promptings and wide reading, enriched with varied learning.

"His opinions from that bench, as well as from that of the United States Circuit Court are, by reason of his name and fame, as well as the general soundness of the opinions themselves, deferred to as authority by all the courts of this country. Those of the state Supreme Court run through fourteen volumes of the Iowa Reports. The first case is that of *Welton v. Tizzard*, 15 Iowa (7th of Withrow) 495; the last one, *Greenwald v. Metcalf-Graham & Co.*, 28 Iowa

(7th of Stiles) 363. Those of the federal court will be found in the five volumes of Dillon's Circuit Court Reports. There they stand as perpetual memorials of a great judge and as beacon lights in judicial history.

"On account of his rapidly increasing practice in New York," says Mr. Stiles, "he felt obliged to relinquish his professorship in Columbia College, which he had filled with eminent distinction. In a comparatively few years his clientage embraced some of the largest interests of the metropolis, and he came to be regarded as one of its ablest lawyers, and one of the most profound jurists of the American bar. By high authority he was ranked as one of its foremost leaders, and, taken all in all — the depth and comprehensiveness of his learning, his distinction as a judge, the accuracy of his opinions, his strength of argument, his judicial aptness, his fame as an author, his felicity of speech, his general literary merit, in short, the *tout ensemble* of his varied accomplishments — he may justly be so regarded.

"An important work in his professional career," continues Mr. Stiles, "was as a member of the commission appointed under an act of the legislature of New York to prepare the charter for the greater city of New York; that is to say, the preparation of the charter uniting into one city three existing cities (New York, Brooklyn and Long Island City), each living to a considerable extent under local laws and each with different charters; and that would also bring into the enlarged city a considerable area of territory besides that still remaining under town and village government. These different communities to be consolidated into one were located upon three different islands and upon the mainland, with distinct histories and antecedents. The problem

was to form a charter which would combine these into one great municipality, with working machinery adapted to the whole and to the separate parts. He took an active and leading part in framing this charter of Greater New York, which went into effect on the first day of January, 1898. The difficulties of this work are apparent, and its vastness will be appreciated by referring to the charter which is embodied in the legislative act which vitalized and put it into effect. It consists of sixteen hundred and twenty sections and covers seven hundred and forty-two pages. The report of the commissioners recommending the charter to the favorable consideration of the legislature covered thirty-two pages. The consolidation thus effected remains, with certain minor changes, and I am authentically told that it is remarkable how little litigation has sprung out of the consolidation itself as respects the meaning and application of the different sections of the charter. I think this result may be largely traced to the clear vision, keen foresight and wide and varied legal experience of Judge Dillon, which enabled him to practically apply his thorough knowledge of the law relating to municipal corporations to the particular work in hand."

His career as United States Circuit Judge was notable. He presided on the bench with dignity, yet was courteous to the bar and showed great consideration to the young lawyers that appeared before him. The first day of his term of court was motion day and he made it a practice always to decide every motion before adjourning the term. This often required him to sit up late in the night studying the cases and consulting the authorities, but he felt the litigants and lawyers were entitled to prompt action by the court.

When he retired from the federal bench to go to New York to become Professor of Equity and Real Estate Law in Columbia University and to engage in private practice, there was universal and profound regret on the part of the profession in his judicial circuit. The bar of every state embraced in the circuit took prompt action through meetings, resolutions, addresses and other testimonials to show their personal affection and their appreciation of his rare qualities and valuable services. These tributes are especially noteworthy, because they were given not to a man who had been elevated to a higher office, but to one who was leaving the bench to return to practice. Mr. Justice Miller's remarks in response to addresses of prominent lawyers at the opening of the June, 1879, term of the United States Circuit Court at Leavenworth, Kansas, give a glimpse of the feelings of the Bar and of himself occasioned by Judge Dillon's retirement. He said:—

"The court is in full sympathy with the bar in the sentiments which have just been expressed in regard to the retirement of one of its members. Judge Dillon's resignation is a loss which must be felt by the bar of the eighth circuit, by the people among whom he has administered justice so long and so well, and by his associates on the bench of which he is about to take leave. This loss, however, is not equal to its effects upon all these classes. His brethren in the courts, who have cooperated with him in the arduous duties of a judge, who have received his aid, who have been with him in council and shared his labors, are the heaviest losers. It is, therefore, eminently appropriate that they should join in testifying to their appreciation of the man and his services by directing that the com-

munication from the bar be spread upon the records of the court.

"If I may be permitted, as the presiding justice for the circuit for a period including the entire time of Judge Dillon's service in the court, to indulge in a suggestion of my own special misfortune in the matter, I must say that it is greater than that of others; for he who I had hoped, as he came later, might remain longer in this court than I, and to whom would have fallen the duty of making the sad comments appropriate to the severance of our official relations, is the first to leave our common sphere of official duty.

"Though in his case the cause is one which carries him to a less laborious, a more profitable, and let us hope a more agreeable and perhaps useful, field of labor, and though this must, as it ought, mitigate the pains of separation, it remains true, as regards myself, that I cannot hope in any successor, however talented by nature or accomplished by learning, the same assistance in the performance of my own judicial duties, and the same relief from unnecessary responsibility as presiding justice which have made my relations with him so pleasant.

"When you add to this the interruption, more or less, of our social relations—relations which are imperfectly expressed by the strongest terms of affectionate friendship and unlimited confidence—it will be seen with what emphasis I unite with the bar and other members of the court throughout the circuit in this cordial tribute of respect and expression of regret at the retirement of Judge Dillon from the bench."

It would not have added to his lustre if Judge Dillon had been made a member of the Supreme Court of the United States, but it is pleasant to reflect that if, on one of the several occasions when

his name was being considered, the question of place of residence could have been eliminated and he induced to accept appointment, there would have been added an illustrious member to that illustrious Court.

He is a commanding figure, whether viewed as lawyer, judge, or author, and he needs no further honor to fix his place in the legal history of this country.

More interesting than anything in this brief sketch will be found Judge Dillon's Preface to the Fifth Edition (1911) of his *Municipal Corporations*, just issued, which is replete with biographic charm and retrospection. An extract from his Preface would seem to be an appropriate conclusion. Judge Dillon says:—

"Over forty-five years have elapsed since the preparation of *Municipal Corporations* began, and more than thirty-eight years since its first publication. It is therefore not only a child, but the companion, of the greater part of a prolonged professional career. Any justifiable satisfaction I might feel in its success is somewhat subdued, if not saddened, by the sombre, although not melancholy, reflection that in this edition I am taking final leave of a work which is intimately incorporate with the studies, lucubrations and labors of so many years. If these observations and reflections betray an author's vanity, they may perhaps on that account even be pardoned. I have indulged in these retrospections, not to gratify my feelings, but because they give opportunity to add that my chief pride and satisfaction in the work consists in the fact that it constitutes the largest and certainly the last payment that I shall be able to make on the Baconian debt which I acknowledge myself owing to this great profession of the law, to which without distraction, diversion, intermission, or

other ambitions I have given fifty-nine years—the whole of my active life. The work falls far below my ideal and far short of what I could perhaps have made it had I not been engrossed during all this time with the exacting duties of a lawyer, teacher and judge. Yet these obstacles have their compensations, for no *doctrinaire*, no mere closet student of the law can be thoroughly prepared to write a practical and technical treatise on the law of muni-

cipal corporations as it exists at this time and in this country. The author of a comprehensive treatise on the law ought to be a person who has the experience and training which are possible only to the practising lawyer and the judge. And these qualifications on the bench and in daily practice I have had in full measure, and I feel that to this environment the work is indebted for a large share of whatever practical value and usefulness it may possess."

The Law and Lawyers of Balzac

A VERY readable paper on "The Law and Lawyers of Honoré de Balzac" was read before the Pennsylvania Bar Association last June by Hon. John Marshall Gest of Philadelphia, judge of the Orphans' Court. Interesting not only as an entertaining legal essay, but as a piece of discerning literary criticism, this paper will give pleasure to all admirers of one of the greatest figures in the literature of France.

Judge Gest's command of literature and of literary expression have won considerably more than local recognition, and even his technical treatise on "Drawing Wills and Settlement of Estates in Pennsylvania" is enlivened, as our reviewer pointed out,¹ with intermittent flashes of brilliant wit and radiant humor. Among the best of the papers which he has read before the Pennsylvania Bar Association have been "The Law and Lawyers of Dickens," "The Law and Lawyers of Scott," and "The Law and Lawyers of Pickwick."

Of Balzac he says:—

"He must be read and judged in the mass. No single book can be selected which would give the reader a fair idea of his genius. He must study and compare very many or all of Balzac's works, and thus derive a composite impression. As Champfleury said: 'There are two ways to criticize Balzac. First, read and sit down and write an article. Second, shut yourself up for six months and study every detail.' Balzac may be justly compared with Dickens for humor, but Dickens was broader in caricature; with Thackeray for satire, but Thackeray was keener; with Meredith for analysis, but Meredith was more subtle; with Poe for imagination, but Poe was more fantastic; with Swift for cynicism, but Swift was more caustic; with DeFoe for realistic narrative, but DeFoe surpassed him in verisimilitude; with Scott for vivid description of nature and of men, but Scott was his master as well as his model. Yet Balzac combined in a manner altogether wonderful all these varied powers, in such a way that his

¹22 *Green Bag* 357.

baptism of the children of his brain as the Human Comedy was justified. Everything is there.

"Balzac was born on May 20, 1799. He died August 18, 1850. Some authorities say it was August 17th, but all agree that he is dead. At this time it makes very little difference to Balzac, and still less to us, which is correct. In his youth the great Revolution was recent history, and he saw disorganized society as it was rearranged by the First Consul and the Emperor. As he matured he witnessed the reactionary monarchies of Louis XVIII, Charles X and Louis Philippe. His father was a lawyer, and obedient to the paternal wishes he studied law, first for eighteen months with M. de Guillonet-Merville, an ardent Royalist, and for an equal period with a notary named Passez. Though duly qualified he never practised either as lawyer or notary. The dry details of the profession were revolting to him. You cannot harness Pegasus to a plow. He said to his sister, 'I should become like the horse of a treadmill which does his thirty or forty rounds an hour, eats, drinks and sleeps by rule, and they call that living!' But his time was not wasted, for it is doubtful if any writer, not even excepting Scott, found his legal knowledge more useful.

"His accurate perception and marvelous memory enabled him to reproduce in imperishable words the men whom he had met and the Code which he had studied. I have counted the number of characters in Cerfberr and Christophe's Compendium of the Human Comedy who are connected with the law. There are twenty-nine judges and magistrates, twenty-three barristers, fourteen attorneys, twenty-four notaries and twenty-eight office clerks, in all one hundred and eighteen. Not all prominent, to be sure, some have only a passing men-

tion, but many of them carry on the main action of the story. There are altogether some fifteen hundred and forty men in the Human Comedy, so that approximately eight per cent of his male characters have something to do with the law. His books are crammed with legal terms and references. The Code was at his finger ends; and as modesty can hardly be called the besetting sin of us common lawyers, it will do us no harm to read these novels as a study in comparative law as well as comparative morals. . . .

"Balzac, in his general views of law and lawyers, more nearly resembled Scott than Dickens. Like Scott he was a well-read lawyer, and was impartial in his treatment of the profession. He could separate the evil from the good, and could contrast the upright and learned judge and lawyer with the trickster and the incompetent. Dickens, on the other hand, could see no good in either the science of the law or in the men who practised it. He scarcely mentioned law except in terms of contempt, and nearly all his lawyers are caricatures. With Balzac, I say, it was different, though, to be sure, his standard — perhaps it was the French standard — of professional ethics is not quite the same as our own. . . .

"Balzac's pictures of lawyers and their offices abound in his novels, all characterized by his minute attention to detail. In '*Cousin Pons*' he thus described the shyster Fraasier and his offices: 'The room was a complete picture of a third-rate solicitor's office, with the stained wooden cases, the letter files so old that they had grown beards, the red tape dangling limp and dejected, the pasteboard boxes covered with the gambols of mice, the dirty floor, the ceiling yellow with smoke.' There is a similar uninviting description of Clapa-

ron's business office in '*César Birotteau*.' 'Fraisier was small, thin and unwholesome looking; his red face, covered with an eruption, told of tainted blood. A wig pushed back on his head displayed a brick colored cranium of ominous conformation. One might have thought there was pestilence in the air.'

"Regnault in '*La Grande Bretèche*' is thus depicted: 'A man tall, slim, dressed in black, hat in hand, who came in like a ram ready to butt his opponent, showing a receding forehead, a small, pointed head and a colorless face of the hue of a glass of dirty water. He wore an old coat much worn at the seams, but he had a diamond in his shirt front, and gold rings in his ears.'

"Desroches is described in '*Un Ménage de Garçon*' as having a harsh voice, a coarse skin, pitiless eyes, and a face like a ferret's licking the blood of a murdered chicken from its lips.

"Balzac has a great deal to say about judges, and most of his judges are honest men, like Popinot in 'The Commission in Lunacy,' and old Blondet in 'The Cabinet of Antiques.' The latter's integrity was as deeply rooted in him as his passion for flowers; he knew nothing but law and botany. He would have interviews with litigants, listen to them, chat with them and show them his flowers; he would accept rare seeds

from them, but once on the bench no judge on earth was more impartial.

"The allusion here is to the practice which at least up to the Revolution permitted, or at least condoned, the personal solicitation of judges and even the making of presents to them by litigants, like the custom in England which caused Bacon's downfall. Indeed, the office of judge in France was formerly salable like an estate. In Balzac's novels there are frequent allusions to the influence used outside of the court room upon the judge. Judge Camusot, for example, was completely under his wife's influence, and the ladies generally seem to have been very successful in this irregular practice. In 'The End of Evil Ways' the Countess de Sérizy called on the judge to interview him as to Lucien de Rubempré, and actually seized the notes of his examination and threw them into the fire. The ladies, said Balzac, have a code of their own, and laugh at statutes framed by men. 'If that is a crime,' said the Countess, 'well, monsieur must get his odious scrawl written out again.'

"To mention those of Balzac's novels that possess legal interest is almost to repeat the catalogue of all. . . . Balzac is too vast. It is impossible to discuss the law and lawyers of the Human Comedy in an hour."

Attorney-General Wickersham on the Big Trust Cases

SPEAKING before the Michigan State Bar Association July 6, at its annual meeting, Attorney-General Wickersham discussed "Recent Interpretations of the Sherman Act," and made it clear, in the course of a lucid

study of the *Oil* and *Tobacco* decisions, that the Supreme Court had strengthened rather than weakened the statute. He gave his unqualified indorsement to the Court's application of the so-called "rule of reason."

"Those who have thoughtlessly yielded to the superficial conclusion resulting from the application by the Chief Justice of the rule of reason to the interpretation of the Sherman law," he said, "can find but little to justify the idea that the Sherman law has been made ineffective by those two decisions, for precisely the contrary is established by these two great judgments. The most cursory examination of the decree in the *Tobacco* case — the most casual consideration of the drastic and far-reaching remedy imposed — makes it perfectly apparent that the Sherman law, perhaps for the first time, has been demonstrated to be an actual, effective weapon for the accomplishment of the purpose for which it was primarily enacted — namely, the destruction of the great combinations familiarly known as trusts."

The Attorney-General reviewed the *Standard Oil* and *Tobacco* cases at length, and traced the history of the Sherman law from its enactment, citing the important cases in which it had been invoked. He continued:—

"The only legitimate object and end of all government is the greatest good of the greatest number of people. The means by which this is attained vary in accordance with the experience and temperament of the people. All history demonstrates the fact that the greatest prosperity to the state has resulted from allowing to individual effort in trade and commerce the utmost freedom consistent with society at large. The area of uncertainty in the law has been greatly narrowed and its scope and effect have been pretty clearly defined. The school of literal interpretation has been repudiated and the application of a rule of reasonable construction declared.

"There will always be a field of uncertainty in so far as an investigation

of facts is required, particularly when intent becomes a necessary consideration, but this much surely may now be said to be beyond controversy, that ordinary agreements of purchase and sale, of partnership or of corporate organization do not violate the first section of the Sherman act, even though incidentally and to a limited degree they may operate to restrain competition in interstate or foreign commerce between the parties to such agreements. But any contract, combination or association, the direct object and effect of which is to control prices, restrict output, divide territory, refrain from competition or exclude or prevent others from competing in any particular field of enterprise, imposes an undue restraint upon trade and commerce, and is in violation of the first section of the act.

"This principle applies to all associations of competitors of the character usually known as pools, to agreements with so-called wholesale or retail agents whereby the manufacture of an article, even though made according to some secret process or formula, seeks to control the price at which it may be sold by purchasers directly or indirectly from the manufacturer. It applies also to attempts to control competition between independent concerns by means of a common stock holding trust, whether individual or corporation holder.

"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.

"It is also now settled that no form of corporate organization merger or consolidation, no species of transfer of title, whether by sale, conveyance or mortgage; and no lapse of time from the date of the original contract, conspiracy or combination, can bar a federal court of equity from terminating an unlawful restraint or compelling the disintegration of a monopolistic combination."

Mr. Wickersham quoted from Governor Woodrow Wilson's work, "The State," the following:—

"It is one of the distinguishing characteristics of the English race, whose political habit has been transmitted to us through the sagacious generation by whom this Government was erected, that they have never felt themselves bound by the logic of laws but only by a practical understanding

of them based upon slow precedent. For this race, the law under which they live, is at any particular time what it is then understood to be, and this understanding of it is compounded of the circumstances of the time. Absolute theories of legal consequence they have never cared to follow out to their conclusions. Their laws have always been used as parts of the practical running machinery of their politics — parts to be fitted from time to time, by interpretation, to existing opinion and social condition.'

"If this law," declared the Attorney-General in conclusion, "designed to protect the people of this country from the evils of monopoly and to preserve the liberty of the individual to trade freely, shall now be clearly understood; if its true purpose shall be recognized and its beneficent consequences realized, the twenty years of slowly developed interpretation and widening precedent will not have been without great value. For the law will henceforth be used, to employ Dr. Wilson's language, as a part of the running machinery of our political system, adapted to the needs of our social condition."

Address of Mr. Justice Holmes to the Harvard Alumni Association

[The following speech was made by Justice Oliver Wendell Holmes, of the Supreme Court of the United States, to an audience of several thousand Harvard graduates at the outdoor exercises in the college yard last Commencement Day. The address, which was received as a message from the war class of '61, made a deep and lasting impression because of its poetic sentiment and beauty of diction.—*Ed.*]

MR. PRESIDENT and Brethren of the Alumni:—

One of the recurring sights of Alaska, I believe, is when a section of the great

glacier cracks and drops into the sea. The last time that I remember witnessing the periodic semi-centennial plunge of a college class was when I heard

Longfellow say "*Morituri salutamus.*" If I should repeat that phrase of the gladiators soon to die, it would be from knowledge and reason, not from feeling, for I own that I am apt to wonder whether I do not dream that I have lived, and may not wake to find that all that I thought done is still to be accomplished and that life is all ahead. — But we have had our warning. Even within the last three months Henry Bowditch, the world-known physiologist, and Frank Emmons, the world-known geologist, have dropped from the class, leaving only the shadow of great names.

I like to think that they were types of '61, not only in their deeds, but in their noble silence. It has been my fortune to belong to two bodies that seemed to me somewhat alike — the 20th Massachusetts Regiment and the class of '61. The 20th never wrote about itself to the newspapers, but for its killed and wounded in battle it stood in the first half-dozen of all the regiments of the north. This little class never talked much about itself, but graduating just as the war of secession began, out of its eighty-one members it had fifty-one under arms, the largest proportion that any class sent to that war.

One learns from time an amiable latitude with regard to beliefs and tastes. Life is painting a picture, not doing a sum. As twenty men of genius looking out of the same window will paint twenty canvases, each unlike all the others, and every one great, so, one comes to think, men may be pardoned for the defects of their qualities if they have the qualities of their defects. But, after all, we all of us have our notions of what is best. I learned in the regiment and in the class the conclusion, at least, of what I think the best service that we can do for our country and for

ourselves: To see so far as one may, and to feel, the great forces that are behind every detail — for that makes all the difference between philosophy and gossip, between great action and small; the least wavelet of the Atlantic Ocean is mightier than one of Buzzard's Bay — to hammer out as compact and solid a piece of work as one can, to try to make it first rate, and to leave it unadvertised.

It was a good thing for us in our college days, as Moorfield Storey pointed out a few years ago in an excellent address, that we were all poor. At least we lived as if we were. It seems to me that the training of West Point is better fitted to make a man than for a youth to have all the luxuries of life poured into a trough for him at twenty. We had something of that discipline, and before it was over many of us were in barracks learning the school of the soldier. Man is born a predestined idealist, for he is born to act. To act is to affirm the worth of an end, and to persist in affirming the worth of an end is to make an ideal. The stern experience of our youth helped to accomplish the destiny of fate. It left us feeling through life that pleasures do not make happiness and that the root of joy as of duty is to put out all one's powers toward some great end.

When one listens from above to the roar of a great city there comes to one's ears — almost indistinguishable, but there — the sound of church bells, chiming the hours, or offering a pause in the rush, a moment for withdrawal and prayer. Commerce has outsoared the steeples that once looked down upon the marts, but still their note makes music of the din. For those of us who are not churchmen the symbol still lives. Life is a roar of bargain and battle, but in the very heart of it there

rises a mystic spiritual tone that gives meaning to the whole. It transmutes the dull details into romance. It reminds us that our only but wholly adequate

significance is as parts of the unimaginable whole. It suggests that even while we think that we are egotists we are living to ends outside ourselves.

Reviews of Books

INTERNATIONAL LAW

Handbook of International Law. By George Grafton Wilson, Professor of International Law in Harvard University, Lecturer on International Law in Brown University and in the United States Naval War College, American Delegate Plenipotentiary to the International Naval Conference, Associé de l'Institut de Droit International. West Publishing Company, St. Paul. Pp. xxi + 482 + 106 (appendices and cases cited) + 33 (index). (\$3.75 delivered.)

International Law. By George Grafton Wilson, Ph.D., Professor in Brown University, and George Fox Tucker, Ph.D., Lately Reporter of Decisions of the Supreme Judicial Court of Massachusetts. 5th ed. Silver, Burdett & Company, New York, Boston & Chicago. Pp. xix, 345 + appendices 140 and index 15. (\$2.50.)

International Law. By T. Baty, D.C.L., LL.D., of the Inner Temple, Barrister-at-Law. Longmans, Green & Co., New York. Pp. 346 + index 18.

The Principles of International Law. By T. J. Lawrence, M.A., LL.D., Member of the Institute of International Law, Honorary Fellow of Downing College, Cambridge, Sometime Professor of International Law in the University of Chicago. 4th edition. D. C. Heath & Co., Boston. Pp. xxi, 732 + 13 (index). (\$3.)

A Digest of the Law of England with Reference to the Conflict of Laws. By Professor A. V. Dicey, K. C., Hon. D.C.L. 2d edition. Cromarty Law Book Co., 1112 Chestnut street, Philadelphia. Pp. xcii + 714 + appendix and index 169. (\$8.)

Letters to *The Times* upon War and Neutrality (1881-1909), with some commentary. By Thomas Erakine Holland, K.C., D.C.L., F.B.A., Chichele Professor of International Law, Vice-President de L'Institut de Droit International, etc. Longmans, Green & Co., New York. Pp. xi, 162 + index 4. (\$1.75 net.)

International Incidents for Discussion in Conversation Classes. By L. Oppenheim, LL.D., Whewell Professor of International Law in the University of Cambridge. Cambridge University Press; G. P. Putnam's Sons, New York. Pp. xi, 129. Alternate pages left blank for notes. (\$1.)

OF GOOD text-books of international law written in English there is no lack. American scholarship, however ripe, can hope to add little to European

erudition. Partly as an indirect consequence of its unique position in world politics, possibly, England at the present time is prolific of good writing in this field, as may be seen merely by referring to that group of contemporaries which includes Westlake, Lawrence, Oppenheim, Holland, Dicey and Baty, not to mention others of similar distinction. We Americans, from the time of Wheaton and Story, have reared a respectable school of international jurists, and may take pride in the accomplishments of Wilson, Moore and Scott. The field of international law, however, is so thoroughly covered by a number of existing treatises constantly being brought up to date by new editions, that there is little use of a new work, unless it can offer some special practical advantage over the others. Such an advantage is found in Professor Wilson's Handbook of International Law. It treats its subject from an American standpoint, with numerous citations of American authorities, and is an elementary text-book particularly well arranged for quick reference. It fully discusses latest phases of the development of international law, and it has a well-defined field of usefulness which readily justifies its appearance.

Professor Wilson in the preparation of this book recognized the importance of the Declaration of London of 1909, and recent events, showing that the Declaration is in a fair way to be rati-

fied by most of the Powers, have vindicated his attitude toward the results of this notable formulation of new legal principles. The material of the second Hague Conference, of 1907, is utilized. There is also a liberal use of quotations from recent treaties and state documents. The work thus has an up-to-date quality. The introductory paragraphs in heavy type make it easy to find what is wanted. There are five appendices, containing (1) the Declaration of Paris of April 16, 1856, (2) the Instructions for the Government of Armies of the United States in the Field, April 24, 1863, (3) the revised Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, July 6, 1906, (4) various acts of the Hague Conference of 1907, and (5) the Declaration of London. The book is one of the best which have appeared in the excellent Hornbook Series.

This treatise is really an enlarged version of Wilson and Tucker's *International Law*, which follows a similar arrangement of topics. The latter work, in its fifth edition, is brought up-to-date so as to cover the same ground as the former, without the use of so much illustrative material. As the first edition appeared as recently as 1901, the whole subject-matter has freshness. The appendices contain the same documents, and the book, which is recognized as a standard authority, will be found useful by those who desire a short, condensed summary of the rules of international law in their latest form.

Dr. Baty's "*International Law*" is of a more informal character, and is not what its name suggests, but simply a discussion of current tendencies rather than an orderly exposition of principles. The book is, in fact, a lengthy essay on the tendency of the law of nations to

advance from the nineteenth century position of independence to a new position of interdependence. The writer has views of his own, which he boldly maintains and copiously illustrates. It is a pleasure to read a book marked by such facility and originality of expression, and the author's ideas, which much space would be required to set forth and discuss, are maintained with a stimulating vigor of style. If a term does not exist to convey the author's meaning, he invents one. By "penetration" he means the influx of foreign elements asserting distinct rights of their own in opposition to those guarded by the territorial sovereign, and by "stratification" he means a breaking up of the system of territorial sovereignty to make room for a new organization of social classes, among which order is to be maintained by an application not of the principle of national independence but of that of what he calls "federation." The author is strongly in sympathy with the peace movement, and does not approve of pacific blockade, nor of any imposition upon a weaker power by measures which fall short of actual war. What he says about arbitration is worth attention, and his entire book, in fact, is extremely readable.

Dr. Lawrence's "*Principles of International Law*," first issued in 1895, and largely rewritten in its fourth edition, seems to have realized its author's aim "to present a connected narrative and give to my account of matters usually deemed inimical to style a certain amount of clearness and literary form." This well-known and well established work is perhaps distinguished from most other treatises of similar scope by a happy fusion of the academic and literary modes of discussion. On the one hand Dr. Lawrence seems to write with the painstaking care of the scholar, on the other with a spontaneity and animation

befitting the essayist. He has smoothed the current of his narrative and discussion by a thorough working over of his materials, and if the educational value of a technical work depends upon its lucidity and attractiveness, this book in its latest edition is an excellent example of a popular text-book of the highest grade.

The treatment adopted permits the author considerable freedom in expressing his opinions, not only with regard to disputed rules, but to the general trend of the times, and while Dr. Lawrence's views may not command universal assent we believe that they will not be much objected to in America. He favors the abolition of some of the existing rules for the capture of private property at sea, and in this he will probably be upheld by the predominant sentiment in this country. In general, Dr. Holland is to be classed with the advocates of peaceable arbitration, and with the opponents of those who consider that the power of nations is founded on military or economic resources, but he is never visionary, and the views which he has inculcated in the minds of the students at the Royal Naval War College are thoroughly practical. His acceptance of the important results of the Declaration of London is not precipitate, though the impending ratification of the Declaration by the leading Powers might have justified him in going further. His conclusion that the United States has the right to fortify the canal is candid, and certainly does not show any pronounced anti-militarist bias.

One of the most interesting views expressed is that the nations may be drifting toward a new conception of inequality. Dr. Lawrence takes issue with Professor Oppenheim's opinion that the legal equality and political inequality of nations may exist side by side.

In international law, which is a system depending for its validity on universal assent, "what is political is legal also if it is generally accepted and acted upon." A certain hegemony which seemed to be vested in eight great Powers by the procedure resulting in the Declaration of London may become definitely established. According to this conception of inequality, all the nations might be legally equal "in matters connected with property, jurisdiction and diplomacy," yet unequal with respect to rights collectively exercised. "It is only when they act collectively that they," meaning the great Powers, "possess a superintending authority not granted to any temporary alliance." The outcome of this tendency may be the development of an international superintending organ analogous to the Concert of Europe. This view should not be blindly opposed as undemocratic, but deserves to be approached solely from the catholic standpoint of world-politics. In fact, it seems to us that the prevailing dogmatic insistence on the principle of equality, if carried too far, may seriously obstruct the movement which aims at a closer international solidarity.

Professor Dicey's treatise on the Conflict of Laws, first published in 1896, the second edition of which is carefully revised, with additions drawn from important cases decided by British courts since the original publication of the work, belongs to a different class from that of the foregoing productions, as a scientific treatise of broader scope and more minute detail. The change of chief interest to American readers is the omission of the notes of American cases, due largely to the publication of Professor Beale's "Cases on the Conflict of Laws," a book which Professor Dicey declares "ought to be found in every law library."

The letters of Professor Holland to the *Times* are notable for their singularly lucid and concise statements of principles, and for a dignified diversion of learned acumen into a journalistic channel. The letters reproduced are selected from a greater number in accordance with a definite plan. To these letters, arranged in a logical order of topics, are appended erudite notes which insure for the volume no little value as a sort of illustrative case book for the concrete elucidation of the matters dealt with in a systematic treatise.

The book deals with recent incidents in international law, including the Venezuelan Controversy of 1902 and 1903, the question of foreign soldiers in England in 1909, the Suez Canal in 1898, the Russian use of Chinese Clothing in 1904, the Naval Proclamation in 1906, the Question of Coal in War, and other topics of live interest. The letters are grouped under the following headings: (1) Measures short of war for the settlement of international controversies, *i.e.*, friendly measures, reprisals; (2) Steps towards the codification of the laws of war; (3) The commencement of war, *i.e.*, declaration and immediate effects; (4) The conduct of war, as between belligerents: this is covered by eight important sections, including one on "the choice of means of injuring"; and (5) The rights and duties of neutrals.

Professor Oppenheim's "International Incidents" is not a legal text-book, but solely a collection of brief statements of the facts of one hundred real and imaginary incidents, which are not discussed. The incidents are not grouped according to principles involved, and the sole object is to provide a basis for oral discussion in classes, the author having found that four of them could be thus discussed in the course of two hours. The alternate pages are left blank for

the notes. The book is certain to be employed by classes to great advantage under the supervision of a competent instructor. Otherwise it is neither likely nor intended to be of any use, except possibly to advanced students seeking profitable exercise of their powers.

CRIMINAL PRACTICE IN ENGLAND

The Administration of Justice in Criminal Matters (in England and Wales). By G. Glover Alexander, M.A., LL.M., formerly Scholar of Downing College, Barrister of the Inner Temple. University Press, Cambridge, England; G. P. Putnam's Sons, New York. Pp. 158 (index). (40 cts. net.)

A SIMPLE, lucid description of the workings of the English system of administering the criminal law is given by Mr. Alexander in this well printed little book, in terms that will be readily understood by laymen and may smooth the path of American lawyers baffled by the intricacies of England's complicated judicial organization. The reader will find an account of the criminal courts, beginning with the police courts and gradually working up the ladder to the Court of Criminal Appeal and House of Lords. How the courts are constituted, and the mode of selecting the judges, are clearly set forth, and there are sections dealing with the various proceedings, though not from a technical standpoint, and with the successive stages of a criminal action. The student of procedure will glean only superficial information from the book, but it is well written to serve its particular purpose. The concluding pages give a brief outline of recent legislation for the probation, reform and discipline of offenders and for the protection of juveniles from harsh penalties. Appended is also some interesting matter relating to criminal statistics and the classification of criminals.

Index to Periodicals

Articles on Topics of Legal Science and Related Subjects

Asylum. "The Right of Asylum." By Robert A. Edgar. 18 *Case and Comment* 74 (July).

"Although, in the absence of treaty, one nation is not bound to deliver up fugitives to another, there is no principle of international law to prevent its doing so of its own accord as a matter of comity or courtesy. And this has been done on numerous occasions. . . .

"The United States has, on several occasions, recovered fugitives from other countries with which no extradition treaties existed, because they had been surrendered as an act of courtesy.

"Extradition treaties covering the most important crimes have been negotiated with most of the civilized nations of the earth.

"Although there was some doubt about the matter at first, it may now be taken as settled doctrine that the surrender of a fugitive cannot be made by a state, but is a national act, and can only be done by the United States or by its orders. The United States may, however, by treaty or statute, confer such authority upon state officials; and in the extradition treaty with Mexico of December 11, 1861, a limited authority was conferred upon certain state officials in the border states."

Aviation. "Aerial Jurisdiction." By George Grafton Wilson. *American Political Science Review*, v. 5, p. 171 (May).

"It would seem wise therefore to start from the premise that air above the high seas and territory that is *res nullius* is free, while other air is within the jurisdiction of the subjacent state, 'and that the exceptions to this rule are such only as by common usage and public policy have been allowed, in order to preserve the peace and harmony of nations and to regulate their intercourse in a manner best suited to their dignity and rights,' and for these exceptions to the exclusive right of aerial jurisdiction of the subjacent state, international conferences should by agreement immediately provide."

Carriers. See Interstate Commerce.

Charitable Relief. See Old Age Pensions.

Criminal Procedure. "Criminal Justice in Kansas." By Prof. William E. Higgins, University of Kansas. 2 *Journal of Criminal Law and Criminology* 247 (July).

"Whatever may be the practice in other jurisdictions, the trial court in Kansas has not been stripped of its power to control the progress of the case. It may make rules to govern the conduct of the business of the court, and in the trial it has a large discretion in limiting the examina-

tion and cross-examination of witnesses. In *State v. Laird*, 79 Kan. 681, upon complaint of the refusal of the trial court to permit cross-examination 'as fully as justice demanded,' the court said: 'An examination of the abstract shows that some of the grounds of complaint are very technical and that the rulings of the court could not in any degree prejudice the rights of the defendant.'

The opinion of the Court in this case contains the following admirable sentiment:—

"The proper administration of justice and the prompt dispatch of pending business demand that time shall not unnecessarily be consumed in the discussion of unimportant and frivolous questions or in the presentation of immaterial or irrelevant testimony. Trial courts are charged with the duty of giving to every litigant a full and fair hearing, and at the same time of transacting business as rapidly as the proper administration of justice will permit. To discharge this difficult task requires patience, forbearance and at times the enforcement of rules which may seem harsh and arbitrary."

"Imperative Law Reforms." By Edward J. McDermott. *Editorial Review*, v. 5, p. 643 (July).

"The greatest hindrances to justice in our criminal courts are the following:—

"(1) Unpunished perjury, the natural loss of witnesses by delay, and the systematic and corrupt dispersal of important witnesses from the place of trial;

"(2) The refusal of courts to compel a defendant to produce documents or other physical things that may make his guilt clear;

"(3) The abuse of expert testimony;

"(4) Reversals in appellate courts on the ground of petty technical errors in mere procedure;

"(5) Maudlin sympathy for the accused in conspicuous cases on the part of the public or of the low or semi-criminal classes that hang about the courts during exciting trials; and the reluctance of jurors and sometimes of judges to punish any criminal adequately, especially if he be an influential murderer or have money enough to pay for open legal aid and disguised illegal assistance. Even the press is sometimes used to create public opinion in favor of such accused persons. . . .

"The law everywhere should be so amended that the accused in his plea should be compelled to state whether his defense is (1) that he was not guilty of the act charged, or (2) that he did the act in self-defense, or (3) that he was insane at the time he did the act. Under neither of these pleas should the court admit the sort of evidence that is usually offered to invoke the so-called 'unwritten law.' The accused should be allowed to offer no evidence of insanity unless he filed the special plea of insanity. Such a reform in procedure would prevent the abuse of this

feigned defense. In such cases the officers of the state would not be taken by surprise, but would have ample time to prepare themselves with testimony as to the sanity of the accused. The law should provide that when the accused, at his arraignment, has pleaded 'insanity,' he shall be confined at once in some suitable, safe place where he may be observed and studied by experts appointed by the court for a reasonable time under good conditions for the observation of his conduct at a time when he does not know that he is being observed and when his shamming may be the more easily detected. This plan, without any statute enforcing it, has been successfully tried in St. Louis. The court and the jury will thus have the benefit of the examinations and observations of disinterested experts who will probably be able to detect whether the accused is really unsound in mind or only feigning."

"Proposed Reforms in Criminal Procedure."

By Charles F. Bostwick. 2 *Journal of Criminal Law and Criminology* 216 (July).

"The defendant should not be granted the privilege of silence. It is not to be denied that in the days when almost every offense was punishable by death, and the defendant himself was not permitted to testify, it was eminently proper that he should not be compelled to testify against himself. It would be effrontery on my part to call your attention to the changed conditions in which this rule is now invoked. Suffice it to say, that the honest and innocent man when accused, demands a hearing and insists upon explanation. The Lord Chief Justice of England has said: 'For an innocent man, the sooner his defense is raised, the better.' (*Rex v. Maxwell*, 2 *Crim. App. Cases*, 28.) The rule has therefore come to be only another aid to the hardened criminal in his efforts to escape punishment, with no corresponding benefit to the innocent; thus adding another of the causes that have made the administration of the criminal law a disgrace. A change in this respect would tend to abolish the examination by the police before hearing, which is now necessary because of this privilege, and which has caused so much adverse comment.

"The judge should not be restrained from commenting upon the facts. The successful operation of this rule in England has made every thinking prosecuting attorney admit that it is, in theory at least, the better practice; and the only substantial and effective argument that has been offered against it is, that the character and ability of the elected judges in certain localities would make the rule unworkable here. An argument to which I must admit there is some force."

See Evidence, Procedure, Self-Incrimination.

Criminology. "Anglo-American Philosophies of Penal Law, IV; The Philosophy of Responsibility." By F. H. Bradley. From his "Ethical Studies" (London, 1876). 2 *Journal of Criminal Law and Criminology* 186 (July).

The ordinary man means by moral responsibility is first considered. "According to

vulgar notions, a man must act himself, be now the same man who acted, have been himself at the time of the act, have had sense enough to know what he was doing, and to know good from bad. In addition, where ignorance is wrong, not to have known does not remove accountability though the degree of it may be doubtful. And everything said of commission applies equally well to omission or negligence."

From this topic the author takes up the controversy over Freedom and Necessity. Necessitarianism "fails in this, that it altogether ignores the rational self in the form of will; it ignores it in the act of volition, and it ignores it in the abiding personality, which is the same throughout all its acts, and by which alone imputation gets a meaning. . . ."

"If the self is ignored in the psychology of our Determinists, or recognized in a sense which is not the vulgar sense, then responsibility and punishment and all the beliefs intellectual and moral, which hang from (as we have seen) and involve in their being the reality of the vulgar sense, with the non-reality thereof, fall and are destroyed; or survive, at most, in a form and a shape which, whatever and however much better it may be, is absolutely irreconcilable with the notions of the people. *A criminal (in that view) is as 'responsible' for his acts of last year as the Thames at London is responsible for an accident on the Isis at Oxford, and he is no more responsible.*"

"The Sexual Root of Kleptomania." By Dr. Wilhelm Stekel. 2 *Journal of Criminal Law and Criminology* 239 (July).

This paper is an abridgment, by Mr. Adalbert Albrecht, of Dr. Stekel's article in the *Zeitschrift für Sexualwissenschaft*. Many cases of kleptomaniacs whose acts were caused by ungratified sexual desire are given. Many of the subjects are persons of high mental and moral character who reform after the physiological cause has been removed. "These examples show us the tremendous importance of sexual instinct in the origin of kleptomania. Similar examples might be given relating to pyromania, the impulse to set fire to something; and hydromania, the pleasure of playing with water."

See Juvenile Delinquency.

Employers' Liability. See Workmen's Compensation.

Evidence. "Testimony of Defendants in Criminal Prosecutions." By John Appleton. 4 *Maine Law Review* 259 (June).

This article is a copy of a letter written by Chief Justice Appleton of the Supreme Judicial Court of Maine in 1866 upon the propriety of admitting defendants in criminal cases to give testimony, on their own behalf, if they so elect.

Government. "The Unlimited Franchise." By Max Eastman. *Atlantic Monthly*, v. 108, p. 46 (July).

"The disorder, the indignity and irregularity, the scattered extravagance, squabbling, and mud-slinging, and general uncertainty—all these aspects of our government which make it unsatisfactory to contemplate—are signs that it

is doing well. Democracy does not aim to produce a government as complete and regular and satisfying to the cultivated mind as possible; it aims to produce a government somewhat loose and dirty, in which the citizens are great as individuals. Remember that a republican government is a continuous education, and you will not expect to find in it the virtues of a graduation ceremony. You will expect to find the children kicking out upon all sides, overturning things the moment they begin to run smooth, forever putting up irrelevant questions, and in general making it appear that nothing is being accomplished. If there is anything in this world that looks like a complete failure, it is a successful kindergarten. And much the same thing is true of a successful experiment in self-government. The success is inside of individuals. It is happiness, and experimental knowledge, and moral independence, and humility."

"Political Institutions in Liberia." By George W. Ellis, F.R.G.S., K.C. *American Political Science Review*, v. 5, p. 213 (May).

Income Tax Amendment. See Taxation.

Insanity. See Juvenile Delinquency.

International Arbitration. "Wanted — An International Police." By Rear-Admiral Casper F. Goodrich, U. S. N. *Nineteenth Century*, v. 70, p. 24 (July).

"Suppose some strong Government whose motives are above suspicion, which has nothing to gain by the new order of things, after recognizing existing boundaries on the principle of *uti possidetis*, and likewise recognizing the right of every country to regulate its affairs in its own fashion within those boundaries, were to invite the other strong nations to unite in threatening to intervene jointly on the side of any Government which agreed to submit international differences to The Hague should hostilities become imminent, and against the other refusing so to submit its case? The Hague tribunal would then become a real court, with a visible and overwhelming police to compel acceptance of its judgments even against a party *in absentia*. The matter in question would be adjudicated on its merits, even if one party obstinately refused to appear in court, and the decision would stand. In some such manner as this the dream of the two young men who, many years ago, pondered over this great problem, may yet come substantially, if not exactly, true. The suggestion is at least in consonance with the growth of the nation from its origin in the family. That nations should ever be willing to give up their right of private vengeance seems to the majority of persons today absurd and fantastic in the extreme. In the same spirit their great-grandfathers scouted the idea of abandoning the duel as not in keeping with a proper sense of honor, but swords are no longer worn and gentlemen realize that disgrace lies in their own words and deeds, not in what others say of them."

"Diplomacy and Arbitration, II." By Rear-Admiral A. T. Mahan, U. S. N. *North American Review*, v. 194, p. 124 (July).

"Not long ago I was the guest of a large club in New York, devoted to economical subjects and interests, and was an interested listener to several speeches which found their common inspiration in the belief that arbitration could be substituted for war in all cases. . . . Much stress was laid by one of the speakers upon the opinion expressed to him by a well-known president of an American university, that no one of the wars in which the United States has been involved could not have been avoided. This is one of those remarks which says either too little or too much. If it is meant that in each instance, if both parties had been reasonable and righteous in their acts, there need not have been war, too little was said. No one will dispute the assertion so qualified. If it is meant that, things being as they actually were, war could have been avoided, too much is affirmed. Doubtless opinions may differ, and this may be considered matter of opinion, but as such it may be discussed.

"Of the Mexican War I have no competent knowledge; but with the War of 1812, with the conflict of views and interests which led to the War of Secession, and to a somewhat less degree with the War of Spain, I am familiar. If it is meant that an arbitral court could have settled these disputes upon legal grounds, the reply is, that, in one of the two principal causes which led to the War of 1812, Great Britain, while maintaining the necessity and consequent propriety of its action, admitted it to be without sanction in law. An arbitral court could have affirmed no more. In 1861 a like arbitration, whatever its result in conceding or denying the right of secession, would have maintained slavery in existence for generations longer, for the United States Government did not allege slavery as a justification of the war; a course which alienated many warm foreign sympathizers. Abolition was a war measure pure and simple. It could never have been a result of legal arbitration."

"The Permanent Court at The Hague." By Dr. Algernon S. Crapsey. *18 Case and Comment* 59 (July).

"The Permanent Court at The Hague is *not*, and under the circumstances cannot be, other than an arbitral tribunal. It has no power to compel the defendant in an international litigation to plead before it, nor can it compel either of the contending parties to accept its decrees. There is as yet no police power behind the court to enforce its commands. The parties in litigation which plead at its bar are there by mutual consent, and, when decision is rendered, it is the same mutual consent that makes the decision binding. It may be said that a court so situated is just no court at all. It goes through the motions of judicial life without being alive. It is of the very essence of the court that it can enforce its decrees. But while it is true that this court has at present no physical power to sustain its judgment, it is possessed of an immense moral power. It has behind it the moral force of the world. It is an established organ of world opinion. Any nations who have consented to The Hague Convention establishing the court who shall henceforth refuse to submit their

quarrels to its adjudication will be visited with the condemnation of the world, and any nation which, having submitted its case to the court, shall refuse to abide by its decision, will be outlawed by the rest of the nations. This world condemnation and national outlawry will be found to be more effective than the constable's mace or the policeman's club. They will be as powerful to secure obedience to the behests of this august tribunal as were excommunication and the interdict, in the middle age, to secure obedience to the spiritual power of the Church."

International Law. See Asylum, Maritime Laws.

International Prize Court. See Maritime Law.

Interstate Commerce. "The Liability of the Initial Carrier under the Interstate Commerce Act." By Jacob S. New. *73 Central Law Journal* 4 (July 7).

"This amendment [the Act of 1906] is of great value to shippers, as in a great many cases where an interstate shipment was involved, and where the value of the shipment was small, they were without remedy, because of the expense which would be entailed upon them, together with the loss of time, in bringing suit in a foreign forum. The trend of the decisions has demonstrated that the courts are willing and ready to administer the provisions of this legislation with liberality, and, also, with a desire to do justice between the parties."

Juvenile Delinquency. "Feeble-Mindedness and Juvenile Crime." By George A. Auden. *2 Journal of Criminal Law and Criminology* 228 (July).

"The returns from the state inebriate institutions have been purposely excluded from consideration in this paper, but enough has been said to show the enormous total amount of crime which is the outcome of feeble-mindedness. Neither the prison nor the asylum is the right place for these feeble-minded criminals. There is no place for their custodial care in our present scheme of social polity, and we are driven to the strange conclusion that the best chance for the individual and for society at large is, under existing circumstances, the commission of some serious crime, such as murder or arson, which will remove him for a lengthy period from further opportunities for anti-social action. By the removal from our penal establishments of the admittedly feeble-minded prisoners (on whom punishment and prison discipline are recognized as having no deterrent effect), the opportunities for greater specialization and classification of the same prisoners by the Borstal system, and by the recent regulations for the provision of humanizing influences, will be greatly increased. It is evident that an indeterminate sentence with statutory power to transfer to some form of institution which shall be substituted for the prison, affords the only satisfactory solution to the question."

Kleptomania. See Criminology.

Labor Laws. "Tendencies of the Labor Legislation of 1910." By Irene Osgood Andrews. *American Political Science Review*, v. 5, p. 224 (May).

"It is probable that the labor legislation of the next decade at least will be concerned mainly with the prevention of accidents in mines, factories and on railroads, and with establishing some just system of compensation for injured workmen. But no such system will be adequate which does not include relief for industrial diseases as well as for accidents."

Lex de Majestate. "The Women of the Cæsars, IV; Tiberius and Agrippina." By Guglielmo Ferrero. *Century*, v. 82, p. 610 (Aug.).

"Too credulous of Tacitus, many writers have severely characterized the facility and the severity with which the Senate condemned those accused under the *lex de majestate*: they consider it an indication of ignoble servility toward the Emperor. Yet we know very well that the Roman Senate at that time was not composed merely of adulators and hirelings; it still included many men of intelligence and character. We can explain this severity only by admitting that there were many persons in the Senate who judged that the Emperor could not be left defenseless against the wild slanders of the great families, since these extravagant and insidious calumnies compromised not only the prestige and the fame of the ruler, but also the tranquility, the power and the integrity of the empire."

Maritime Law. "The Declaration of London." By Sir Thomas Barclay, M.P. *Fortnightly Review*, v. 90, p. 126 (July).

"At the outset of this article I mentioned that I was not sure that we were wise in promoting the establishment of an International Prize Court. The object of instituting such a Court was to avoid the bias which it is supposed weighs in the decision of cases by belligerent courts. But how do we know that the International Court would not be just as much biased in favor of the neutral interest? . . .

"The new Convention prescribes that the Court shall be composed of fifteen members out of the whole panel (Article 14). Of these fifteen members Great Britain, France, Germany, Austria-Hungary, Russia, Italy, the United States and Japan each appoint one (Article 15). A schedule of the other Powers is appended to the Convention, under which they take their turn. . . . The American bias is in favor of immunity from capture, and this may be taken to be the bias of all the weaker states, possibly of the whole of the seven subsidiary countries. Of the eight permanent judges, besides those of the United States, the Austro-Hungarian judge might be suspected of a similar bias against Great Britain. The same would probably be true of the state to which the captured vessel belonged. Thus, out of the eight permanent judges, almost certainly three would be biased against Great Britain; possibly, with all the

subsidiary seven, as many as ten out of the fifteen! . . ."

"In any case, I do not think the subject has been considered with sufficient fullness to warrant this country joining in any scheme of such a revolutionary character as that involved in the creation of an International Prize Court. That the Convention can be determined at the end of twelve years (Article 55) is not an argument in favor of an experiment which might oblige Great Britain to play an invidious and unpopular part among her fellow nations.

"It is true that the preamble to the Declaration refers to Article 7 of The Hague Convention for the establishment of an International Prize Court, but it does not seem to me that ratification of the Declaration necessarily implies ratification of The Hague Convention. The ratification of the Declaration might, therefore, precede the ratification of the Convention, the ratification of the Convention being specially reserved until further consideration."

"The Declaration of London." By R. A. Patterson. *Contemporary Review*, v. 100, p. 77 (July).

"Should the other Powers decline either to alter the wording of the Declaration, especially on the point of conditional contraband, or to come to an agreement clearing up doubtful points, it would seem as if they construe its provisions in a manner less favorable to this country than is claimed by those supporting ratification. If this be correct we should surely be unwise to tie our hands, and lose our independent position by ratifying the Declaration of London in its present form."

Medical Jurisprudence. See Criminology.

Monopolies. "The Supreme Court Decisions." Symposium of articles by Judge Peter S. Grosscup of the United States Circuit Court of Appeals, William Jennings Bryan, and four prominent New York lawyers, John Larkin, Frederic R. Coudert, James M. Beck and Samuel Untermyer. *North American Review*, v. 194, p. 1 (July).

Judge Grosscup, writing of "The Judgment," says that the Court, in turning upon itself, repealed an interpretation that had previously made the Sherman Act "a wholly misconceived and misdirected public experiment." Till these decisions, every one except the "law" had recognized the fact that the economic current had changed, and business had come to operate through combinations. Now the Court recognizes this fact, says Judge Grosscup. The *Standard Oil* decision is "a turning event in the life of the nation." From the standpoint of the business man the act as now construed is still not definite, but he is subjected to no greater hardship, in having to determine what restraint of trade may be unreasonable, than in being held by the law to other liabilities, such as those of "reasonable care" with regard to the safety of others, or what is called fraud or fair dealing in one's business relations.

Mr. Bryan, discussing "The Reason," makes the characteristic assumption that judges are

prone to have either an aristocratic or democratic bias, of which they are unconscious, and that the President, himself possibly biased, might unconsciously select judges of plutocratic leanings, and in this way the practical unanimity of the opinions in the two great cases would be accounted for. On the other hand, "if it 'just happened' that in the selection of eight judges *all* should take the view of Justice White, and if it is *not* accounted for by bias on great subjects, then it shows what a lottery is conducted at the White House when the President blindfolds himself and picks judges at random, only to find that all the prizes have gone to those who do not fear 'reasonable' trusts and none to those who oppose all restraint of trade." Which seems to us to show a little cloudiness of reasoning, for if the views of the judges are not accounted for by bias the President must have succeeded in obtaining impartial judges whose agreement on any question cannot be the result of mere chance. Mr. Bryan also takes the untenable position that the decisions are judicial legislation in a sense repugnant to our institutions, a view which if carried to a logical extreme would make Congress the legal sovereign, as Parliament is the legal sovereign of England.

Mr. Larkin, writing of "The Effect," says that the decisions "should satisfy every citizen because the object of the act has been attained. Danger to the country comes only with corporations of giant size whose power and wealth when combined with others make them no mean rival to the power of the country. To restrain such power and keep it within bounds was the real purpose of the Anti-trust Act. The phraseology of the act was but a means to this end and this end has now been brought to pass."

Mr. Coudert, taking for his subject "The Record," luminously traces the history of the law of monopoly, and his article is scholarly and valuable. He thinks that "the emphasis placed upon the words 'reasonable' and 'the light of reason' by the Court in the *Standard Oil* case was perhaps unfortunate. It is quite probable that for the words 'reasonable' and 'unreasonable' with regard to restraints of trade the words 'direct' and 'indirect' restraints could be advantageously substituted. This would put the test of validity in a clearer, less subjective and metaphysical light and distinguish between combinations which have for their primary purpose restraint of trade and those contracts which may incidentally restrain trade, but whose main object is the sale of a business. . . ."

"From the analysis already made it seems to us that the language of the statute and the results of all the decisions as to the Anti-trust Act bear out the view that *all contracts and combinations which directly tend to restrain trade are unlawful, and that all attempts to monopolize, brought about by whatever methods, whether old or new, are equally within the statute. . . .*

"The warfare against modern monopoly is being carried on with the rusty weapons of mediæval England, and any confusing economic result should not be attributed to our courts. . . . The Sherman Law, if construed absolutely and literally, according to the most approved Chinese method, would result in complete economic

stagnation. Interpreted rationally in the sense intended by its originator, as declaratory of well-settled rules of common law, it will not annihilate business nor even perhaps very seriously impair its development. It is, however, calculated to leave the whole question of 'monopoly' and 'combinations in restraint of trade' in an uncertain condition necessarily resulting in suits and prosecutions in which courts and jury must determine in every case whether there was restraint of trade or attempt to monopolize, and all this with results of very doubtful value to the community. The real difficulty lies in the fact that the nation has not as yet thought out any intelligent legislative programme which will adequately deal with new and largely untried economic conditions."

Mr. Beck, dealing with "The Quandary," says: "The Sherman Law is an anachronism in the age of steam and electricity. Ajax defying the lightning has never impressed me with his wisdom. I much prefer the homelike but more practical spirit of a Franklin, who not only disarmed the lightning, but turned electricity to practical uses of great moment. The statesmanship of the future will consider a law, which, while forbidding in clear, positive and scientific language, the abuses of combination, will yet recognize that the spirit of association is at once the most potent and noble manifestation of present civilization. To this end, the Trust decisions just announced will undoubtedly contribute in their clear recognition that the law is impotent to forbid all combinations which incidentally restrict competition, but the problem is, in its last analysis, legislative in character, and what is imperatively needed is a saner public sentiment, which will compel Congress to conform the laws of business to the irresistible and centripetal tendencies of steam and electricity."

Mr. Untermyer, writing of "The Remedy," says: "From the very beginning the execution of the law was intrusted to unfriendly hands and so it has continued to this day. That is the key to all our present difficulties and to the many worse ones that are to come. . . . In so far as the criminal sections of the statute have been invoked it has savored of persecution. Courts and juries have rightly refused to lend themselves to the perpetration of such manifest injustice. . . ."

"The proposed remedy may be summarized as follows:—

"(1) The compulsory federal incorporation of all corporations engaged in trade or commerce between the states or with foreign countries.

"(2) The creation of a commission similar in its powers over business corporations to those now possessed by the Interstate Commerce Commission over railroads and the utilization in that connection, so far as possible, of the present Commerce Court.

"(3) That this commission pass upon the right of every applicant for a federal charter, and that where violations of law exist which would prevent the granting of such a charter such violations should be first removed.

"(4) That the commission have power to authorize and approve agreements that will be enforceable in the courts in the form of pools, kartels, or syndicate arrangements for regulating

competition in any industry, provided such agreement does not have the effect of unreasonably restricting competition or of operating as a direct restraint of trade; that in that connection it be empowered from time to time to determine the extent to which prices may be fixed or production restricted, and particularly to prevent any interference by the parties to the agreement with outside competition.

"(5) That the Sherman Anti-trust Law be enforced against existing offenders, and that the execution of the details of the judgment be intrusted to the commission, subject wherever necessary by reason of constitutional limitations to the approval by the Court and the adoption by the latter of the findings of the commission.

"(6) That (a) the criminal section of the Anti-trust Law, (b) the provisions allowing an injunction against the creation or continuance of violations, and (c) the provisions for the summary seizure and confiscation under section 6 of all property in interstate transit of any corporation operating in violation of the statute be rigidly enforced."

"The *Standard Oil Decision: The Rule of Reason.*" By H. L. Wilgus. 9 *Michigan Law Review* 643 (June).

"It is not quite clear therefore why the court should in a case not requiring it, and when the question was touched upon only incidentally in the briefs—because it had been considered practically settled for fifteen years, suddenly reverse itself, and mount that 'unruly horse' public policy—which no court has ever yet successfully ridden and which will vary as it has heretofore in matters of this kind, on the equity side 'with the length of the Chancellor's foot,' and on the legal side from Hull's '*per Dieu*, if the plaintiff were here, he should go to prison till he paid a fine to the King,' because he took a bond from a dyer not to use his dyer's craft in town for half a year (*Dier's case* (1415), Y. B. 2 H. V. f. 5, pl. 26) to the House of Lords' conclusion that a combination to engross all the tea trade between Shanghai and Europe, to the exclusion of the plaintiff, was not *unlawful*—so as to give the plaintiff an action for damages (*Mogul Steamship Co. v. McGregor*, A. C. 25); the court here, however, was careful to point out that while this was a *contract in restraint of trade*, it was not *unlawful*, so as to give a *third party* an action for damages; they did not hold that it was a contract in 'reasonable restraint of trade,' so that one party to it would have had an action against another for damages for refusing to abide by it; they probably would have refused to enforce it so, because it was in *unreasonable* restraint of trade (*Nordensfeldt v. Maxim*, etc., Co., A. C. 535). And it is safe to say that had the case arisen before 1844, the court would hardly have held under the *laissez faire* rule of reason so fashionable at the time that the English statutes did not apply as they before had been interpreted. It would have been left to Parliament, as it was, to abrogate the statutes and establish a new policy.

"However, if hereafter the common law rule of reason is to apply, and though this will lead to a sea of uncertainty, if one can judge by the conflict in the views of the members of the

court, perhaps the ultimate result will not be greatly different, except to throw a greater burden on the government in getting at and establishing the facts in each case. There is not much in the common law rule of reason, except its uncertainty, to give comfort to any of the large trusts to classify themselves among the sheep instead of among the goats."

There is a very full review of case law, classified under distinct sub-headings. "There is not much in the common law rule of reason, nor in the cases reviewed, to furnish much of aid or comfort to such existing institutions as are similar to those that have been challenged in the courts heretofore."

"The Future of Anti-Trust Legislation." By Gilbert H. Montague. *Editorial Review*, v. 5, p. 619 (July).

"Criminal statutes, it is obvious, should be absolutely definite in their terms, and any uncertainty should, if possible, be avoided. Eminent lawyers have expressed the fear that indefiniteness and uncertainty lurk in the language of the Sherman Act, because, to quote the Supreme Court in the Standard Oil case:—

"As the acts which may come under the classes stated in the first section and the restraint of trade to which that section applies are not specifically enumerated or defined—it is obvious that judgment must in every case be called into play in order to determine whether a particular act is embraced within the statutory classes, and whether if the act is within such classes its nature or effect causes it to be a restraint of trade within the intentment of the act."

"The futility of indiscriminate anti-trust statutes has long been demonstrated by business experience, and more recently by the highest judicial authority in the United States. The anti-trust statutes in force in many of the states must be pruned of indefinite and impracticable prohibitions in order to be truly effective. What particular form such statutes should take will depend, in large measure, on how workable the federal anti-trust statute, as now interpreted, is found to be. Such a statute should forbid no method of organization evolved out of normal competition. Yet it should prohibit, in comprehensive fashion, every improper interference with trade and competition."

"Review of the Opinions of the Supreme Court of the United States in the Standard Oil and Tobacco Cases." By Albert H. Walker. *73 Central Law Journal* 21 (July 14).

"The motives of Chief Justice White in composing and promulgating his Standard Oil or his Tobacco *obiter dicta* . . . were probably based upon the following sincere, though erroneous, opinions relevant to the science of economics:—

"*First.* Restraint of competition always constitutes restraint of trade, and would therefore always be prohibited by the Sherman Law if the statutory phrase 'restraint of trade' were to be construed without any limitation.

"*Second.* Restraint of competition is in many

cases economically wise and ethically proper; and when it is so it ought not to be the subject of statutory prohibition.

"*Third.* The only way to prevent the Sherman Law from prohibiting many cases of economically wise and ethically proper restraint of competition is to construe the statutory words 'restraint of trade' by means of some limitation which will confine those words to non-ethical restraint of trade, and that result can be accomplished only by limiting them by some such word as 'unreasonable' or 'undue' or 'injurious.'

"The line of argument suggested in the last three paragraphs has long been sincerely entertained by many excellent men, including Chief Justice White; but all of those men must have overlooked one particular gap in the argument, the undeniable existence of which quite vitiates its conclusion. That gap consists in the economic fact that restraint of competition never does, when it is ethical, result in restraint of trade, and therefore never falls within the unlimited statutory phrase 'restraint of trade' as that phrase is used in section 1 of the Sherman law."

Municipal Corporations. "The Quasi-Contractual Obligation of Municipal Corporations." By Jerome C. Knowlton. *9 Michigan Law Review* 671 (June).

"The courts have considerably modified their views on the question involved, during the past thirty years, and to an extent that renders a recovery in quasi contract against municipal corporations very doubtful." The author analyzes what he calls a "truly bewildering" mass of cases, under the topics, "Liability for Money Had and Received," "Liability for Labor and Material Furnished," and "Legislative Prohibition of the Quasi-Contractual Obligation."

Old Age Pensions. "The Constitutionality of Old Age Pensions." By Prof. Frank J. Goodnow. *American Political Science Review*, v. 5, p. 194 (May).

"Whether the [United States Supreme] Court will carry this idea of the local autonomy of the states in deciding what should be the remedies to be applied to the evils attendant upon an intense industrial life under conditions of freedom of individual action, of course cannot be said, but the logic of the argument cannot be avoided if the Court can be brought to see that the difference in conditions due to the varied occupations of the people in different parts of the country are in reality just as great as the differences in climate and social conditions which were recognized in the opinions from which quotations have been given. . . .

"Our conclusions then as to the constitutionality of old age, accident and sickness pensions are, assuming that the courts do not change their view:—

"1. Such pensions when provided by state action are not prohibited by the Fourteenth Amendment or any other provision of the federal Constitution, particularly if they are confined to indigent persons.

"2. If not confined to indigent persons they

are unconstitutional under the ordinary provisions of the state constitutions."

"3. Even if confined to indigent persons they are probably unconstitutional under the ordinary provisions of the state constitutions, although there is some reason for believing they might be justified as a form of outdoor poor relief.

"4. There is much ground for the belief that such pensions, particularly if confined to indigent persons, might constitutionally be provided by the federal Government."

Penology. "Some European Comments on the American Prison System." By Ugo Conti and Adolphe Prins. 2 *Journal of Criminal Law and Criminology* 199 (July).

"It is well known that in America arose the Philadelphia system and the Auburn system of prison discipline, after which the Irish system was modeled, and that in this country also originated the idea of prison congresses. And now in these latter days America is producing for us model penal institutions which are splendid and marvelous, animated by one common principle—the principle of the reformation of the offender. Reformation, to be sure, as the sole basis of a penal system, is an untenable principle. And even in the aspect of an incidental object to be aimed at, we Italians are apt to place little faith in it. Yet this principle the Americans (mistakenly, if you like, but it is noble and high-minded mistake) make the main support of their prison system. . . .

"The care of dependent children is another field in which America can teach us much—even though it has yet a long road to travel before it has perfected the indispensable protective measures. In the treatment of delinquent children, even more positively, it can be asserted that America offers us an admirable example, with its juvenile courts, its probation system and its reform schools. We have, indeed, already taken advantage of this example, and are importing such institutions; but for us the problem is, how to get the means to establish those wonderful family-colonies. The reformatories, too, or schools of supplementary correction, made a remarkable impression on us; in these the indeterminate sentence seems to work ideally and fruitfully. The penitentiaries (for long sentences) are noteworthy; but luxury of the buildings and their arrangements is a thing difficult for us to approve. . . .

"Each institution has its own character. I have seen some that are magnificent—such, for example, as the prison of Auburn, where the workshops are really factories fitted up with the most perfect tools and in which intensive production is carried on. I may also cite the prison of Chicago, where the convicts can work in an immense quarry and in a large brickyard. I have also seen detestable institutions—jails in which there prevailed promiscuity, idleness and gambling, just as in the most horrible common-rooms under the old system. I have seen glaring contrasts; on the one hand, astonishing conditions of luxury, of comfort in prison, of kindness for the convicts; on the other hand, species of barred cages in which convicts condemned to death awaited for months their exe-

cution. I have seen evidences of great respect for the person of the convict, who remains a citizen and can claim his rights under conditions which seem to us astonishing. I have also found evidence of a very different feeling; for instance, the practice of an operation called vasectomy, the details of which I need not go into, having for its object the prevention of the propagation of a degenerate race. . . .

"The difference between America and Europe results from other causes as well: in the first place, from the pessimism of our civilization, which distrusts the criminal, because we have not room enough for our respectable classes, and furthermore, from the optimism of the new world, which does not distrust the criminal, because all the men available can be made useful, even criminals. This optimism has another source in the religious feeling which makes it a duty for the American to help his neighbor, and in a humanitarian feeling analogous to the confidence of the French eighteenth century and of the encyclopedists in the goodness and perfectability of human nature. One must add a scientific tendency which takes account of heredity and environment, which holds that the man who has fallen is never wholly responsible for his fall, but that fatality has had a certain share in determining his destiny, and that, consequently, the criminal is still deserving of pity.

"These religious and humanitarian feelings and this scientific tendency have produced a penal code different from ours; a very liberal penal code, which our ancient civilization could not imitate. It does away entirely with the system of vengeance, and often takes away from punishment any intimidating effect. The old system is replaced by the enthusiastic, superstitious, exaggerated faith in the effect of education upon the convict; that one can change the physical and moral nature of the convict and cause the germs of a new life to spring up in him. But if this is exaggerated in the case of adults, it is not exaggerated in the case of children and young criminals, and here the educative effects have proved admirable and really effective."

See Juvenile Delinquency.

Police Power. See Old Age Pensions.

Procedure. See Criminal Procedure.

Public Service Corporations. See Taxation.

Quasi-Contracts. See Municipal Corporations.

Railways. "The German Drift Toward Socialism." By William C. Dreher. *Atlantic Monthly*, v. 108, p. 101 (July).

"The railway is almost wholly a state institution in Germany. The Prussian system, with its more than 400,000 laborers and officials, is the largest employer of labor in the world; and this vast business is administered with remarkable honesty and efficiency. . . . Bismarck's purpose to use the railway wholly in the interests of the people, as declared when he nationalized the roads, has not been fully carried out,

since rates have been kept up high enough to make them the largest source of revenue for the state, besides paying interest on the capital invested. On the other hand, shippers have the great advantage of absolutely fair treatment; there is no discrimination among them, there are no rebates, secret or other. Another great advantage consists in having a single system to deal with, as well as simplified tariff schedules; before the nationalization there were 63 rail-ways, with 1,357 different tariffs."

See Interstate Commerce, Taxation.

Responsibility. See Criminology.

Roman Law. See Lex de Majestate.

Self Incrimination. See Criminal Procedure.

Taxation. "The Income Tax Amendment." By Hon. Charles E. Littlefield. *Editorial Review*, v. 5, p. 610 (July).

"I do not suppose it is contended by anybody that the conferring of this power would eliminate the states as a matter of legal entities. He [Justice Brewer] means the disastrous effect of such legislation upon the power of the state to borrow — the power to control the exercise of the governmental functions of the state. . . . While the state when it goes into the market for a loan has to compete with capital engaged in private business, it is always for the public interest that the loan should be obtained by the state for the lowest possible rate, as every dollar added to the interest charge increases the burden that the public has to bear. When this burden is imposed upon the state government by the federal government, a separate and independent power, then the state government as a government is subjected to the domination and control of the federal Government which has the power to say what the size of the burden shall be. From the days of Webster and Marshall it has been recognized that the power to tax is the power to destroy."

"The Proposed Federal Income Tax." By Governor John A. Dix. *Editorial Review*, v. 5, p. 603 (July).

"Our present system of Federal taxation practically puts the entire burden upon the shoulders of producers and consumers. If the legitimate rights of property are to be conserved by the establishment of a just system of taxation that will create a contented and prosperous nation, it is time for a change."

"Some Phases of Tax Reform in Illinois." By F. B. Garver. *Journal of Political Economy*, v. 19, p. 574 (July).

"The general property tax has never been given a fair trial in Illinois. That is, however bad the undifferentiating tax levied upon all forms of property may be in theory, there has been no state-wide enforcement of the tax that could furnish conclusive proof of its essential unworkableness. For instance, taxation of moneys and credits under the present system amounts almost to confiscation, for property discovered, but this would no longer be the case if real estate and other personal property were assessed at actual values, or the prescribed percentage of actual value.

This instance illustrates the fact that much of the present agitation for separation and for substitutes for the personal property tax, on the ground that our present system has entirely broken down, is in reality directed against the administrative organization and not against the tax itself."

"The Inequalities of Taxation." By Tom L. Johnson. *Hampton's*, v. 27, p. 192 (Aug.).

"Now, gentlemen," I continued, "the market value of the bonds and stocks of the Nickel Plate Company is about \$40,000,000. As about forty-six per cent of the road is in Ohio, it has over \$17,000,000 worth of property in this state. The law says you shall assess property at its full value in money and that includes railroads, but as you have adopted a rule to assess property at only sixty per cent of its value, I ask you to apply that rule in this case. If you apply this rule of sixty per cent, the Nickel Plate road will be assessed in Ohio at about \$10,000,000 instead of \$3,000,000, as it has been valued and wants to continue to be valued."

Workmen's Compensation. "The New York Employers' Liability Act." By Andrew Alexander Bruce. 9 *Michigan Law Review* 684 (June).

In a thoughtful article which discusses *Ives v. South Buffalo Ry. Co.*, the author says: —

"Have we, and has the New York Court, and have our courts generally, really understood the meaning and the qualifications of the terms liberty and property as they have been used in our constitutions? Is there, after all, any absolute right of property? Are there any inalienable rights which can be pigeon-holed, classified and defined? Is not every right subject to the paramount right of the public weal, and has not the right of private property itself as opposed to communism, merely been conceded because it is deemed to promote industry and virility and to be the best social policy? The rights to liberty and property, indeed, have always been relative, and whenever the unlimited exercise of those rights has been deemed injurious to the public welfare they have been modified and restrained or permitted only under certain conditions. The tradesman in England was from an early time under the royal protection, and the free burghs or trading and manufacturing cities were the recipients of royal charters. Every extra-hazardous occupation is a business which is affected with a public interest. . . .

"Mr. Justice Werner does not state the historical truth when in his opinion in the New York case he intimates that at the time of the adoption of the American Constitution there was no common law liability where negligence could not be proved. From an early time the innkeeper and the common carrier were not merely compelled to accommodate and carry the goods of all, but were made almost absolute insurers of their safety. Their regulation was justified on the theory that they were engaged in public callings and that their control redounded to the good of all classes, but much more upon the theory that they were accorded privileges and protection and owed to their lords and to the

King something in return. . . . It is now quite generally conceded by the courts that a common carrier of passengers is not only liable for the exercise of a high degree of care in the carriage of its passengers, but is liable for flaws and defects in its cars and machinery, provided the manufacturer could have ascertained their existence by a high degree of care, but regardless of the fact as to whether the railway company itself (even after the most thorough examination), could have ascertained the defect after the same had been manufactured."

See Old Age Pensions.

Miscellaneous Articles of Interest to the Legal Profession

America. "The New Spirit in America." By Prof. L. T. Hobhouse. *Contemporary Review*, v. 100, p. 1 (July).

"The 'Bosses' of the old type are said to be dead or dying out everywhere. Though the Commonwealth still wages uncertain war with the Trusts, few appear to think that the methods by which the greatest of the Trusts built up its power would be available today. Finally, the railways have been tamed by the Interstate Commission, and have learnt at any rate the first lesson in the doctrine that they have to be the servants rather than the masters of society."

Biography. "The Militant Justice Harlan." *Current Literature*, v. 51, p. 33 (July).

"With such a militant career in war and politics, surely no one can be surprised that Judge Harlan can still, at the age of seventy-eight, manifest a certain degree of militancy even with a solemn-looking black robe draping his tall form."

"Grotius, and the Movement for International Peace." By R. Walton Moore. 18 *Case and Comment* 81 (July).

"He knew that nations, without their consent, cannot be subjected to the natural law which imposes upon them moral obligations. But he insisted that they should consent to be thus subjected. He meant that their positive law should express their moral sense. He was adversely criticized for theorizing and dreaming about what the law of nations should be, and, as some believed, never would be, rather than announcing what it was. But as I understand, the validity of his premise has for a long time been uncontested. Unless I misapprehend, it has from the foundation of our government been approved in this country. It seems to pervade the utterances of our courts."

"The Life Story of J. Pierpont Morgan." By Carl Hovey. *Metropolitan*, v. 34, p. 507 (July).

Telling the story of Mr. Morgan's wonderful generalship in the panic of 1907.

"Theodore Roosevelt Please Answer." By M. E. Stone, Jr. *Metropolitan*, v. 34, p. 487 (July).

Treating of Mr. Roosevelt's behavior towards "malefactors of great wealth." "Just what trusts

did you bust, Mr. Roosevelt, and what malefactors of great wealth did you punish?"

Camorra Trial. "The Neapolitan Camorra and the Great Trial at Viterbo." By Walter Littlefield. *Metropolitan*, v. 34, p. 405 (July).

"Secret commands were given the Minister of War — commands which his colleagues in the Departments of Justice and the Interior knew nothing about, and Captain Fabbroni and his companions were ordered 'to purge' Naples. Together these Three Musketeers of Modern Italy laid out their campaign. Fabbroni, with documents all in proper form, was to probe the archives of the police, courts and prisons. Farris, with letters of introduction from eminent personages in Rome, was to enter the charmed circle of the Neapolitan aristocracy.

"There remained for Capezutti the hardest and most dangerous task of all. He, in the guise of one of the brigands, escaped from his own Sardinia, was to enter the 'mala vita' of Naples and gather the roots of the Honorable Society of the Camorra, while his comrades plucked its fatal fruit in the professional and social life of the city.

"These three men began their work in silence and in darkness. Five years were before them — five years of secret and perilous toil. Then the light was to shine over the most extraordinary and romantic feats of detection that the age can produce."

Fiction. "Strategy — A Story Partly True." By Judge A. G. Zimmerman. 18 *Case and Comment* 88 (July).

Roman Catholic Church. "The Pope and Democracy." By William Canon Barry. *Atlantic Monthly*, v. 108, p. 8 (July).

"Long before the American Constitution was dreamed of, and nearly two hundred years previous to the States-General of 1789, our leading theologians, Jesuits in the front, had affirmed that power comes to the ruler through the people, who are its immediate depository. In resisting that superstition which makes kings irresponsible, these eminent teachers were following St. Thomas Aquinas; they did but repeat the lessons inflicted on European tyrants by the Papacy during its glorious Middle Age. To bring out the whole of the story by citation from documents is not now my design. Scholars know it well. Pope Leo XIII has thrown into lucid Latin the idea itself in his beautiful style; and the eloquent state paper which begins 'Immortale Dei,' or that other entitled 'Libertas,' will furnish me with warrant enough for the parallel on which I am insisting.

"The sum of these things is that as regards the persons who shall govern, the Catholic Church is a free elective system; that Catholics are as much members of a voluntary association as are the citizens of every true Republic; that the Pope himself is, according to the sublime ascription, 'Servant of the servants of God'; and that consequently he is at home in a democratic age, as he never could be under the yoke of the old absolute monarchies. Therefore he belongs to the future, not to the ancient régime."

Latest Important Cases

Circumstantial Evidence. Murderer Trailed by Bloodhounds — Evidence Sufficient to Convict. Kan.

The Kansas Supreme Court July 7 upheld the evidence of bloodhounds; if the hound had been proven accurate in following the trail of human footsteps, that evidence was enough, said the Court, to convict. The decision came in the appeal of Glen Adams, convicted in November, 1910, in Graham County, of the murder of Joseph Anderson, a farmer. Tracks about Anderson's home gave the hounds a good trail and they followed it to the Adams home, six miles distant. Some tracks at the Adams house and around Anderson's body corresponded with the shoes Adams wore. The shoes and the hounds were all the evidence against Adams.

Discovery. Privilege Against Self-Incrimination Does not Protect Officials of Corporations from Order to Produce Books of the Company in Court — Subpœna Duces Tecum. U. S.

The decision of the United States Supreme Court in *Wilson v. U. S.*, 220 U. S. 614, decided May 15, emphasized the existence of a wholesome tendency to cut down abuses of the plea of privilege against self-incrimination, and to prevent technical defenses from blocking the administration of justice. Another example of this tendency is seen in *U. S. v. Swift et al.*¹ in which District Judge Carpenter declined to give the federal Immunity Act an over-indulgent construction.

In 1910 a subpœna was served on the United Wireless Telegraph Company

directing that certain books of the company be produced for examination by the grand jury, which was investigating "an alleged violation of the statutes of the United States by Christopher C. Wilson." Wilson appeared in court but declined to allow the grand jury to examine the books, or to turn them over to the directors of the company for production in court. The ground for his refusal was that the books would tend to incriminate him. He was adjudged in contempt of court.

The Supreme Court affirmed the action of the Court below. Mr. Justice Hughes, in announcing the opinion, said that Wilson could not assert a personal privilege which would enable him to withhold the books of the corporation of which he was president.

The technical question was presented whether the *subpœna duces tecum* was void for not containing an *ad testificandum* clause. On this point the Court said:—

"It is urged that its form was unusual and unwarranted, in that it did not require any one to attend and to testify but simply directed a corporation, which could not give oral testimony, to produce books. While a *subpœna duces tecum* ordinarily contains the *ad testificandum* clause, this cannot be regarded as essential to its validity. The power to compel the production of documents is, of course, not limited to those cases where it is sought merely to supplement or aid the testimony of the person required to produce them. The production may be enforced independently of his testimony, and it was held long since that the writ of *subpœna duces tecum* was adequate for this purpose." The

¹23 Green Bag 372.

Court went on to cite authorities, both English and American. Moreover, —

“Where the documents of a corporation are sought, the practice has been to subpoena the officer who has them in his custody. But there would seem to be no reason why the *subpœna duces tecum* should not be directed to the corporation itself. Corporate existence implies amenability to legal process. The corporation may be sued; it may be compelled by mandamus, and restrained by injunction, directed to it. Possessing the privileges of a legal entity, and having records, books and papers, it is under a duty to produce them when they may properly be required in the administration of justice. . . .

“A command to the corporation is in effect a command to those who are officially responsible for the conduct of its affairs. If they, apprised of the writ directed to the corporation, prevent compliance or fail to take appropriate action within their power for the performance of the corporate duty, they, no less than the corporation itself, are guilty of disobedience, and may be punished for contempt. . . .

“The appellant asserts his privilege against self-incrimination. There is no question, of course, of oral testimony, for he was not required to give any. Undoubtedly it also protected him against the compulsory production of his private books and papers. *Boyd v. United States*, *supra*: *Ballmann v. Fagin*, 200 U. S. p. 195, 50 L. ed. 437, 26 Sup. Ct. Rep. 212. But did it extend to the corporate books?

“For there can be no question of the character of the books here called for. They were described in the subpoena as the books of the corporation, and it was the books so defined which, admitting possession, he withheld. The copies of letters written by the president of the corporation in the course of its trans-

actions were as much a part of its documentary property, subject to its control and to its duty to produce when lawfully required in judicial proceedings, as its ledgers and minute books. It was said in the appellant's statement before the grand jury that the books contained copies of his 'personal and other correspondence, as well as copies of the correspondence relating to the business and affairs' of the corporation. But his personal letters were not demanded; these the subpoena did not seek to reach; and as to these no question of violation of privilege is presented. Plainly he could not make these books his private or personal books by keeping copies of personal letters in them. . . .

“The physical custody of incriminating documents does not of itself protect the custodian against their compulsory production. The question still remains with respect to the nature of the documents and the capacity in which they are held. . . . Thus, in the case of public records and official documents, made or kept in the administration of public office, the fact of actual possession or of lawful custody would not justify the officer in resisting inspection, even though the record was made by himself and would supply the evidence of his criminal dereliction.”

Evidence. See Circumstantial Evidence.

Interstate Commerce. *Natural Gas May be Subject of — State Statute may not Burden Interstate Commerce by Discriminating Against Foreign Pipe Line Corporations.* U. S.

Natural gas, when reduced to possession, is a commodity which belongs to the owner of the land, and may be the subject of both intra-state and interstate commerce, said the United States Supreme Court in *West v. Kansas*

Natural Gas Co. (decided May 15, L. ed. adv. sheets, no. 13, p. 564).

Prohibiting the construction of pipe lines for natural gas, or the transportation of the gas by such lines except by domestic corporations, under certain conditions, and giving to such domestic corporations the exclusive right of eminent domain and the use of the highways as attempted by Okla. Laws 1907, chap. 67 — unconstitutionally interferes with interstate commerce, and cannot be justified as an exercise of the police power of the state to conserve its natural resources. So held the Court (McKenna, J.).

Hours of Labor of Railway Employees — Federal Statute not Void for Uncertainty. U. S.

In *Baltimore & Ohio R. Co. v. Interstate Commerce Commission*, decided by the United States Supreme Court May 29, it was held, *inter alia*, that the federal act of March 4, 1907³⁴ limiting hours of labor of railway employees does not apply to intrastate commerce, and that merely because many such employees are necessarily engaged in intrastate commerce, it does not follow that the restrictions are void. (L. ed. adv. sheets, no. 13, p. 621).

The Court (Hughes, J.) said: —

"In its power suitably to provide for the safety of employees and travelers Congress was not limited to the enactment of laws relating to mechanical appliances, but it was also competent to consider, and to endeavor to reduce, the dangers incident to the strain of excessive hours of duty on the part of engineers, conductors, train dispatchers, telegraphers and other persons embraced within the class defined by the act. And in imposing restrictions having

³⁴ Stat. at L. 1415, c. 2939, U. S. Comp. Stat. Supp. 1909, p. 1170.

reasonable relation to this end there is no interference with liberty of contract as guaranteed by the Constitution. *Chicago, B. & Q. R. Co. v. McGuire*, 219 U. S. 549, 31 Sup. Ct. Rep. 259 [23 *Green Bag* 320].

"If, then, it be assumed, as it must be, that, in the furtherance of its purpose, Congress can limit the hours of labor of employees engaged in interstate transportation, it follows that this power cannot be defeated either by prolonging the period of service through other requirements of the carriers, or by the commanding of duties relating to interstate and intrastate operations."

See Monopolies.

Landlord and Tenant. Constructive Eviction — Adjoining Premises Leased to Prostitutes. N. Y.

The owner of an apartment house at 342 West Fifty-sixth street, New York, sued for rent for an apartment which had been vacated, and the defense was a constructive eviction because of the fact that the owner allowed an adjoining apartment to be tenanted by prostitutes. The Municipal Court of the fifth district, in New York, decided for the plaintiff.

The defendant appealed, and the Appellate Term reversed the decision, in *Dale v. Fyfe*.

In ordering a reversal Presiding Justice Seabury said in part: "The actions which the landlord permitted to take place in the elevators and halls constituted a common nuisance which the landlord had the complete power to abate. His failure to do so justified the defendant in vacating the premises. The defendant was not obliged by any rule of law or reason to remain in the premises and permit his wife to be grossly insulted and the peace and comfort of his family to be rudely interrupted. The actions

complained of, in so far as they were committed in that part of the premises which were under the control of the landlord, constituted a constructive eviction (*Dvett v. Pendleton*, 8 Cow. 727). While we regard the principle stated as decisive of this case, we are of the opinion that the failure of the landlord to institute proceedings to remove the objectionable tenants itself justified the defendant in removing from the premises."

Monopolies. *Sherman Act — Direct and Substantial Restraint — Competition between Railways.* U. S.

The Government's petition to enjoin the Union Pacific from continuing to control the Southern Pacific Railroad Company was dismissed June 24, in the United States Circuit Court of the Eighth District, at St. Louis. Judge Elmer B. Adams wrote the majority opinion, which was concurred in by Judge Sanborn and former Judge, now Supreme Court Justice, Van Devanter. Judge William C. Hook wrote a dissenting opinion.

Judge Adams found that the railroad merger, engineered by the late E. H. Harriman and his associates in 1901 and subsequently, did not amount to a direct and substantial restraint of trade, interstate or international. "Our conclusion," the Court said, "is that all facts of this case considered in their natural reasonable and practical aspect and given their appropriate relative significance do not make the Union Pacifica substantial competitor for trans-continental business with the Southern Pacific in or prior to the year 1901. We therefore pass to a consideration of some less important matters relied upon by the Government to establish destruction of competition between these companies. Certainly the desire to appropriate the trifling business done by the

Southern Pacific on the minor lines or to suppress a competition in traffic which was in the aggregate of such small proportions could not have been the inspiration of the vast outlay involved in the purchase of the Huntington stock. It did not amount to a direct and substantial restraint of either interstate or international commerce. This is not sufficient to bring it within the condemnation of the anti-trust law."

Judge Adams prefaced his opinion with the statement that the Government must prove that the restraint in trade, alleged in the bill, must be substantiated in character as the direct and immediate effect of the combination. The Government, he said, failed to prove this.

Judge Hook, dissenting, said the majority opinion "so greatly narrows the act of Congress that very little is left of it when applied to railroads," and that under the tests which the majority opinion was based on "the Union Pacific probably could have lawfully purchased control of all the great railroad systems in the United States."

Self-Incrimination. See Discovery.

Unfair Competition. "*Chartreuse*" Case — *Trademarks and Trade Names — French Law of Trademarks without Extra-Territorial Effect.* U. S.

At the time of the expulsion of the religious orders from France, the monks of Chartreuse fled to Tarragona in Spain, taking with them the secret formula for the manufacture of the cordial which has made the name Chartreuse famous throughout the world. The French liquidator, Lecouturier, endeavored to duplicate their formula with the aid of skilled chemists, and put an imitation Chartreuse on the market purporting to be identical in character with the monks' product. The latter, divested of

the use of their trademark in Spain, resumed the manufacture of their cordial under the name of Pères Chartreux, meanwhile endeavoring to protect their rights to the original name outside of France. Not long ago the question was litigated in English courts, as to whether the French liquidator could claim an exclusive right to the trade name, and Lord Macnaghten in the House of Lords, in *Lecouturier v. Rey* (1910, A. C. p. 265), thus decided: —

“To me it seems perfectly plain that it must be beyond the power of any foreign court or any foreign legislature to prevent the monks from availing themselves in England of the benefit of the reputation which the liqueurs of their manufacture have acquired here or to extend or communicate the benefit of that reputation to any rival or competitor in the English market. But it is certainly satisfactory to learn from the evidence of experts in French law that the law of associations is a penal law — a law of police and order — and is not considered to have any extra-territorial effect. It is also satisfactory to find that these legal experts confirm the conclusion which any lawyer would draw from a perusal of the French judgments in evidence in this case, that the sale by the liquidator of the property bought by the appellant company has not carried with it the English trademarks or established the claim of the appellant company to represent their manufacture as the manufacture of the monks of La Grande Chartreuse, which most certainly it is not.”

This question also came up in this country, an injunction against the New York agent of the French liquidator having been sought by the Carthusian

order, to prevent infringement of trademark rights. In *Baglin v. Cusemier Co.*, decided May 29, the United States Supreme Court took substantially the same position as the English courts. Mr. Justice Hughes said: —

“Upon the application of the Procureur of the Republic the French court proceeded to the judicial liquidation of the properties in France held by the non-authorized congregation of the Chartreux, and it was of these properties that a liquidator was appointed. It does not appear that the court assumed jurisdiction of the trade marks registered on behalf of the monks in other countries. On the contrary, it appears to have been held that the question of the ownership of such trade marks was not involved in its determination. . . . The monks' secret was not the subject of seizure by the liquidator and did not pass to him. It is not pretended that he or his vendee have manufactured the liqueur at Fourvoirie under a formula or recipe derived from the monks, but it is maintained that a formula believed to be essentially similar has been arrived at by experimentation, in accordance with which the liquidator and the French Company have been making their liqueur. We are not concerned with their authority under the French law to conduct this business, but it is not the business to which the trademarks in this country relate. That business is being conducted according to the ancient process by the monks themselves. The French law cannot be conceived to have any extra-territorial effect to detach the trademarks in this country from the product of the monks, which they are still manufacturing.”



The Editor's Bag

LITERATURE AND THE LAW

MANY eminent men of letters have begun their careers as lawyers, and have speedily freed themselves from the ties of what seems to have impressed them as a singularly uncongenial pursuit. It is an often repeated saying, that such men find the law irksome, and there is a widely prevalent opinion that the law and literature do not go together. As a matter of fact they have much in common — the debt of literary men to the law is immeasurably great, and instead of stifling their talents, their knowledge of the law has had, in spite of every possible objection, a most stimulating effect upon their powers.

It is something more than a mere coincidence that Thackeray, Maeterlinck, Anthony Hope and Galsworthy should have entered the bar, that George Meredith and Arnold Bennett should have studied law, that Bacon should have been equally great in two professions, that Scott, Dickens, Fielding and Balzac should not always seem to be writing from a layman's standpoint. Nor is it an incongruity to be attributed solely to a remarkable accident that Thomas Nelson Page and Robert Grant should have turned with such success from the law to literature. In fact, there is nothing surprising or exceptional in any of these instances. Why should not such men have been powerfully attracted by a study more closely bound up

with life than any other? They may have tired of its dreary technicalities and dry abstractions, and a profession so enamored of dull facts and cold logic may have sometimes oppressed them with a sense of its sterility. But law has also another side, which attracts rather than repels, and the charm of the law is something of which it is hard to write and which every lawyer who has not taken leave of imagination well understands for himself. And to all these men, the higher, more human side of the law gave something which may be seen enshrined in the work of their hands.

Even as a painter studies anatomy to perfect his knowledge of the human form, so may a novelist study the dry bones of the law that he may write intelligently of the living society modeled upon them. The law may help him to master arts of observation and analysis which must be exercised in the production of every great novel. It may help him to achieve realism when his imagination threatens to make him merely fantastic.

It may be that some authors have disagreeable memories of tedious hours in a lawyer's office, and that they have forsaken the law in disgust. Yet we find these selfsame writers applying the intellectual processes of the lawyer to the study not of a few select cases of wills, torts and real property, but to the illimitable reservoir of fact in which all case law has its origin. They have

not really ceased to be lawyers — they have become lawyers in a new and higher sense, through their interest in the laws found not in books but in life. There may be sermons not only in stones, but in the dry bones of the law for such as these, and even poor Yorick's skull may tell its tale.

EXPEDITIOUS PROCEDURE IN ENGLAND

SOME idea of the admirable way in which litigious work is disposed of in the English courts may be gathered from the fact that at the middle of July last there were only one hundred and eighty-five jury actions awaiting trial. Of these more than half had been set down for trial since June 1st, and less than twenty-five were of older date on the calendar than May 1st. In fact the celerity with which business is dispatched is so great that solicitors shrink from setting their cases down for trial until they are absolutely ready to go into the trial. According to the English practice the solicitor for the plaintiff or for the defendant may set a case down for trial within ten days from the time when the issue is joined by the pleadings. If the case is thus entered it must be proceeded with, unless for a substantially good reason the Court consents to have it delayed. No such excuse as the mutual inconvenience or engagements of counsel would suffice to procure a continuance to the next term. Nothing short of inability to procure the attendance of an absolutely essential witness would afford a reasonable foundation for such an application, and the applicant would expect to be obliged, in case his application was granted, to pay the costs of the adjournment, which might amount to

anywhere from \$50 to \$500, if counsel had been briefed. It is stated that all of the jury actions now on the lists will be tried before the Court rises on the 31st of July, for the long vacation, if the parties are ready, as nearly all the Common Jury actions entered in May were disposed of by the end of the second week in July and the Courts at that time were trying actions set down in the previous month. On the chancery side parties can get to trial in ten days after the actions have been set down for hearing.

AN OLD CONTRIBUTOR

ROBERT VASHON ROGERS, K.C., died recently at his home in his native city of Kingston, Ont. Mr. Rogers was a frequent contributor to legal periodicals. He early distinguished himself by giving a humorous turn to the study of the law. He wrote "The Law of the Road, or the Wrongs and Rights of a Traveller by Boat, by Stage, by Rail" (1875), "The Law of Medical Men" (1884), books alike humorous and sound in their exposition of the law.

Mr. Rogers was the author of the following articles which have appeared in the *Green Bag*: "Legal Position of Women in Ancient Greece," v. 11, p. 209; "Scotch Marriages," v. 11, p. 426; "The Legal Position of Women in China," v. 13, p. 16; "Gardening," v. 13, p. 293; "Women Among Mohammedans," v. 13, p. 466; "The Devil in Law," v. 13, p. 581; "Pigs," v. 14, p. 374; "Women Under Early Christian Law," v. 14, p. 539; "Trials of the Dead," v. 15, p. 239; "Woman and the Law in Babylonia and Assyria," v. 15, p. 485; "Hair," v. 16, p. 326; "Christopher Robinson, K.C.," v. 18, p. 1; "Marriage in Old Rome," v. 18, p. 402.

THE COLORED ATTORNEY

WE HAVE received from George C. Johnson, Esq., of Chicago, the following story based on an actual occurrence, though the colored lawyer's argument may not have been reproduced *verbatim*.

I was sitting in the court room of Judge Wells of the Municipal Court of Chicago one day last week, waiting my turn. A small wizen-faced woman of about thirty-four summers was suing a large fat boarding house keeper in replevin, and the subject in controversy was some household goods left in the care of the defendant. The boarding house keeper set up as a defense that the goods were left as a pledge for meals furnished to the plaintiff, while the plaintiff contended that she did not owe for any meals, but rather that she had taken the defendant out and bought meals for her.

Both parties to the suit were white. The boarding house keeper was represented by a prominent colored attorney of Chicago. At the close of the testimony the judge intimated that he was going to find the issues for the plaintiff. The colored lawyer stepped up to the bar and shaking his right arm high in the air, vehemently addressed the court:—

"Why, your Honor, you are not going to find the issues agin' my client, are you?"

"Such is my intention now, after having heard all the testimony," suavely replied the judge.

"Why," began the colored lawyer with great emotion, "why, your Honor, that is not right! That is not justice! That is not morality! That is not religion! Why, your Honor, all religion, all morality, all justice cries aloud that in justice to God and in justice to this

court and in justice to my client, this woman first be obligated to pay my client.

"To eat, your Honor, is man's highest duty to God. Why, sir, to eat? Because a man's duty is to serve God, and if he serves God, he must be alive, and to keep alive, your Honor, does he not have to eat? How can a man serve his God if he is dead? Why, your Honor, if it hadn't been for my lady that lawyer there wouldn't have had a client today. No, sir! Why, your Honor, didn't my lady feed that woman? Didn't she keep her alive? Because my lady fed that woman, your Honor, isn't she here in court today?"

"Why, your Honor, look at the two litigators. Look at my big stout lady. Look at that little skinny woman. Which can tell the truth? Which, your Honor, can best afford to lose the money? Which, I say, your Honor, is the most likely?"

"No, sir, your Honor, if my lady hadn't nourished that woman and kept her alive she wouldn't have been in court today and testify against her. Is it right then, I say, is it right? Is it morality? Is it religion? Is it justice that she should now have to surrender the goods without being recompensed for the subsistence she acquired? No, sir, your Honor, in the name of God, no, sir! no, sir! no, sir, it is not! You should first give my lady her just deserts!"

"Judgment finding property in the plaintiff and assess the damages at one cent and costs," meekly announced the Court.

HASTY LEGISLATION

DECISIONS handed down by the Illinois Supreme Court within the past few months have directed attention

to the extreme folly of "last day" legislation. But this fact has been indicated in like manner, many times before, and has not been heeded.

More than once important enactments have been nullified by the indifferent manner in which they have been constructed during the closing hours of a legislative session. The Ettleston school text-book bill is a striking example of what hasty examination will do for a law.

The measure in question was held back until late in the session, and, just before adjournment, was taken up for consideration and passage. In the hurry of the hour, its friends failed to note a provision which was impossible of enforcement; as a consequence, of course, the law became a dead letter.

Two-thirds of the confusion and litigation which results from hastily written laws and indifferently considered legislation, could be prevented by placing a limit upon last-day legislation; no bill should be permitted to reach the order of third reading in the House until its form has been passed upon by some one competent to do that sort of work.

A LINGERING SUIT

AMONG the last official acts of Porfirio Diaz of Mexico previous to the breaking out of the revolution which ended his perennial Presidency, was to cause a settlement of a suit which had been pending in the courts of his country for no less than three hundred and forty years.

The dispute arose between the local authorities of the towns of Yodocome and Munu over the question of the boundary between the villages, conflicting titles having been granted by the Spanish colonial government. Many private titles were also involved. Even

municipal authorities could not hurry the Mexican courts, however, and years and centuries dragged along without any settlement being reached, first one side and then the other making some legal move. In the meantime the citizens of the two villages were in the habit of engaging in armed contests and in these small battles, from first to last, several thousand persons must have perished.

The father of Porfirio Diaz was a native of Yodocome, and all his life endeavored to arrange a settlement of the dispute, but unavailingly. At last President Diaz found time to give the matter his personal attention, and caused the huge mass of documents, dating back three and a half centuries, to be examined and directed that the matter be laid before a council of men from the two towns. A compromise was at length effected and the suit was formally dismissed by the court after having been upon the docket longer than any other suit in the world's history.

CLINCHING CONVICTION

IN THE early '90's T. was a quick-spoken, stirring and intelligent member of the Ohio bar, located and practising in the capital city. At the arraignment of accused persons upon the report of the grand jury, certainly without solicitation, on his part, he was assigned by the court to defend an impecunious prisoner under indictment for the misappropriation of a neighbor's porker.

The defense was skillfully conducted, considering the facts, and, at the close of the evidence, there was, at least, one chance in ten that the jury might acquit the defendant. The rebuttal had closed and the accused was leaving the witness stand when T. bethought him-

self to fix a date with reference to the disappearance of the missing chattel. "One more question," said he; "was this before or after you stole the hog-ah-er-I mean after the hog was stolen?"

The answer to the question is not remembered. An audible smile ran around the court room and the jury was out only long enough to elect a foreman and have him fill in the word guilty and sign the verdict.

On his way from the Pacific Coast, where his home has been for the last fifteen or eighteen years, to visit his student haunts and some of his early friends at Yale, T. called, the other day, to renew old acquaintance, and in response to a quiet quotation of his slip of the tongue laughingly said, "Oh, well, I think the rascal was guilty anyway."

A PRUDENT SUICIDE

SUICIDES often adopt ingenious methods, but the art of the *felo de se* seems not to have advanced materially during the centuries. The modern case of a heavily insured broker who on a feigned hunting trip stood barelegged in a quagmire for hours and so wilfully contracted a fatal pneumonia, is matched in cleverness by one five hundred years old. The following facts are well vouched for, and indeed were never questioned.

Sir William Hankford, a Judge of the King's Bench in the reigns of Edward III, Henry IV, Henry V and Henry VI, and at the time of his death Chief Justice of England, was a man of melancholy temperament. He seems to have contemplated suicide the greater part of his long life and during his later years the idea became a fixed purpose. The act was of peculiarly serious con-

sequence in those days, for the reason the law treated it as a capital crime. The offender was buried at the cross roads, with a stake driven through his body, and all his goods and property were forfeited to the Crown, to the utter ruin of his family. Hankford made good use of his wits and succeeded in accomplishing his purpose without incurring either unpleasant penalty. He gave open and notorious instructions to his gamekeeper, who had been troubled with poachers in the deer preserve, to challenge all trespassers in the future, and to shoot to kill if they would not stand and give an account. One dark night he purposely crossed the keeper's path and upon challenge made motions of resistance and escape. The faithful servant, failing to recognize his master, followed instructions to the letter as was expected of him and Sir William fell dead in his tracks. The whole truth of the affair was common knowledge, but it was impossible to establish a case of suicide by legal proof. The servant was protected by his instructions. Hankford had honorable burial and his estate passed to those whose interests as heirs he had so wisely considered. A. P. C.

ONLY A STOP-GAP

A WESTERN lawyer tells of an old Irishwoman in Chicago who sent for him in great haste. She wanted him to meet her in court, and he hastened hither with all speed. The old woman's son was about to be placed on trial for burglary. When the lawyer entered the court the old woman rushed up to him, exclaiming excitedly:—

"I want ye to git a continuance for me boy Jimmie!"

"I will do so, if I can," said the law-

yer, "but it will be necessary that I present to the court some grounds for a remand. What shall I say?"

"Shure, ye can just tell th' court that I want a continuance till I can git a better lawyer to spake for the boy."

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, factia, and anecdotes.

USELESS BUT ENTERTAINING

"THERE used to be an old fellow of sixty," said Judge Lindsey, at a Denver dinner, "who got arrested about twice a week for conviviality. He was always haled before Magistrate Blank, and as the magistrate was about sixty too, a queer kind of comradeship, almost friendly, arose between the two men.

"In the late autumn the toper was called away from Denver. He did not return till Christmas time.

"The magistrate, in the green-festooned court room, felt kindly:—

"Well, George,' he said to the prisoner, 'you are here again at last, eh?'

"Yes, your honor,' said old George humbly.

"And how many times, George, did you get drunk?'

"I don't like to say, your honor,' old George faltered, 'before all these here people.'

"Well,' said the magistrate, 'write it down.'

"So George wrote, and the paper was passed up to the magistrate, who looked at it and said:—

"Ah, well, it's the Christmas season; and as

you only got drunk sixteen times, I'll let you off.'

"Thank you, Judge,' said old George, as he left the dock. 'You looked at the paper upside down, though.'" — *St. Louis Globe.*

A NEGRO was charged in a Mississippi Court with the murder of another of his race and had pleaded not guilty and on being questioned repeatedly had said, "I didn' do it, I didn' do it!"

There was no doubt of his crime, however, and the jury brought in a verdict of "guilty" and the Judge proceeded to sentence.

After reminding the negro that he had been "duly tried by a jury of twelve men," etc., the Judge said: "It is my duty to warn you that your days on this earth are numbered and it behooves you to avail yourself of the little remnant of time allotted to you to make your peace with God."

Just here the negro broke in with the exclamation, "I done dat ar, Jedge, I done dat ar long befo' I killed dat niggah!"

Correspondence

THE TORRENS SYSTEM AGAIN

To the Editor of the Green Bag:—

Sir: This torrid July weather, is not particularly conducive to cool and calm discussion of the Torrens Law, but as you have been so kind as to allow me considerable space in previous issues of the *Green Bag*, I desire to still further trespass upon your courtesy.

In your editorial comment upon my

letter published in the July number of the *Green Bag*, you quote the remarks of a certain lawyer at the meeting of the New York State Bar Association held at Syracuse in January, 1911, as follows:—

Here is a result which can actually practically [sic] happen. A man may own a piece of vacant property, which he will naturally unfrequently [sic] visit. He goes to Europe for six months and upon his return he finds that some one has

put a deed on record, registered the title, conveyed to a purported *bona fide* purchaser, and the title has passed out of the real owner without any recourse whatever to any fund or against anybody. This is a result that actually can happen under the law.

Unfortunately professional engagements prevented my attendance at the last annual meeting of the New York State Bar Association, and consequently I could not answer the gentleman then and there, and it seems that there was no one present sufficiently familiar with the Torrens Law to expose the absurdity of this supposititious case.

The vice of this so-called argument arises from the fallacy of the premises. I think it was Josh Billings who once remarked, "It is better not to know so much than to know so many things that are not so." The sad adventure of the unfortunate owner of real estate who goes to Europe for a six months' vacation and then returns, only to find that during his absence some one else has become possessed of his property, and that he has no redress, could not possibly happen, by the wildest stretch of imagination, under the wise provisions and safeguards of the Torrens Law.

In the first place, it must be borne in mind, as I have already pointed out in previous articles, that there is a clear distinction in the Torrens Law between the *record* owner or lienor and the person who merely *claims* some right, interest or lien in the premises, *which is not of record*. Individuals of the latter class are included in the statutory designation "*All other persons, if any, having any right or interest in, or lien upon the property affected by this action, or any portion thereof.*" The United States Supreme Court, by its unanimous decision in *American Land Company v. Zeiss*, (219 U. S. 44), has unanimously declared that all such persons, having any right, interest or lien not of record,

are included within this statutory designation, and that the posting and publishing of the summons and notice of object of action, as required by the Torrens Law, is sufficient notice to them, and that the same is not inimical to the Fourteenth Amendment of the Constitution of the United States, which provides that no person shall be deprived of his property without due process of law.

But the gentleman who cites this supposititious case, the like of which has never arisen during the past fifty years, while the Torrens Law has been in successful operation in many countries and states, involving the disposition of property aggregating many millions of dollars in value, fails to discriminate between owners of record and persons having a claim not of record. He also makes use of this ambiguous language — "*a man may own a piece of vacant property.*" What does he mean by this phrase? If he wishes to convey the idea that he owns the property by virtue of a deed or other instrument duly recorded, then I can only say that his hypothetical conclusion is wholly incorrect and unfounded. The Torrens Law distinctly provides that "all persons, having or claiming any right or interest in, or lien upon the property or any part thereof, as shown by the Examiner's Certificate of Title," which includes all record owners, must be specifically named as parties defendant, and final judgment and decree of title registration cannot be entered until after all such record owners have been personally served and given an opportunity to protect their interests by interposing answer to the Complaint, or otherwise.

In the second place, assuming that the property owner who is sufficiently wealthy to make a six months' sojourn in Europe finds on his return that his

name has been forged to a deed, or that some other fraud has been perpetrated, whereby he has been deprived of his property, has his remedy under the Torrens Law, which provides in Section 392 thereof as follows:—

392. FRAUD; ACTION TO SET ASIDE THE JUDGMENT OR TO RECOVER THE PROPERTY. Any title registration procured by or as the result of fraud may be set aside, in the same manner and by the same proceedings as in the case of a deed obtained by fraud, provided that such proceedings for setting aside the registration shall not injuriously affect the rights of an innocent purchaser or encumbrancer of the property after such registration, for value and without actual notice of the fraud, and provided further that the action or other proceedings to set aside such registration be commenced within ten years from the time when the final judgment of registration was entered. No action shall lie or be commenced, except on the ground of fraud as above stated, to set aside any judgment of registration or to modify or affect the same or for the recovery of registered property or any estate, right or interest in or lien upon the same or any part thereof, or to make any entry thereon, adversely to the title or interest registered therein, as directed by a final judgment of the Court, unless such action or proceedings is commenced within six months after such judgment of registration is entered.

It thus appears that it is untrue to assert that under any conceivable circumstances, "*the title has passed out of the real owner without any recourse whatever to any fund or against anybody.*" It is very easy to say that such a result "can actually practically happen," but why does not the gentleman point out one single instance where such a thing has happened after registration of a Torrens title?

Furthermore, the section above quoted provides that an action or other proceeding to set aside such registration on the ground of fraud, must be commenced within ten years from the time when the final judgment of registration was entered, and in any event the judgment does not become final until six months

has expired after the judgment of registration is entered.

As it takes generally from six weeks to two months to complete the registration proceedings, this means that any person feeling aggrieved would have upwards of eight months within which to protect his interests or to obtain redress. If any owner of a lien on real estate is so ignorant that he does not know of the existence of the Torrens Law, or is so stupid as to neglect to file a "Caution," as provided by Section 383 of the Act, or is so unintelligent as to fail to read the newspapers, or is so indifferent as to fail to record his deed or other instrument, setting forth his interest in the land, then he deserves to lose that interest. But let him not blame the Torrens Law, which contains every provision necessary to protect the rights of the property owners. The law in this state has been amended already by chapter 627 of the Laws of 1910, and further amendments are not needed but would create confusion and tend to dissipate the benefits and advantages which we now enjoy under the Torrens System of Land Title Registration.

However, all this discussion so far as the Torrens Law in New York State is concerned, has become purely academic, as the brief in opposition to the amendment of the law which I filed with the Judiciary Committee of the Legislature has done its fatal work, and the Bill containing proposed amendments is now dead and buried.

GILBERT RAY HAWES.

New York, July 5, 1911.

[Having already expressed our views, in commenting upon Mr. Hawes' letters in the May and July issues, and having given him this opportunity to have the last word, we must request that this discussion now be terminated. — Ed.]

The Legal World

Personal

Justice Francis J. Swayze of Newark, N. J., was elected president of Harvard Alpha chapter, Phi Beta Kappa, on June 29.

The Senate has confirmed the appointment of Guy D. Goff, to be United States Attorney for the eastern district of Wisconsin.

Charles H. Turner has resigned as assistant United States Attorney for the District of Columbia to take up the active practice of law. Mr. Turner, who is a native of New Hampshire, served in the Fifty-first Congress as the "baby of the House," representing the sixth district of New York City at the age of twenty-eight.

John J. White of Atlantic City has been appointed by Governor Wilson judge of the Court of Errors and Appeals of New Jersey, to succeed the late Judge George R. Gray of Newark. Judge White practised law sixteen years before going to Atlantic City, where he has been one of the proprietors of the Marlborough-Blenheim.

Hon. Lucilius A. Emery has retired as Chief Justice of the Supreme Court of Maine, his resignation taking effect July 26. He gave as the reason for his retirement the fact that he had passed his 70th birthday and thought he should devote his remaining years to less arduous labors and less onerous responsibilities. Chief Justice Emery had served on the supreme bench for twenty-eight years, this period having been exceeded only twice in the history of the state,

by Chief Justice Appleton, who served thirty-one years, and by Justice Walton, thirty-five years. Chief Justice Emery has been succeeded by Associate Justice William Penn Whitehouse of Augusta.

At a meeting of the trustees of Boston University, Dean Melville M. Bigelow was, at his own request, relieved of his position as dean of Boston University Law School, and appointed to the position of regius professor of the school. Alonzo R. Weed, a member of the board of trustees, was elected acting dean to succeed Mr. Bigelow. Professor Bigelow is a native of Michigan, where he was born in 1846, his father being a Massachusetts man, and his mother a Virginian. He was graduated from the University of Michigan in 1866, and two years later was admitted to the bar in Tennessee. He came to Cambridge in 1870, received an honorary degree of Ph.D. from Harvard in 1879, and in 1896 the Northwestern University conferred upon him an honorary degree of LL.D.

The Academic Roll of Honor

The following lawyers received honorary Commencement degrees in June:—

John Wilkes Hammond, LL.D. Harvard.

Justice of the Supreme Judicial Court of Massachusetts; "a magistrate, learned, just and wise, honored by bench and bar, who has upheld the pride of Massachusetts in the great traditions of her highest court."

Joseph Rucker Lamar, LL.D. Yale.

Justice of the Supreme Court of the United States.

Simeon E. Baldwin, LL.D. Columbia.

Governor of Connecticut.

Charles Nagel, LL.D. Brown.

United States Secretary of Commerce and Labor.

George Grafton Wilson, LL.D. Brown.

Teacher of international law at Brown and Harvard and at the Naval War College.

Albert Russell Savage, LL.D. Dartmouth.

Justice of Supreme Judicial Court of Maine.

Theodore N. Vail, LL.D. Dartmouth.

President of American Telephone & Telegraph Co.

Isaac Newton Mills, LL.D. Amherst.

Justice of Supreme Court of State of New York for term 1907-1920.

Henry Stockbridge, LL.D. Amherst.

Member of 51st Congress; now judge of Court of Appeals of Maryland.

Willis Van Devanter, LL.D. De Pauw.

Justice of the Supreme Court of the United States.

Francis L. Swayze, LL.D. Rutgers.

Justice of the Supreme Court of New Jersey.

Oliver A. Harker, LL.D. Knox.

Dean of the law school of the University of Illinois.

George A. Lawrence, LL.D. Knox.

Attorney of Galesburg, Ill.

Harrington Putnam, LL.D. Middlebury.

Judge of the Supreme Court of the State of New York.

George Kunkel, LL.D. Dickinson.

Presiding Judge of the courts of Dauphin county, Pa.

Edward O. Malley, LL.D. Fordham.

Attorney-General of New York.

Joseph Morschauer, LL.D. Fordham.

Justice of the Supreme Court of New York.

Arthur Tompkins, LL.D. Fordham.

Justice of the Supreme Court of New York.

Henry Sturgis Drinker, LL.D. Penn., Franklin and Marshall.

President of Lehigh University, engineer, jurist, author and educator.

E. D. King, K.C., D.C.L. Arcadia.

Barrister-at-law, Halifax, N. S.

W. E. Rosco, K.C., D.C.L. Arcadia.

Barrister-at-law, Kentville, N. S.

William Renwick Riddell, Litt.D. Syracuse.

Justice of the High Court of Ontario.

Conrad John Rueter, A.M. Tufts.

"Secretary of the board of trustees of the

Boston City Hospital, lawyer, public-spirited citizen, notable example of the educated man of affairs."

Miscellaneous

At the annual meeting of the Harvard Law School Association, held June 27 in Boston, Justice Oliver Wendell Holmes, class of '61, was chosen president to succeed the late Chief Justice Fuller. Among the vice-presidents elected were Richard Olney, Governor Baldwin of Connecticut, Judge George Gray of Delaware, Judge John C. Gray of the New York Court of Appeals, Justices Hammond and Loring of the Supreme Court of Massachusetts, and Governor Willson of Kentucky. Robert G. Dodge, '97, was re-elected secretary, and Roger Ernst, '03, treasurer.

About one hundred and fifty members of the Buffalo Lawyers' Club enjoyed a day's outing to Toronto on June 24, being entertained by the legal fraternity of the Canadian city, and listening to addresses by Sir Allen Aylesworth, Minister of Justice of the Dominion, William Renwick Riddell, Justice of the High Court of Ontario, and J. J. Foy, Attorney-General of the Province. That blood is thicker than water was the keynote of Justice Riddell's words. Two great pines, growing side by side, were cited as typical of the two countries, Canada and the United States — the supporting roots everlastingly embedded in a common soil, no matter how much a momentary gust may ruffle twig points of one against the other. "The longest international boundary line on earth," he said, "shows, with its proper absence of forts, the kinship between these great nations of the same blood. The recent speech of the President of the United States on international and world-wide arbitration will be historic, I believe.

The fool and the pessimist will always be with us, but I feel and hope that the day of the warrior is about gone and that the day of the lawyer and the judge has come."

Obituary

James E. Hays. — James Eyre Hays, prominent as a corporation lawyer in New Jersey, New York and Philadelphia, died June 29 in the last-named place, aged sixty-eight. He was the New Jersey counsel for many well-known corporations and practised in New York city from 1899 to 1904.

Solomon Schoyer. — Solomon Schoyer died at Pittsburgh July 3, aged seventy-nine. He was one of the best known attorneys at the bar and spent the greater part of his life in the practice of corporation law, being known as an authority throughout the state. For many years he was associated with John P. Hunter, the firm building up an extensive practice.

Justice Frank A. Hooker. — Frank A. Hooker, Justice of the Supreme Court of Michigan, a resident of Lansing, Mich., died suddenly July 10. He was born at Hartford, Conn., in 1844, and was graduated from the University of Michigan in 1865. Before being appointed to the Supreme bench in 1892 to fill a vacancy, he practised law in Bryan, Ohio, and Charlotte, Mich. He was elected Supreme Justice for ten-year terms in 1893 and 1903. During 1902 and 1903 he was Chief Justice of the Supreme Court.

Charles F. Southmayd. — Charles F. Southmayd, a law partner of the late Senator William M. Evarts and of Hon. Joseph H. Choate, died July 11 in New

York, in his eighty-seventh year. For more than fifty years he was regarded as one of the ablest members of the New York bar, not as a court lawyer, but as an expert of great knowledge and sagacity in intricate matters of constitutional and railroad law. Many actions of great importance were won upon briefs which he had prepared. He retired from active practice many years ago. Yale conferred upon him the degree of LL.D. in 1883.

General William H. Koontz. — General William Henry Koontz, lawyer, orator and former Congressman, died at Somerset, Pa., July 4, in his eighty-first year. He was elected District Attorney of his county when twenty-six years of age. In Congress, he took an active part in the Johnson impeachment proceedings. For years he maintained an active interest in Republican politics and in 1898 was elected to the state House of Representatives and re-elected in 1900. In those sessions he took an active part in the contest against M. S. Quay and in 1901 was defeated for Speaker of the House by one vote, being the nominee of a combination of anti-Quay men. General Koontz was noted as an orator and lawyer. He was a director in banks and railroads and coal companies.

Eugene F. Ware. — Eugene Fitch Ware, Pension Commissioner under Roosevelt, died suddenly of heart failure at Cascade, near Colorado Springs, July 1. Mr. Ware was seventy years old. He was born in Hartford, Conn., in 1841, and at an early age removed with his parents to Iowa and obtained his education in the public schools of Burlington. When the Civil War broke out he enlisted in the First Iowa Volunteer Infantry, later serving in the Fourth Iowa Cavalry and as captain in the

Seventh Iowa Cavalry. For some time after the close of the war he remained in the army, fighting Indians, and then went to Fort Scott, Kas., where he opened a harness shop, wrote verses for the county papers and began to study law. In 1871 he was admitted to the Kansas bar. As a lawyer Mr. Ware flourished, and from the law he entered naturally into politics. From 1879 to 1884 he was a member of the Kansas Senate and he was two times delegate to the Republican national convention. In 1893 he removed to Topeka. He was United States Commissioner of Pensions from 1902 to 1905. Since that time Mr. Ware had been senior member of the law firm of Ware, Nelson & Ware of Kansas City. Under the pseudonym

of Ironquill, he first gained fame as a newspaper poet, many of his poems appearing in the papers of Topeka, Kas. His name went abroad as "Ironquill of Kansas" and rested on a homely optimism that he put into his verses. As a writer Mr. Ware's best-known works are his prairie poems, of which one volume, "Rhymes of Ironquill," passed through thirteen editions. Others of his writings are "Ithuriel," "The Rise and Fall of the Saloon," "The Lyon Campaign and History of the First Iowa Infantry," "The Indian Campaign of 1864" and "From Court to Court," which had four editions. In addition he made several translations and was a plenteous contributor to legal and literary publications.

Bar Association Meetings

Alabama. — The thirty-fourth annual meeting of the Alabama Law Association was held July 7-8, at Montgomery and Jackson's Lake. President John London in his address discussed recent Alabama legislation, especially that relating to local option and the commission form of government.

The annual address, delivered by Hon. W. A. Blount, of Pensacola, Florida, treated of "The Past, Present and Future Status of Employers and Employees," and was received with a great deal of interest.

The papers submitted included the following: Sam Will John, "Our Imperative Duty to Procure a Judicious Reform of the Judicial Procedure in the Courts of Alabama"; W. W. Lavendar, "Judiciary Recall"; L. J. Bugg, "Direct

Legislation and Its Operation in America"; Hon. W. W. Whiteside, "Some Mistakes of Lawyers and Judges"; C. C. Whitson, "The Subordination of the Judge to the Jury"; Ray Rushton, "Handling the Facts."

These officers were elected: President, Judge John Pelham; first vice-president, Gen. Robert F. Ligon, Montgomery; second vice-president, Paul Speake, Huntsville; third vice-president, T. Sidney Frazer, Union Springs; fourth vice-president, John E. Mitchell, Mobile; fifth vice-president, W. W. Lavendar, Centreville; secretary-treasurer, Alex Troy, Montgomery.

Colorado. — President Charles D. Hayt's address, at the annual meeting of the Colorado Bar Association June

30-July 1 at Colorado Springs, dealt with "Pending Controversies over State Streams" — Colorado's conflict with Kansas, New Mexico, Wyoming and the federal government. He outlined at length the situation in the several disputes and urged that Colorado should be prepared to meet and combat the claims of her neighbors. "The fact is that the officers of the reclamation service, from the highest to the lowest, have always been unfair to the state of Colorado, particularly since the decision in the case of *Kansas v. Colorado*," he declared.

President Hayt's address was followed by an address by former Attorney-General N. C. Miller of Grand Junction, on "The Growth of Federal Power."

The annual address was delivered by Frederick N. Judson of St. Louis. Mr. Judson had for his topic, "The Progress of the Law in the United States." He urged the abolishment of useless technicalities that hinder and delay the wheels of justice. Simplicity should be the keynote, he said, and common sense the controlling factor in the procedure of courts.

An address which also excited much interest was that of John A. Gordon of Denver, on "Nationalizing the Railroads." He advanced the novel theory that the federal government, through the interstate commerce commission, should control intra-state as well as interstate commerce. He declared: "Laying aside all preconceived ideas and prejudices as to state rights and encroachment on such rights by the national government, and viewing the question strictly from a legal and from a commercial point of view, it seems to me only one conclusion can result and that is that the best interests of the people, the best interests of commerce and the best interests of the railroads themselves,

require a unity of governmental control. The constitutional power of the nation seems to be almost but not quite sufficient for such control. To complete its power it should have power directly to regulating railroad rates and charges of fares for the transportation of such commerce. Whether or not an amendment to the national constitution is necessary to control such power, or whether it may be reached, as has been suggested by at least two eminent statesmen, by judicial construction, remains for the future to demonstrate. I very much prefer the former method. I do not favor the extension of governmental power by judiciary construction."

The following officers were elected: Henry C. Hall, former mayor of Colorado Springs, was chosen president; N. C. Miller, former Attorney-General, Grand Junction, vice-president; Edward S. Worrell, Jr., Denver, second vice-president; William H. Wadley, Denver, secretary-treasurer (re-elected).

Illinois. — While women have addressed state bar associations before — the very able paper of Miss Crystal Eastman on "Workmen's Compensation" read before the New York State Bar Association will be recalled — a woman had never spoken before the Illinois State Bar Association until Miss Mary M. Bartelme, public guardian of Cook County, discussed "A Woman's Place at the Bar," at the annual meeting held at Urbana-Champaign, June 22-3. Other women lawyers attended the convention.

Miss Bartelme's paper was the second on the program, following that of former Attorney-General Bonaparte. She said: "There are less than ten women devoting their entire time to the practice of law in Chicago today and they are, from an earning standpoint, making a

comfortable livelihood with something to save. I believe that the place of any one in this profession is not a question of sex, but of qualification."

Attorney-General Bonaparte spoke on "Judges as Law Makers."

George M. Wall of Du Quoin read a paper on "Judicial Settlement of International Disputes."

Clarence True Wilson of Chicago, formerly of Oregon, spoke on "Oregon's Experiment in Self-Government."

President William R. Curran discussed the laws passed by the last legislature. He spoke earnestly for the removal of the stain of the Lorimer scandal.

At the last session of the Illinois General Assembly, Hiram T. Gilbert sought to make radical and drastic reforms of the law of practice and procedure. Strong opposition by the state bar association aided the defeat of the bill. To offset the "Gilbert Bill" the "Conference Bill" was introduced, but this, too, met defeat. At the annual meeting, these bills came up for discussion, E. C. Kramer of East St. Louis, and Col. Nathan W. MacChesney both urging the Association to approve the conference bill, which it did for the first time.

Officers elected were: President, Horace Kent Tenny of Chicago; vice-presidents, Harry Higbee of Pittsfield, William D. Fullerton of Ottawa, Joseph De Frees of Chicago; secretary and treasurer, John F. Voight (re-elected) of Mattoon. The next meeting will be held in Chicago.

Indiana. — "What a Constitution is and What it Represents" was the subject of William A. Ketcham's presidential address before the Indiana State Bar Association, at its annual meeting at Winona Lake July 11-12. It was a forceful address opposing many proposed

radical innovations, including the recall of judges. Timothy E. Howard of South Bend, in "Our Charters," took up the history of the federal Constitution. These topics owed their timeliness to the agitation for the new Indiana constitution, and another paper on this general topic was read by Linn D. Hay of Indianapolis. Enoch G. Hogate of Bloomington discussed the question, "Is There a Law's Delay?" After a lively debate, the outcome of which was a sentiment opposing the discussion of questions pending before the courts, the following resolution was finally adopted: "Resolved, That the State Bar Association expresses no opinion as to the validity or invalidity or wisdom of submitting the new constitution to the people."

Officers of the association were chosen as follows: President, Samuel Parker, South Bend; vice-president, John W. Hanan, Lagrange; secretary, George H. Batchelor, Indianapolis; treasurer, Frank E. Gavin, Indianapolis.

Iowa. — The Iowa State Bar Association has taken up a position contrary to that of the American Bar Association. At the seventeenth annual meeting, held at Oskaloosa June 29-30, Justice Horace E. Deemer of the Iowa Supreme Court made a strong plea for the adoption of a recommendation that the legislature enact a statute providing that no judgment shall be set aside, case reversed or new trial granted, on a mere technical error, misdirection of jury, improper admission or rejection of evidence or error in pleading or procedure, unless the substantial rights of litigants are injuriously affected. The subject was debated for an entire morning session, but Justice Deemer was defeated by a small majority.

President J. L. Carney's address had for its subject "John Marshall," and the annual address, delivered by Governor John Burke of North Dakota, had for its subject "Employers' Liability and Workingmen's Compensation Acts."

Other papers were: "The Lawyer as a Patriot," John C. Sherwin, Justice of the Iowa Supreme Court; "Particularist Society," F. F. Dawley, Cedar Rapids; "The Law," Judge W. R. Lewis, Montezuma; "A Practical Legal Education," Prof. Ralph Otto, State University of Iowa.

The following officers were chosen: President, Charles G. Saunders, Council Bluffs; vice-president, Horace E. Deemer, Red Oak; secretary, Claude Horack, Iowa City; treasurer, Frank T. Nash, Oskaloosa; librarian, A. J. Small, Des Moines.

Kentucky. — Governor Woodrow Wilson gave the annual address at the tenth annual meeting of the Kentucky Bar Association, held at Lexington, Ky., July 12-13, taking as his subject, "The Lawyer in Politics." He said in part: —

"The truth is that the technical training of the modern American lawyer, his professional prepossessions and his business involvements, impose limitations upon him and subject him to temptations which seriously stand in the way of his rendering ideal service to society. He seldom thinks of himself as the advocate of society. He moves in the atmosphere of private rather than public service. Moreover, he is absorbed now more than ever before into the great industrial organism. He becomes more and more a mere expert in the legal side of a certain class of great industrial or financial undertakings.

"It is apt to happen with the most successful and by that test the most eminent lawyers of our American com-

munities that by the time they reach middle life their thoughts have become fixed in very hard and definite moulds. It is evident what must happen in such circumstances. The bench must be filled from the bar, and it is growing increasingly difficult to supply the bench with disinterested, unspoiled lawyers capable of being the free instruments of society, the friends and guides of statesmen, the interpreters of the common life of the people, the mediators of the great process by which justice is led from one enlightenment and liberalization to another."

Other addresses on the program were: "Some Great Lawyers of Kentucky," by W. H. Mackoy of Covington; "Is the Fellow Servant Law Becoming Obsolete," Hon. J. F. Gordon, Madisonville, Circuit Judge; "Lawyers' Fees," Judge Matt O Doherty of Louisville; "The Value of Precedents," Judge Shackelford Miller of the Kentucky Court of Appeals.

Maryland. — The tendency of the American bar toward commercialism, and the way in which this cause makes for delays in the administration of justice, was the topic of the address of William L. Marbury, president of the Maryland Bar Association, at the sixteenth annual meeting held at Cape May June 29-July 1. "So far as I can now see," he concluded, "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 come through the successful conduct of the strictly business side of the law to devote themselves to the more efficient discharge of its duties as an aid in the advancement of justice in the courts."

Archibald H. Taylor made an address

in which he criticized the recent decision of the United States Supreme Court laying down the rule that a manufacturer cannot dictate the prices at which his retailers shall sell goods. His subject was, "Is Competition Compassed by Immorality that Sort of Unrestricted Trade, such as is Intended to be Favored by Law?" He said that the decision meant a step toward socialism and the ultimate undermining of the stability of the nation.

Judge Henry Stockbridge of the Court of Appeals made an interesting address on "Titus," his subject being a notorious negro offender who once broke into jail after he was released. Titus served sixty distinct sentences for stealing various amounts of money, the total aggregating not more than \$100.

"The Courts and the New Social Questions" was the subject of an address by Edward Q. Keasbey of Newark, N. J. Mr. Keasbey discussed recent decisions regarding regulation of hours of labor and workmen's compensation. Of the recent New York decision in the *Ives* case he said:—

"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 guarantee 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."

Other addresses were delivered by Jackson H. Ralston of Washington, D. C., on "The Hague, Its Function and History," and by Attorney-General Isaac Lobe Strauss on "Some Recent Biographies of World-Famed Lawyers."

The Association by a majority vote approved the proposal to submit bills to the next legislature, the general aim of which will be to reform the methods under which trial juries are selected in criminal cases. It is proposed to repeal the law which exempts from jury service members of state militia organizations, and to decrease the number of the peremptory challenges granted the accused from twenty to ten.

The following officers were elected: President, James Alfred Pearce of Chestertown; vice-presidents, E. Stanley Toadvin of Salisbury; J. Frank Harper of Centerville; Thomas H. Robinson of Belair; A. Hunter Boyd of Cumberland; John Wirt Randall of Annapolis; Milton G. Urner of Frederick; Walter J. Mitchell of La Plata; Bernard Carter of Baltimore; John Hinkley of Baltimore; secretary, James W. Chapman, Jr., of Baltimore; treasurer, R. Bennett Darnall of Baltimore; executive council, Benjamin A. Richmond of Cumberland; George Weems Williams of Baltimore; J. Harry Covington of Easton, and Moses R. Walter of Baltimore.

Michigan.—Attorney-General Wickersham delivered the annual address at the annual meeting of the Michigan State Bar Association, held at Battle Creek July 6-7 (see p. 458 *supra*). President C. W. Perry's opening address dealt with "Criticism of the Courts," and opposed the recall of judges.

Ex-Judge Harry A. Lockwood of De-

troit, read a paper on the life and services of Isaac P. Christiancy, who was a member of the Michigan Supreme Court from 1857 to 1875. The association has had a bust of Judge Christiancy made, which will be placed permanently in the state library at Lansing.

The subjects selected by other speakers were: United States District Judge Arthur C. Denison, "Substance and Form"; Hon. Grant Fellows, "Reversals on Technical Errors"; Hon. A. B. Eldredge, "Matters in Which the Discretion of the Trial Court Should Be Final"; Prof. Jerome C. Knowlton, University of Michigan, "Admission to the Bar."

The association elected the following officers: President, A. B. Eldredge, Marquette; vice-president, Watts S. Humphrey, Saginaw; secretary, W. J. Landman, Grand Rapids; treasurer, William E. Brown, Lapeer; directors, T. A. E. Weadock, Detroit; Judge Parkinson, Jackson; L. H. Sabin, Battle Creek; W. W. Potter, Hastings; W. K. Clute, Grand Rapids; Judge Wiest, Lansing; Lincoln Avery, Port Huron; William M. Smith, St. Johns; Lieut.-Gov. Ross; C. W. Hitchcock, Bay City; Judge Dodds, Mt. Pleasant; H. M. Oren.

Minnesota. — Attorney-General Wickersham was selected to give the annual address before the Minnesota State Bar Association meeting at Duluth July 18-20. Discussing "What Further Regulation of Interstate Commerce is Necessary or Desirable," he declared that a national administrative commission to regulate great industrial organizations in the same way that the Interstate Commerce Commission regulates railroads, is desirable and may be necessary. "The anti-trust legislation of the United States," he said, "and of most of the separate states is based on the theory

that the natural price of an article is that fixed by the operation of the natural law of supply and demand, working without artificial restraint. But the fact is that the law of supply and demand does not, and has not for many years worked in this country in a natural unrestrained and unfettered manner. Prices of standard articles of consumption have been fixed by associations of the producers, without the participation of the consumer or the general public."

Mr. Wickersham asserted that it was a matter of serious consideration whether it would be practicable to give to the proposed interstate corporation commission the power to fix prices. He also considered the holding company to be an important factor in the problem of great combinations.

Missouri. — Governor Simeon E. Baldwin has accepted an invitation to address the Missouri State Bar Association Sept. 23, at its annual meeting at Excelsior Springs. His subject, it is said, will be "Artificiality of the Law of Evidence."

North Carolina. — The thirteenth annual meeting of the North Carolina Bar Association was held at Lake Toxaway June 28-9. The association had counted on hearing the annual address delivered by Congressman Martin J. Littleton of New York, but he was unable to be present.

The association adopted the report of its committee on law reform, recommending that the number of judges be increased to twenty-four, that the present system of rotation be abolished, that the solicitors be put on salary and that the law relating to challenges of jurors be amended. Bills designed to carry out these reforms will be introduced in the next legislature.

The meeting was called to order by President Charles W. Tillett of Charlotte. The address of welcome was delivered by Walter E. Moore and the response by Francis D. Winston, former Lieutenant-Governor. An address was given on "The Torrens System," by Thomas M. Pittman of the Henderson bar.

Ohio. — At the annual meeting of the Ohio State Bar Association, held at Cedar Point July 11-13, the annual address was delivered by Congressman Samuel W. McCall of Massachusetts, and dealt with "Representative as Against Direct Government." He said in part: —

"Madison clearly expressed his perception of the necessity of a republic rather than a democracy. The makers of the Constitution were able to consummate the most democratic movement that had ever taken place on a grand scale in the history of the world, and being statesmen as well as democrats they sought to make their government enduring by guarding against hasty action and the excesses which had so often carried popular governments to destruction.

"In order to establish what Lincoln called 'a government of the people, by the people, for the people,' they saw clearly the lines over which they might not pass in pretended devotion to the democratic idea without establishing a government of, by and for the demagogue, with the certain reaction in favor of autocracy sure speedily to come, for they knew that the men of the race to which they belonged would not long permit themselves to be victims of misgovernment."

James Harrington Boyd of Toledo presented a paper on "Employers' Liability Legislation; its Purpose and Methods of Enforcement."

The annual address of President Andrews dealt in part with the coming constitutional convention.

Resolutions were adopted urging that at the coming constitutional convention the number of Ohio Supreme Court judges be increased to nine, and that the judges be appointed by the Governor. A resolution was also adopted asking that each county in the state be made a common pleas court district. In all, eight proposed amendments to the Constitution were indorsed, including a recommendation that the country justice shop be abolished and that justices of the peace be made county officers.

The following officers were elected: President, Judge Frederick L. Taft of Cleveland; secretary, Gilbert H. Stewart, Jr., of Columbus (re-elected); treasurer, Clement R. Gilmore of Dayton; vice-presidents, first, J. Chandler Harper, Cincinnati; second, W. R. Warneck, Urbana; third, Hugh T. Mathers, Sidney; fourth, John H. Price, Cleveland; fifth, Smith Bennett, Columbus; sixth, Frank Taggart, Wooster; seventh, Thomas A. Jones, Jackson; eighth, D. A. Hollingsworth, Cadiz; ninth, W. S. Metcalf, Chardon; tenth, Silas Huron, Findlay.

Pennsylvania. — The seventeenth annual meeting of the Pennsylvania Bar Association, held at Bedford, Pa., June 27-29, was marked by the presentation of some striking papers. The president's address, delivered by Edwin W. Smith, discussed "Law and the Function of Legislation." "Judges make law, and so they should," said the speaker. "It is a sad time when they are afraid to take this responsibility. Let us not hide behind the theory that decisions are always declarations of custom. So they are sometimes and in that respect they are not new laws, but let us admit

that the judges do declare law also before custom establishes it. Let us admit that judges must declare new principles sometimes which are not customs, but only reasoning and common sense. Judge-made law should ever be behind the common thought but not too far behind. . . .

"I do not think that I would ask any judge to change the law of real property, of notes and bills, agency or commercial law generally, for the relations governed by these branches of the law have not changed. But where the relations between the parties have changed by force of modern conditions, why should not judges make the changes a part of the system of law? I do not think that I would be unwilling that there should be judge-made changes in the law of master and servant, employer and employee. I think that public opinion is demanding this. I would broaden the rule of negligence and narrow the rule of assumption of risk, making the employer liable in many cases now covered by the fellow-servant rule, and making him liable for negligence in more cases where the furnishing of better appliances would have prevented the accident.

"This, I think, would be in accordance with public opinion. 'Common thought' or 'public opinion' do not mean the thought or opinion of all the people. There are many who have no thoughts or opinions upon many subjects. They do not need to have. The public opinion upon a subject is the best general opinion on that subject of the many who are acquainted with it. We have seen well discussed by laymen these questions of law bearing upon the relations of employers and employees, and the general trend of the discussion seems to be in favor of wide modification. Why should the judges hesitate then

to pronounce as law this recognized public opinion? Judges did this in times past, and they should not fear to do it now.

"There are objections to legislation as a method of reaching scientific law, which are inherent in the system of popular law-making, and the objections which are the most obvious are common to all legislation in all governments, and are not necessarily a criticism of our form of government. The history of law shows that all important legislation is a compromise; it never expresses exactly what anybody wants. Friends and opponents finally meet on some neutral ground, not quite satisfactory to either. There may be, and usually is, an honest difference of opinion as to the advisability of serious legislation. Dicey, in his 'Law and Public Opinion,' asserts that the 'sinister interest' affecting law-making, of which Bentham complains, is not necessarily selfish or dishonest — that it is much more likely to be stupid.

"I am not willing to admit that politics is responsible for all the evils of our system of legislation. We find the same defects in countries where politics are comparatively pure. So long as we submit to untrained men this important function of making law, we must expect disappointment. I do not know what the remedy is, but it seems to me that the suggestion is worthy of some consideration, that all the administrative functions of the state should be performed, as now, by a legislature elected by the people, but that substantive law should be made only by a board of trained experts also chosen by the people. Judge-made law is at least made by experts; legislation is not."

The report of the committee "on judiciary department" was accepted, the association thus going on record against an elective judiciary. Last year the

committee was divided on the question of whether judges ought to be elected by the people for a single term of twenty-one years, or appointed to office as a means of removing the bench from political influence. The committee was asked to reconsider the question and this year by a vote of 4 to 3 agreed that instead of being elected all the judges ought to be appointed. As to how this should be done the committee disagreed.

Former Governor Andrew J. Montague of Virginia made the annual address, in which he advocated "A More Effective Cabinet" for the President of the United States. He thought it would be advantageous for members of the cabinet to have the right to appear upon the floor of Congress, answer interrogatories and speak in defense of the policies of their several departments, although they might not have the right to vote.

The Cabinet as at present constituted, the speaker said, was at best an extra-constitutional body, "but the Constitution at least permits and encourages a Cabinet as such, and necessity has evolved and usage has confirmed it, and while it may differ from similar agencies in other legislative governments, nevertheless, its adaptability to submit in the person of its members on the floor of the House of Congress bills and measures of the President, accompanied with appropriate explanation, and to respond to inquiries and interpellations respecting their several departments under Congressional regulation now seems indubitable.

"Indeed, of what purpose is the Constitutional duty of the President to recommend measures unless they be accompanied or followed by appropriate exposition. Custom the world over forbids such exposition by the executive in person, but custom the world over sanctions such exposition by a Cabinet

Minister. The conclusion seems inevitable from a proper construction of this Constitutional clause, together with the manifest necessities of government that the performance of such delegated functions by a Cabinet Minister is not only not a violation of the mandatory provision, but a plain consummation of the provision."

Mr. Montague contended that the plan would cause the Cabinet to become not only an educational factor of transcendent influence, but a great power for discovering, unifying and expressing the popular will, and besides tend to greatly elevate the character, ability and dignity of the membership of the Cabinet.

It would make of Cabinet members originators, formulators and expounders of policies.

Judge Ralston offered a paper on "The Delay in the Execution of Murderers." From a summary of statistics he had gathered, he concluded that the delay was not in the trial nor in the action of the Supreme Court on the appeal, but arose, in Philadelphia county, largely in the disposal of motions for new trials. The principal delay, however, was between sentence and execution, due to the intervention of the Board of Pardons in wrongly seeking to pass upon the question of actual guilt.

The paper of John Marshall Gest, Judge of the Orphans' Court, on "The Law and Lawyers of Honoré de Balzac," was an admirable summary of the literary qualities of the great novelist, luminously expressed with that charm and originality of style for which Mr. Gest is well known, and also described a large number of the legal plots and legal characters in the "Comédie Humaine." Mr. Gest said that Balzac's works were crammed full of knowledge of the law, and that it would be impossible to treat

his subject fully in a paper occupying a single hour. (See p. 456 *supra*.)

The Uniform Desertion Act and Uniform Foreign Wills Act, submitted by the Committee on Uniform State Laws, were both approved by the Association.

Canons relating to the ethics of the bench, corresponding to those adopted last year with regard to the bar, were adopted in accordance with a report of the Special Committee on Legal Ethics.

The following officers were elected: president, George R. Bedford, Luzerne; vice-presidents, Paul A. Gaither, Westmoreland, Hon. A. B. Hassler, Lancaster, Hugh B. Eastburn, Bucks, William Righter Fisher, Philadelphia, Isaac Ash, Venango; secretary, Hon. William H. Staake, Philadelphia; treasurer, Hon. Wm. Penn Lloyd, Cumberland; executive committee, Charles D. Gillespie, Christian H. Ruhl, Russell C. Stewart, Andrew A. Leiser, James I. Brownson, T. C. Hipple, E. L. Whittelsey, Quincy A. Gordon, R. Stuart Smith, John H. Jordan, George C. Lewis, J. B. Woodward, H. S. Prentiss Nichols, John M. Strong, Nicholas M. Edwards, Roland D. Swoope, B. Frank Eshleman, Harry Keller, Paul A. Kunkel, John D. Dorris, and J. Benjamin Dimmick.

Texas. — Congressman Martin W. Littleton of New York delivered the annual address at the thirtieth annual meeting of the Texas Bar Association, held at Waco July 4-5. Congressman Littleton is a native of Texas. He advocated effective regulation of corporations, and the election of United States Senators by the people. In speaking of the organization of corporations he stated that no share of stock ought to be issued until it was able to hold up its hand and say, I know my redeemer liveth; that the dishonest corporation made the honest corporation suffer.

President Hiram T. Glass submitted his annual address, followed by the reading of a paper on "Judicial Reform in Texas" by Judge William Hodges of Texarkana.

The report of the committee on judicial administration and remedial procedure was read, and excited much interest and discussion.

An interesting paper was read by Hon. Ben Kendall of Waco, giving a sketch of John Marshall.

Judge John C. Townes, dean of the law faculty of the State University, read the report of the committee on legal education and admission to the bar, which carried with it the recommendation that the president appoint a committee to consider the laws regulating examinations and admissions to the bar in other states, and to prepare a bill on the subject. The recommendations of the report were adopted.

Lee Estes of Texarkana read the report of the committee on commercial law, which carried with it some recommendations as to legislation looking to uniform commercial laws and renewed the recommendations of a former committee to endeavor to secure the passage of an act recognizing the commission of uniform state laws and creating a similar board of commissioners of Texas. The recommendations of the report were adopted in their entirety.

W. A. Wright of San Angelo read the report of the committee on criminal law, which made the following suggestions for the consideration of the association: Longer terms and higher salaries for all judges, trial and appellate; an immediate record of all exceptions and reasons therefor to be made by the court stenographer, together with the court's ruling and qualifications, and a copy to be embraced, as taken down in the statement of facts and transcript; as soon as the

testimony in a criminal trial is closed the court shall prepare his charge and submit same to counsel for defendant, who shall have time to request special instructions and raise exceptions, and no other shall be considered in his motion for a new trial. The recommendations of the report were unanimously adopted.

A forceful and striking paper was read by Col. T. N. Atkinson of Houston, on "Some Results of Holding the Legal Intellect in Mortmain."

The following officers for the ensuing year were elected: R. E. L. Saner of Dallas, president; John T. Duncan of La Grange, vice-president; William D. Williams of Austin (re-elected), treasurer; J. B. Cave of Austin (re-elected), secretary; W. W. Searcy of Brenham, A. D. Sanford of Waco, Marshall Spoons of Fort Worth, W. T. Bartholomew of San Angelo and W. C. Morrow of Hillsboro, directors; Norman G. Kittrell of Houston, O. L. Stribling of Waco and B. B. Stone of Ballinger, delegates to the American Bar Association; W. P. Hilderbrant of Austin, A. B. Watkins of Athens and J. W. Woods of Houston, alternates.

West Virginia.—At the twenty-seventh annual meeting of the West Virginia Bar Association, held at White Sulphur Springs, West Va., July 12-13, the following papers were presented: President W. W. Hughes, "The Spirit of the Times, its Effect on Law"; Judge W. N. Miller, "Is There Need of Additional Judges for the Supreme Court of Appeals"; Judge B. F. Keller, "The Judicial Code"; S. W. Walker, "The Law's Delays and its Remedies." The following officers were elected: president, Judge B. F. Keller, Bramwell; vice-presidents, first, H. C. Hervey, Wellsburg; second, Stuart W. Walker, Martinsburg; third, Joseph H. Gaines,

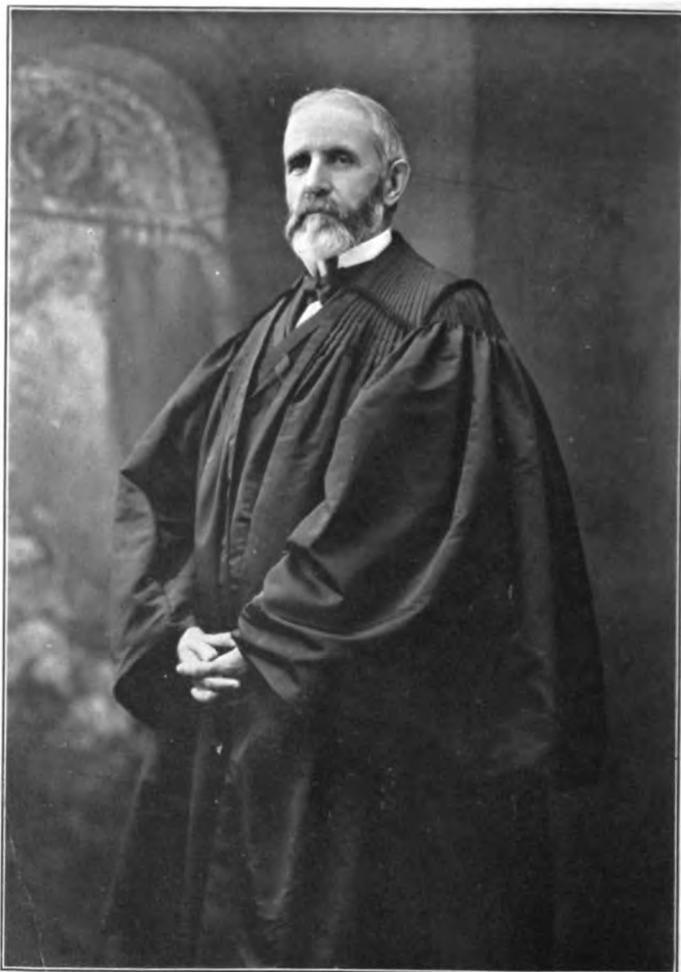
Charleston; fourth, W. G. Peterkin, Parkersburg, fifth, Jean F. Smith, Huntington; secretary, Charles McCamic, Wheeling; treasurer, Charles A. Kreps, Parkersburg.

Wisconsin.—The annual meeting of the Wisconsin Bar Association was held at Milwaukee June 29-30. President M. A. Hurley of Wausau, in his address, urged that efforts be made to increase the membership.

Edgar A. Bancroft of Chicago, discussing "The Sherman Law and Recent Decisions," pronounced the Sherman law a masterpiece of comprehensive prohibition rather than an effective remedy for a specific wrong. "It contains a general declaration of public policy rather than a definite and specific provision for regulation of the abuses of co-operation in modern industry and commerce. These recent decisions, however, have removed much of the uncertainty concerning its scope."

Chief Justice Winslow offered a paper on "Recent Changes in the English System of Taxation." A. A. Jackson of Janesville, in his eulogy of Edward Vernon Whiton, gave an account of the legal history of the state. Walter D. Corrigan of Milwaukee painted an interesting picture of the ideal lawyer.

The following officers were elected: president, John M. Olin, Madison; vice-presidents, Thomas M. Kearney, T. W. Spence, Fred Begliner, E. G. Nash, J. W. Murphy, J. E. McConnell, B. B. Park, Spencer Haven, J. M. Clancey, O. E. Clark, George B. Hudnall, Alexander E. Matheson, Judge Martin L. Lueck, S. H. Cady, M. Barry, G. D. Jones, Daniel H. Grady, James Wickham; secretary, Adolph E. Kanneberg, Milwaukee, and treasurer, J. B. Sanborn, Madison.



HON. LUCILIUS A. EMERY

EX-CHIEF JUSTICE OF THE SUPREME JUDICIAL COURT OF MAINE

(Photo. by Purdy)

The Green Bag

Volume XXIII

October, 1911

Number 10

Lucilius A. Emery, Retiring Chief Justice¹

BY WILLIAM P. WHITEHOUSE

CHIEF JUSTICE OF THE MAINE SUPREME JUDICIAL COURT

IT IS altogether fitting and proper that the members of the court and of the bar should join in this merited tribute of respect and honor for their retiring Chief Justice, who for twenty-eight years has adorned the bench of the highest court of the state by the dignity of his manners, and illumined its counsels by his wisdom and learning. It is fitting and just that during his lifetime public attention should be directed to the admirable fidelity and distinguished ability which have characterized not only his judicial service, but the discharge of all his public and official duties for forty years.

Too oft the flowers that deck the bier
Had better brightened living eye.

Let it be made known to him while living that the conscientious and faithful discharge of onerous and responsible judicial duties in our state, though from its juridical history it is expected as of course, is none the less appreciated and honored by the bar and the people of the state.

¹Delivered at the banquet tendered Chief Justice Emery by the Maine Bar Association July 27, 1911, on the occasion of his retirement from the bench.

It is not fitting, however, on this occasion, to indulge in fulsome eulogy of our distinguished guest. It would be distasteful to one who "hath borne his faculties" with becoming meekness and modesty. During twenty-eight of the best years of his life he has been engaged in performing the highest function of organized government, the administration of that justice which is the chief end and purpose of human society, and the highest interest and most important concern of man on earth. For "wherever her temple stands," said Mr. Webster, "and so long as it is duly honored, there is the foundation of social security, general happiness and the progress and improvement of the race." For twenty-eight years he sought to administer justice without respect to persons and to do equal right to the poor and to the rich. During all these years no speck or stain has ever blemished his judicial ermine, and no suspicion rested upon the purity of his motives. No untoward incident has ever disturbed or ruffled the serenity of his judicial demeanor, and no consideration except the truth and the justice of the cause has ever been suspected of

controlling or affecting his rulings or his judgment.

Judge Emery has been an extensive reader of general history, and a diligent student of the history and philosophy of the law and of political science and governmental policies. After his admission to the bar he promptly identified himself with the public life of the community in which he lived and of the county and state. He became county attorney at twenty-six years of age, was a member of the Maine Senate at the age of thirty-four, and Attorney-General of the state at the age of thirty-six. In all of these positions he performed his duties with a conspicuous fidelity and ability reflecting credit upon himself and honor upon the state. In the Legislature his service was notable for his efforts to procure legislation conferring upon the court full equity jurisdiction and powers and rendering the procedure in both law and equity more simple, speedy and effective.

He came to the bench of the Supreme Court fully qualified by intellectual endowments, liberal culture and experience at the bar to render eminent judicial service to the state and make an honorable career for himself. He brought with him besides, not only high ideals of the honor of the legal profession and the dignity of the law and exalted conceptions of the judicial character and functions, but also the capacity and disposition for prolonged and arduous labor as well in the trial court as in the examination of the law for the preparations of the opinions of the law court. He also had the courage of his convictions and the faculty of clear and methodical statement which is ordinarily developed by clearness of apprehension. Thus at the end of each juridical year his desk has disclosed no work unfinished, no duty unperformed.

At *nisi prius* he stated the law to the jury with absolute impartiality, in clear

and simple language, without encroaching in the slightest degree upon their province to decide the issue of fact, but with a singleness of purpose to have the law correctly determined and the truth discovered and declared. He never forgot the distinction pointed out by Chief Justice Marshall that "judicial power is never exercised for the purpose of giving effect to the will of the judge, but always for the purpose of giving effect to the will of the law."

It was his firm conviction that punctuality in the discharge of all public and official duties, and correct deportment and courteous manners in the court room have a tendency to facilitate the administration of the law as well as to enhance the respect that is due to the court, and he endeavored with all reasonable vigilance and appropriate methods to discountenance any disregard of such commendable and dignified practices. The ameliorating influence of his discipline in that behalf has been distinctly observable.

But his judicial opinions as a member of the law court, found in thirty-two volumes of the Maine Reports from the seventy-sixth to the one hundred and seventh, constitute an enduring monument to his great intellectual gifts, the extent and variety of his learning, his accurate knowledge of the common law and his faculty of adapting its flexible principles to new enterprises, new developments and new conditions in industrial and social life. My attention was first attracted to the excellence of his work in the law court when, in the second year of his service upon the bench, his opinions in the important cases of *Ames v. Savage* and *Andrews v. King* appeared in the seventy-seventh Maine Report. The former involved a discussion of constitutional law and it was held that upon judgments against municipalities, execution may be issued

against and levied upon the goods and chattels of their inhabitants and that this would be "due process of law." *Andrews v. King* was a petition for *certiorari* to quash the proceedings of the mayor and aldermen of Portland in removing the city marshal from office. The nature, powers and duties of special tribunals in such cases are fully considered and it was held that a hearing by the aldermen alone, the mayor being required to sit on the hearing, was not sufficient, even if no objection was made by the officer. *Warren v. Westbrook*, in the eighty-sixth Maine, is a leading case upon the exercise of the equity powers of the court in the apportionment of waters where there are two natural channels in a river caused by an island. In the subsequent opinions will be found luminous expositions of constitutional law relating to interstate commerce, the police power of the state and other questions of fundamental and far-reaching importance. In the opinion of the justices prepared by Chief Justice Emery in 1907, in answer to questions submitted by the Senate, this court, true to the motto of the state, led all others, state and federal, in promulgating the beneficent doctrine of the conservation of our natural resources in the interests of the people. It is there held to be within the constitutional power of the Legislature to restrict or regulate the cutting of forest trees on wild or uncultivated land by the owner thereof, without compensation to such owner in order to prevent injurious droughts and freshets and preserve the natural water supply of the state.

In all of these opinions his generous intellectual gifts, his vigorous original reasoning, the ripe fruits of his varied experience and his robust moral principles have been employed to crystalize into judicial decrees the justice of the

state which has been made luminous by reason and conscience, and advanced to its ends with calm deliberation and the dignity and strength of impartial laws. He has been deeply impressed with the importance of the doctrine of *stare decisis*, as necessary to maintain the stability of the law and enable counselors to advise with reasonable certainty and men of affairs to act with a reasonable sense of security. But he has been a progressive jurist in the true sense of the term and has never hesitated to recommend new legislation or adopt a new rule, which distinctly appeared to be an improvement either in substantive law or methods of procedure. Change is ever going on in a ceaseless round. Bewildering discoveries and developments are constantly being made involving radical changes in nearly all departments of human activity. Conservative as the law and the courts must necessarily be, they are compelled to catch the spirit that animates the progress of society and to keep in sympathy with the advancing thought and progressive tendencies of the age. But it will not fail to come to the younger generation, as it has to us of the older, that the principles of simple truth and justice and the instinctive conceptions of common right upon which, in the last analysis, the protection of human rights and the redress of human wrongs must be founded, will remain the same from generation to generation, now and forever.

The public press outside of New England continue their laments over the law's delay and the failure of justice in the criminal courts. But the reasons for these complaints have not existed in our state during Judge Emery's service upon the bench. With all modesty we affirm that in no other state in the Union has the substance of truth and right been so rarely sacrificed to the science of state-

ment or the shadow of form, and in no other state has justice been administered more promptly and with fewer blemishes than in the good state of Maine.

No eulogy upon the life of Chief Justice Emery is required. He retires from the bench in the fullness of labor and of fame. He has erected his own monument more enduring than bronze. The deep impress which he has made upon our jurisprudence and upon the public and professional life of the state will perpetuate his memory to generations beyond ours and cause his name to be inscribed among the highest on the roll of Maine's learned jurists and honored and successful magistrates.

We shall greatly miss his learning and experience in our judicial counsels but he will remain through life Chief Justice

emeritus, and will be cordially welcomed at our social gatherings. And in behalf of all of his associates and the present members of the court, I wish to express our hope that he may have many remaining years of comfort and happiness cheered and blessed by the pleasant memories of his stainless life of usefulness and honor.

As newly organized, all the members of the court will cherish with reverence its honored traditions in the generations that have gone before, in their constant endeavor to omit no duty on their part, to maintain the proud position which our state has enjoyed, for the nobility of character of its people, for the probity of its public officials, the righteousness of its laws and the purity of its justice.

Until We Rise

BY HARRY R. BLYTHE

WHERE is the ancient strength, the noble fame
 With which tradition clothed the bench and bar?
 It has gone palely out like some burned star,
 Leaving but acrid ashes of the name
 Which should be ours. Whose is the bitter blame?
 And whose the taint that makes us what we are—
 A calling which suspicion scents afar
 As sheltering knaves? How long shall last the shame?
 Aye! it shall last until we crush it out.
 There is no help for us till we rebel,
 Shake off the thrall of gold, the pleasant spell
 Of easy standards,—rise in wrath and shout
 A fierce defiance, mighty to compel
 A nation's recognition free of doubt.

Judges as Law Makers¹

BY CHARLES J. BONAPARTE, OF THE BALTIMORE BAR

IN a very forcible separate opinion, dissenting in part from the views expressed by the majority of the Supreme Court, filed on May 15 last in the *Standard Oil* case, Mr. Justice Harlan says:—

After many years of public service at the national capital, and after a somewhat close observation of the conduct of public affairs, I am impelled to say that there is abroad, in our land, a most harmful tendency to bring about the amending of constitutions and legislative enactments by means alone of judicial construction.

About two years ago Mr. Gifford Pinchot, defending in a public address some features of his official course, advanced a theory and quoted an opinion of the Supreme Court in its support, to the effect, in substance, that the general purpose, the evident policy, of a statute is the key to its meaning and that, so far as possible, it should be so construed as to accomplish that purpose, to promote, and not to defeat that policy. This contention on his part was promptly and vigorously denounced in certain publications which met my eye as novel and visionary, dangerous to vested interests, subversive of order and stability, and, in brief, as a belated survival of a certain lawless and arbitrary system, of which, the critics had hoped, our country was finally rid on March 4, 1909, when it gave place to what was afterwards happily termed: "The Reign of Law." I am not now concerned with Mr. Pinchot's practical application of his theory of statutory construction; that may or may not be open to just

criticism; but the critics who denounced the theory itself as startling and revolutionary might have been expected to cordially endorse the views of Mr. Justice Harlan; curiously enough, these same writers, so far as I know, appear to think almost as ill of him as they did of Mr. Pinchot himself. I feel, therefore, emboldened to ask you to consider with me very briefly the character and scope of judicial action in the United States in the development of American law, and to see how far such action and development may be fitly called "law making" and how far such law making by judges, such "judicial legislation," if you will, is wholesome and tends to assure our national greatness and happiness.

First of all, what is "law"? In his "Note on Utilitarianism," Fitzjames Stephen says:—

Bring any considerable number of human beings into relations with each other. Let them talk, fight, eat, drink, continue their species, make observations, form a society, in short, however rough or however polished, and experience proves that they will form a conception more or less definite of what for them constitutes happiness; that they will also form a conception of the rules of conduct by which happiness may be increased or diminished; that they will enforce such rules upon each other by different sanctions, and that such rules and sanctions will produce an influence upon individual conduct varying according to circumstances.

In a very wide sense, all such "rules of conduct," thus "enforced" at any one time by any particular community upon its individual members, may be described as "law"; this would include rules of piety, good morals, courtesy and good taste; but custom and convenience have nowadays restricted the term

¹An address delivered before the Illinois State Bar Association, Friday, June 23, 1911.

"law" to such of them as are "enforced" by one or more of three particular kinds of "sanction," namely, injury in person or estate to their transgressor inflicted by the community through its agents, remedial action on its part, through the like agents, intended to place him and all other persons in the positions they would have respectively occupied had the violated rule been obeyed, and denial to him of the benefit of similar remedial intervention on its part in cases where he would have been entitled to such intervention but for his transgression. In other words, and speaking for lawyers, "law," as the term is used today and for our present purpose, means the aggregate of those rules of conduct, disobedience to which by a member of the community constitutes (1) a crime, (2) a ground for a civil suit or (3) a reason to refuse the offender some right of action or defense or other benefit which he would have otherwise enjoyed by virtue of such rules of conduct.

It is the function of our Courts to determine whether and to what extent one or the other of these sanctions shall be applied in any instance of alleged transgression of such a rule of conduct or, in other words, of the law. Mr. W. Irvine Cross, a well-known lawyer of my native city, in a short but trenchant magazine article on the "Doctrine of Public Policy," says on this subject:—

It is a severe restraint often, upon the judicial temperament, to confine itself to passing upon the rights of individuals as governed by what Baron Alderson called "fixed rules and settled precedents." The temptation is strong to round out one's usefulness by the appropriation of a little of the legislative power, to inject a high morality into the law, to help it along out of one's own individual wisdom. . . . The judge who allows himself to be led away from his grand, though simple, function, by consideration of general morality, the public interest, or public opinion, is only weakening himself against the

day when he may have to face popular clamor or resist political influence.

Mr. Cross suggests that a judge is "led away from his grand though simple function" when he yields to the "temptation" to appropriate "a little of the legislative power," that such "appropriation" is, in fact, a usurpation: is this true? In his "Ancient Law," Sir Henry Sumner Maine says on the same subject:—

We in England are well accustomed to the extension, modification and improvement of law by machinery which, in theory, is incapable of altering one jot or one line of existing jurisprudence. The process by which this virtual legislation is effected is not so much insensible as unacknowledged. With respect to that great portion of our legal system which is enshrined in cases and recorded in law reports we habitually employ a double language and, as it would appear, a double and inconsistent set of ideas. When a group of facts comes before an English Court for adjudication, the whole course of the discussion between the judges and the advocates assumes that no question is or can be raised which will call for the application of any principles but old ones, or of any distinctions but such as have long since been allowed. It is taken absolutely for granted that there is somewhere a rule of known law which will cover the facts of the dispute now litigated, and that, if such a rule be not discovered, it is only that the necessary patience, knowledge or acumen is not forthcoming to detect it. Yet the moment the judgment has been rendered and reported, we slide unconsciously or unavowedly into a new language and a new train of thought. We now admit that the new decision *has* modified the law. The rules applicable have, to use the very inaccurate expression sometimes employed, become more elastic. In fact, they have been changed. A clear addition has been made to the precedents, and the canon of law elicited by comparing the precedents is not the same with that which would have been obtained if the series of cases had been curtailed by a single example. The fact that the old rule has been repealed, and that a new one has replaced it, eludes us, because we are not in the habit of throwing into precise language the legal formulas which we derive from the precedents, so that a change in their tenor is not easily detected unless it is violent and glaring. . . . We do not admit that our

tribunals legislate; we imply that they have never legislated, and yet we maintain that the rules of the English Common Law, with some assistance from the Court of Chancery and from Parliament, are co-extensive with the complicated interests of modern society. . . . The *fact* is . . . that the law has been wholly changed; the *fiction* is that it remains what it always was.

That is to say, in *fact* English and American judges "appropriate" and have always "appropriated," not "a little," but a *great deal* "of the legislative power," although this "appropriation" has been and is concealed from superficial observers and those wilfully blind by one of the most noteworthy among those "legal fictions" which have played so important a part in the development of both Roman and English jurisprudence. What would have been the result had the fiction in this case been a fact? In other words, if our judges, from the beginnings of the Common Law, had been guided *only* by Baron Alderson's "fixed rules and settled precedents," what would have been the consequence to the world and especially to us? This is shown by the experience of those countries where these "rules" have been immutably "fixed" by a supposed sacred origin and a religious sanction; and, on this point also, we can call Sir Henry Maine as a witness. He tells us, in the work already quoted:—

This rigidity of primitive law, arising chiefly from its early association and identification with religion, has chained down the mass of the human race to those views of life and conduct which they entertained at the time when their usages were first consolidated into a systematic form. There were one or two races exempted by a marvelous fate from this calamity, and grafts from these stocks have fertilized a few modern societies; but it is still true that, over the larger part of the world, the perfection of law has always been considered as consisting in adherence to the ground plan supposed to have been marked out by the original legislator. If intellect has in such cases been exercised on jurisprudence, it has uniformly prided itself on

the subtle perversity of the conclusions it could build on ancient texts, without discoverable departure from their literal tenor.

Some less harmful, but yet clearly mischievous results of similar mental processes may indeed be found in various obsolete and obstructive rules of procedure or proof in our criminal law which, in practice, serve only to provide loopholes of escape for conscious and often brazen guilt.

For example, no one would have a man once fairly and properly tried for a crime and either convicted or acquitted brought to trial again for the same offense: *interest rei publicae ut sit finis litium*, and no more fitting occasion could arise for the application of this wise and salutary maxim. But if the trial has been unfair or otherwise improper, whether through misconduct of the jury or error of the judge, it is the dictate of common sense that this miscarriage should be duly corrected and the man retried. This can be and is daily done when he has been convicted; but if he has been acquitted, no matter how erroneously and with what evident injustice, there is no remedy, because of an old and arbitrary rule against what is called "double jeopardy," a rule originating under circumstances utterly unlike those of today and which has been generally embodied in our constitutions and statutes to the great profit of law breakers.

Again the Common Law of England, unlike most other systems of mediæval law, never sanctioned torture, whether of defendants or witnesses. In this the Common Law showed itself both wise and humane for human experience has shown that the use of torture tends, not to secure but to hinder the discovery of the truth; but, by reason of the strong and reasonable repugnance thus fostered towards confessions and testimony extorted by

physical pain, there grew up in England rules against admitting in evidence confessions procured under highly conventional duress and against obliging prisoners to incriminate themselves, which rules in American law have crystallized into numerous constitutional and statutory provisions, and these have been in turn so construed in some judicial decisions as to extend the prohibitions far beyond the bounds of reason and public policy: we have seen convictions set aside because juries were told of remarks of the prisoner made under no obvious compulsion and which contained no intelligible admission of guilt. One of the most enlightened changes made by modern statutes in the rules of evidence permits the accused to testify in his own behalf; this privilege is invaluable to an innocent man, and it is therefore simply impossible for a rational mind to avoid an unfavorable opinion as to the probable guilt of one who refuses to avail himself of it. Yet in the great majority of our states the statute law gravely requires this impossibility of a jury, and even obliges the Court to so instruct them, while forbidding the public prosecutor to tell them what everybody knows they must think anyhow.

The *reductio ad absurdum* of the rule in question would seem to have been furnished, if it be really true that a statute making it the duty of an automobilist to give his name and the number of his machine to a person he runs over has been recently held unconstitutional because it "obliges him to give evidence against himself"!

Nevertheless, in the main, we have been saved from the fate of stationary communities, we have escaped the sterile "rigidity" of Baron Alderson's "fixed rules and settled precedents" and all its baleful consequences through the legis-

lative activity of our judges; why it has been needful to cloak this salutary activity under the shadow of legal fiction is again explained by Sir Henry Maine with his accustomed sagacity. He says as to this:—

It is not difficult to understand why fictions in all their forms are particularly congenial to the infancy of society. They satisfy the desire for improvement, which is not quite wanting; at the same time they do not offend the superstitious disrelish for change which is always present. Nothing is more distasteful to men, either as individuals or as masses, than the admission of their moral progress as a substantive reality. This unwillingness shows itself often, as regards individuals, in the exaggerated respect which is ordinarily paid to the doubtful virtue of consistency. The movement of the collective opinion of a whole society is too palpable to be ignored, and is generally too visibly for the better to be decried; but there is the greatest disinclination to accept it as a primary phenomenon. . . . There are, moreover, and always have been, persons who refuse to see any fiction in the process, and conventional language bears out their refusal.

This "conventional language" language as to the propriety and necessity of a complete separation of legislative from judicial powers and functions, may be found with us in many constitutional provisions; but its effect on the facts is the same as calling a dog's tail a fifth leg on the number of his organs of progression. There can be no doubt that the great body of English and American case law, built up by the steady law making of English and American judges during six or seven centuries, in the main is the fruit of a constant effort on the part of these judges to make the law what they believed the law ought to be to advance the public welfare, and as little that, on the whole, they have been inspired in this belief by the enlightened public opinion of their respective days and countries.

Sir Henry Maine, in the passages to which I have called your attention, had

more particularly in mind the character and effect of judicial action in moulding what he called the "Common Law," but there is yet more obviously room for wise and enlightened law-making when our American judges are called to deal with questions of constitutional and statutory construction; for, in the United States, these questions have been and are now fraught with consequences of a moment to the community elsewhere unknown.

When a law is enacted, some of our publicists, some of our jurists, some of our statesmen would seem to think first, not how it can be faithfully observed, but how it can be skilfully and safely eluded; for them it is *prima facie*, not a command of our common sovereign, the American people, a command which every loyal American obeys in letter and in spirit, with all his heart and all his mind and all his strength, but, in general, a mere sop to a troublesome Cerberus, a mere blind meant to hoodwink or soothe an inconveniently exacting public opinion, something to be talked about during a political campaign and forgotten when the polls have closed, something through which any adroit counsel of any huge "interest," if he be really worth his large fees, should be able to drive a coach and six, even an automobile at racing speed. It is but consistent that those who think thus of our laws should think of our courts as properly and essentially umpires in a game of mingled chance and skill played by opposing counsel, with no higher duty than to enforce the established rules of the game, and with no responsibility, in law or morals, for its results to the community or to humanity.

Those who think, or would have others think thus, have, of course, no sympathy with, *exempli gratia*, Chief Justice Marshall's favorite doctrine of Implied Fed-

eral Powers, since that doctrine, in last resort, merely applies to the Constitution the principles so severely criticized when announced by Mr. Pinchot, namely, that any law should be so construed as to make it fruitful, not barren, *ut res magis valeat quam pereat*, a principle which is now not only overwhelmingly sustained by authority, but, on its face, is the plain dictate of common sense.

An Act of the Legislative Power is the command of the sovereign, it voices the sovereign's wishes; if those owing allegiance to the sovereign, and therefore a loyal obedience to the law, know, either from the terms of the statute itself or from the circumstances of its enactment or from any other statutes *in pari materia*, what are the wishes of the sovereign as to its general subject-matter, what are the ends the sovereign seeks to attain, what are the mischiefs the sovereign seeks to remedy by giving this command, surely, if there be room for any doubt at all as to its meaning, they will obey it in that sense which will bring to pass what the sovereign would have done, which, so far as may be, will make impossible what the sovereign would prevent. Some years ago, in one of our Eastern states, a statute punished by fine or imprisonment anyone wearing birds of a certain species in *his* hat. A Chief of Police, called upon to enforce this law, could find no person wearing such a bird in *his* hat, but many persons each of whom wore one or more of them in *her* hat; applying Mr. Pinchot's principle of construction, he so read the law as to make it mean something and not so as to make it a dead letter; does anyone doubt that he read it aright? A trade mark consisting of the figure of a fish, belonging to one of my clients, was once pirated by an ingenious rival in business, who called

the device he used a "whale," and claimed that a whale wasn't a fish but a mammal. This defense didn't "go down" with the Court; and if a law should forbid the taking of "fish" at certain times or places and this law were undoubtedly and notoriously inspired by a policy of conservation regarding marine animals in general, whales would, no less undoubtedly, enjoy its protection: the courts would perhaps remember that Blackstone classed them as "royal fish."

I have said that there is yet more clearly room for helpful "law making" by judges, for good "judicial legislation," in dealing with questions of statutory construction than with the application of established rules of the common law. This is mainly because these rules have been slowly worked out by men, the most of them able, the most of them conscientious, the most of them disinterested, to meet exigencies arising in actual life according to their well considered opinions as to the permanent interests of the community, while our statutes are in great part the work of mere vote-hunters and demagogues, enacted for the temporary ends of politicians or artfully contrived to advance the selfish purposes of unscrupulous men, often the very men against whose wrong-doing they pretend to provide safeguards. At best, they are seldom more than rudimentary, embryonic laws, destined and intended to be moulded into their final and practical shapes by the legislative action of the courts in professedly construing but really completing them.

A former Cabinet officer has less difficulty than another might have in understanding these things. Doubtless he is occasionally brought in contact with worthy gentlemen belonging to each house of the national legislature who

serve the public ably and faithfully; but the law-giver who habitually takes up the time of a head of department is ordinarily a very different personage, at least, according to my own experience. I found him too often a marvel of pettiness, selfishness and timidity. He could look at nothing beyond his own political interests and trembled at the bare thought of displeasing anybody whose displeasure might cost him votes. When he called on the Secretary of the Navy, it was always to intercede for a deserter or to ask the discharge of a recruit or to get work for a navy yard or higher wages for some workmen; when he visited the Department of Justice, it was to further a pardon or beg that a criminal be not prosecuted or to importune for higher salaries to some deputy marshals or to talk about some matter of patronage. In any case, he always "wanted something" for his friends or his state or his district and really and in last resort, always "wanted something" for himself. To make him talk or think about the national defense, the effective administration of justice, the enforcement of the very laws he had helped to make, there must have been, in the words of Sam Weller, "nothin' less than a nat'ral convulsion." That such should be the characteristics of many among our Lycurguses, whether in state or nation, is, after all, in no wise surprising. No one with any experience in the dismal labor of trying to persuade reputable and esteemed men to become candidates for elective offices will doubt the genuine and profound reluctance of the right man to settle himself into the right place in this field of his duty as a citizen; and, according to my own observation this reluctance usually, although not always, increases as the prospects of election become brighter. I have found

it easier to induce the man in question to run when he knows that his running can amount only to a protest against abuses and scandals or a help to other candidates than when there seems to be some fair show for his own election. We may ask why do really first-class men, as a rule, shun public employment in its higher grades and too often oblige their state or nation to be content with second-class, if, indeed, even these can be secured and our public trusts are not abandoned to the clearly unfit? The answer is sufficiently obvious. Those men best fitted for such work will not do it, or do it long, because the conditions of their work do not allow them to work happily and with self-respect.

The American people, as a would-be employer of labor, approaches a skilled workman of this class, a man assured at all times of steady work at good wages, and says to him, speaking by its acts: "Come and work for me; if you come I shall probably take away your job at just about the time you have learned to take interest in it and to do it to your own satisfaction. Meantime I shall let others of my workmen, whose help is indispensable to your work, constantly hinder it and embarrass you by all sorts of gratuitous annoyances, not necessarily because they have any quarrel with you but often as incidents to squabbles among themselves or to attain ends of their own with which you have no concern. I shall also permit, indeed I shall encourage, some of your fellow-workmen and outsiders as well, to frequently and publicly censure you and your work, and often to do this not only harshly and uncharitably, but ignorantly and in bad faith, without knowing what you have really done and without wishing or trying to know this. Often, moreover, while you are at your work-bench, a crowd of silly and badly behaved

urchins called newspapers will hoot and make faces at you and draw on the walls nonsensical pictures intended to wound your feelings and make you ridiculous, and I shall tolerate and even applaud their antics. Finally, if you shall stay with me far longer than do most of my workmen and, by reason of this long and faithful service, can no longer work hard or find work readily, when I have done with you I will show you the door with no mark of gratitude for the past and no provision against want for the future." Is it likely that a private employer who talked thus and whose acts squared with his words would get such a workman? And, if it isn't, why should one of our states or the nation hope to do better?

There are two classes of our public servants who are treated, in the main, as all servants must be treated by a master who would be well served. I mean our judges and the officers of our Army and Navy. We behave to a judge, we behave to a military or a naval officer as if we expected to find him a man of honor, and, in no small measure as a result of this treatment, with lamentable but comparatively rare exceptions, we do find him a man of honor. We safeguard our soldiers and sailors against an old age of misery, and men of the highest character and capacity willingly relinquish the hope of wealth and the independence of civil life to thus serve us. Although, as yet, a like provision for our judges is scandalously far from universal, and although their salaries amount hardly to a living wage, we yet find men worthy of the bench to give up for it all the great possibilities of our bar. Our courts and our Army and Navy are indeed far from perfect; neither is our treatment of those who preside in the former or who command the latter in all respects just to them or

worthy of us; but, speaking broadly, we deal with these men as though we wished the best men for our service, and, again speaking broadly, we obtain for our service the best men to be obtained for our outlay; indeed it were safe to say far better men than the like salaries command elsewhere.

Our judges are far more capable than are our legislators to give expression and effect to the people's will; they are also more competent and more faithful interpreters of what is the people's will, because far less liable to be misled as to this by mere outcry from the press or the tawdry gabble of agitators; for, ever since the days of the Three Tailors of Tooley street, the query: "What is" or "Who are 'the people'?" has been matter of debate and often of dispute; and, although it has received, for practical purposes, many different answers in different countries and at different times, the legal "people," that is to say that part of the community empowered by law to speak and act for the whole, has been always and everywhere a minority of all the human beings subject to the "people's" will. Moreover, if we look critically and philosophically into the genesis of any notable piece of legislation, we shall become convinced that only an extremely small fraction of even the legal people has had any appreciable or recognizable agency in its production and that what we have described as "the will of the people," is in reality the will of but a few among the individuals composing the people.

In truth, in the human body politic, as in the human body physical, development of will power is a specialized function. The former has always its hewers of wood and drawers of water, to do as they are bid like the hands and feet, the arms and legs; *locomotor ataxia* is no less a malady in politics than in physi-

ology. Other classes are its vital automata, working, as do the heart and lungs, at their several tread mills, with no thought beyond their daily tasks and daily needs, yet on whose continued labor depends its continued life. The hunger for gain of still others among its members makes them, like the stomach, in seeming blindly selfish and greedy, but, under proper control, none the less indispensable to its health; like a man, a community languishes when it loses its appetite. Finally, it has the equivalent of a brain, the seat of its political consciousness and the source of its political will, an organ which, in politics, thinks and decides for its whole mass.

Now, the brain is always a very small portion of the organism; even in man it is only two or three per cent, although its proportionate size grows steadily as we ascend the scale of physical being. If one man may say truthfully, or with any approach to truth, "*L'Etat c'est Moi*," the state of which he speaks has, politically, but the rudimentary brain of a fish or a reptile. Unquestionably the political brain of the American people is vastly more developed; but it is none the less a specialized organ and to recognize, interpret and intelligently obey its dictates we need the services of true experts; we find these in our judges.

A very singular doctrine has been advanced of late years to the effect, in substance, that our judges are exempt from public criticism, at all events with respect to their judicial acts and utterances. If the newspapers may be trusted, a member of the Legislature of a great state recently spoke of a resolution of censure on a judge as "anarchistic." There can be little doubt that the germ of this curious notion is found in the facts that any effort *ab extra* to influence the action of a judge or a jury *in a pending cause* has been always held a

contempt of court, and that criticism of the court may amount to or involve an attempt at intimidation or an appeal to sympathy. It would be well, in my opinion, at least, if these well established principles of law were more generally respected and more practically enforced; but they furnish no support for the novel and extraordinary theory of judicial immunity to which I have referred. As is said by Mr. Justice Holmes, speaking for the Supreme Court, in *Patterson v. Colorado*, 205 U. S. 462: "When a case is finished, courts are subject to the same criticism as other people." In fact, the judges themselves are and ought to be courteous but severe and therefore useful critics of each other. The opinion of Mr. Justice Harlan, from which I quoted at the commencement of this article, furnishes a striking example of just such criticism.

While, however, it is alike foolish and mischievous to ask that our judges be exempted from the ordinary incidents of public service in a free country, it is clearly the duty of every good citizen, yet more clearly of every worthy lawyer, to protest with all his powers against any such detestable device to promote judicial servility as the so-called "recall," and against an encroachment in any form on the absolute and inflexible

independence of our judges. God forbid that the day should ever come to America when the rights of Americans shall be left to be vindicated, the liberties of Americans shall be left to be protected, by a bench made up of men "with their ears to the ground!" The greatest judge our country ever had said in the Virginia Constitutional Convention of 1829:—

Advert, Sir, to the duties of a judge. He has to pass between the government and the man whom that government is prosecuting — between the most powerful individual in the community and the poorest and most unpopular. It is of the last importance, that in the performance of these duties he should observe the utmost fairness. Need I press the necessity of this? Does not every man feel that his own personal security, and the security of his property, depends upon that fairness? The judicial department comes home in its effects to every man's fireside; it passes on his property, his reputation, his life, his all. Is it not to the last degree important, that he should be rendered perfectly and completely independent, with nothing to control him but God and his conscience?

Having thus spoken, John Marshall might well add:—

I have always thought, from my earliest youth till now, that the greatest scourge an angry Heaven ever inflicted upon an ungrateful and a sinning people was an ignorant, a corrupt, or a dependent judiciary.

Some Singular Massachusetts Decisions

IN response to a request from a brother lawyer for information regarding certain humorous occurrences in the dispensation of law by the Supreme Judicial Court of Massachusetts, a Boston lawyer recently wrote a letter which we are glad to publish, taking care to comply with the writer's preference for unanimity:—

John Jones, Esq.,
Tremont Building,
Boston, Mass.

Dear Mr. Jones:—

The farther one passes on through this Vale of Tears, the more one learns to give thanks for the saving grace of humor. It is given to one who seeks, to find, if he only has the divining rod.

Even in the dry well of law, humor may bubble forth if one in digging for the spring use as his implement the pick of common sense and discard the subtleties of too nice analysis.

Humor in the law is of two kinds, the conscious and the unconscious. The quality of conscious humor is, unlike mercy, somewhat strained, though it may be twice blessed; and to that kind of humor one needs no pointing star. But the unconscious kind, the kind that necessarily results from straining the law and the facts to meet the apparent exigencies of justice and to make a particular result more merciful than general precedents would compel, requires perhaps a personally conducted tour in order to have its delights appreciated truly. Far be it from me to attempt completely to cover this comprehensive subject. I can only try to point out a few instances of judicial humor as perpetrated by the Supreme Judicial Court of Massachusetts in recent years.

At this point I ask permission to digress a moment, that I may comment on the too evident tendencies of this august body, if I may do so without seeming unduly irreverent. I admit and admire the great knowledge and the high purposes of the Court. It is not, however, a divinity; it is but a combination of human units and as such it must and does have a common attribute of humanity, to wit, a proneness to err. I also concede that the way of a critic is much the easiest way, but in Boston we are only forbidden to see "The Easiest Way"; we still may, if we wish, pursue it. With this apology as a preliminary, I go on to say that I have in mind a motto, which, if the Court knew itself, it would emblazon on its rescript paper. Individually, each member has good common sense. Collectively, the

Court believes in sacrificing this essential attribute to a sense of expediency. Believing itself appointed and anointed to blaze the path of justice in an untried wilderness, it conceives that precedents are not for wise men, that what has been may perhaps help but must not hinder those who are explorers in the realm of law, and therefore, in its peregrinations in search of justice, its only compass has as its magnet merely the collective guess of all as to what is expedient under the circumstances.

Moreover, the Court apparently has read and remembered the words of the bard: "If 'twere well done when 'tis done, 'twere well 'twere done quickly"; and therefore haste is always regarded as of the essence of a decision. The Court renders anew the phrase to read: "'Twere well done when 'tis done quickly." May I suggest that sometimes one may decide in haste only to repent at leisure?

The motto I suggest as appropriately expressing the foregoing alleged tendencies, is

EXPEDIENCY + EXPEDITION = JUSTICE

Revenons à nos moutons. It is amusing but none the less a judicial fact that an eye witness of an accident is one who does not see the accident. The case of *Lewis v. Brotherhood Accident Company*, 194 Mass. 1, conclusively proves this otherwise doubtful proposition. Apparently, a blind man has more possibilities as a witness than has been heretofore generally supposed.

The song which says "I'd rather be outside a-looking in than inside a-looking out" has lost its meaning now, for in *Nash v. Webber*, 204 Mass. 419, the Court declares that "in" is "out." A staircase *outside* the house is *in* the house. The plaintiff in that case was with the "ins" rather than with the "outs" at

any rate; but what kind of house was it she lived in with the staircases all topsy-turvy by judicial decision?

John did not have any children, but his father said by will that John's three children should take a remainder. Lo! and behold, nothing daunted by the creation of man, the Court performed a metamorphosis and obtained the result that the three non-existent children of John should become the children of Sister Mary and Brother Ed. Conception is not alone the prerogative of woman; some "old women" evidently have the power. See *Polsey v. Newton*, 199 Mass. 450.

A man's knowledge consists frequently of those things he doesn't know. A poor innocent express driver took a harmless looking parcel to transport it to the dry city of Lynn. He had no right to examine the parcel, he just had to take it along with him. It turned out to be a *fera natura* so far as he was concerned, for it bit him, since it contained liquor, and as he was prohibited by law from bringing the dangerous substance into the respectable city of Lynn, he paid a fine for the knowledge that he did not have. See *Com. v. Mixer*, Banker & Tradesman, Dec. 17, 1910.

Again does it appear judicially that we do not know what we do know, for in *Burr v. Mass. School for Feeble-minded*, 197 Mass. 357, and its complement, *Friedman v. County of Hampden*, 204

Mass. 494, we are told that when the law says that public officers and agents shall obtain security and they don't do it, nevertheless they do it, because although they didn't know the law that required them to do it, still they are conclusively presumed to have known it, and therefore they intended to do it, and they did do, what they did not do. The foregoing sentence is somewhat involved, but what can we say of the decisions that called it forth?

Once more the laity stands in awe of law when it reads *Parrott v. Mexico Central Ry. Co.*, Banker & Tradesman, Jan. 14, 1911, and finds that whereas the jury was justified in finding that X and Y had authority to make an oral contract in substitution for a written one which they had made, yet so far as the defendant's defense was concerned the same X and Y had no authority to make the same contract. For ways and tricks that are vain and devious, the heathen have nothing on our esteemed distributors of justice.

More could be said in like vein, but closing time has come, and the curtain must be drawn.

Before we go, let us read for a parting lesson the humorous yet exceedingly well written article on "Three Weeks" by our beloved Justice Hammond, as contained in *Com. v. Buckley*, 200 Mass. 346.

Yours respectfully,

X— —.

Some Law Clerks That I Have Known

A LAW SCHOOL COMMENCEMENT ORATION

BY A. M. BARRISTER, OF THE NEW YORK BAR

Note. — Like many others of the world's greatest orations, among them some of Cicero's, the present address was never delivered orally. The author was unwilling to give these valuable thoughts to any one Law School alone, but was persuaded to give them to the world at large through the pages of this magazine.

YOUNG men of the Class of 1911: When your dean asked me to deliver the oration upon this memorable occasion he gave me some more or less specific instructions. He requested that the thoughts which I give you should be taken from life and from my actual experience, rather than from the distant rare atmosphere of idealistic theories. But he insisted that the talk should be elevating though not too lofty, and improving though not too tiresome. In looking about through my long experience for topics that would fill these requirements, I passed over the much mooted problems of legal ethics that are now often talked about; and I passed by the subject of disbarment of attorneys which will probably never be of immediate importance to very many of you; and so I passed over many other possible and impossible topics for this address. During my cogitations it occurred to me that many of you will leave the legal profession before long to become bank presidents or book agents, or politicians or judges — but before you leave, practically every one of you will have been a law clerk in an office for a longer or shorter period. So I finally decided, for your own benefit and for the benefit of your future employers, that I would introduce you to a few law clerks that I have known. You and your dean will

have to judge for yourselves whether I have carried out my instructions.

The first man we will call Mr. Gay. He came from a New York law school where they teach a man to pass the bar examinations, and he certainly didn't know any more than they taught him. He was a very delightful fellow to meet and all the girls were crazy about him. He wore the best clothes that I ever saw on a law clerk and how he paid for them I don't know. Moreover Gay was forever going out to dances, receptions, theatre parties and similar exercises of the unemployed rich of New York. That sort of thing also costs money in New York even when one acts the part of a sponge, soaking up entertainment without paying for it.

Now just between you and me Mr. Gay was at that time partially holding down a job that paid just \$10 per week, and the job was pretty nearly getting away from him at that. I supposed for a while that he was independently wealthy and was trying to practise law as a pastime. But one day he happened to tell me that he was wholly dependent upon his wages or rather "salary" as he called it. I was so surprised that I involuntarily asked him how the devil he managed to pay for such elegant clothes on \$10 per, to say nothing of board and lodging. It is

a mystery to me to this day. He was always the perfect gentleman around the office and might have stayed with us if he had only had the slightest brain power. I remember one characteristic bit of work that well illustrates his attainments. I asked him to prepare a complaint, or a declaration, as you might call it, in an action against the New York Building Company. When the finished complaint came to me it contained an allegation that the defendant New York Building Company was a corporation duly organized and existing under and by virtue of the laws of the state of New York. When I asked how he knew it was a New York corporation he was much injured and said it was perfectly obvious from the name. Well, one glance at the Corporation Directory showed that the New York Building Company was a New Jersey corporation. But Mr. Gay probably never looked beyond the name or outward appearance of anything. His best guess was that by their looks ye shall know them.

Good looks and good clothes, however, are not to be jeered at for they really are a help. Gay got his job on his looks and manners, and he was really an ornament around the office. Moreover he always made a great hit with the lady clients, and if we had only had enough of that *semper mutabilissime* sort of clientele, I believe we would have kept him and made him secretary of our Ladies' Department. Unfortunately, however, we had no more lady clients than we could possibly help — but I will have to tell you about women at law some other time when I am feeling stronger and when the occasion is more suitable for violent expression of feeling.

Anyway we finally let him go and he got a place as secretary or something of the sort with a great and elegant

corporation, where his job was to ornament the outer office at a rich mahogany desk on a soft green carpet and greet the customers. He is no doubt of considerable money value there and I understand he is doing very well. In the ordinary law office your good looks, fine clothes and elegant manners will help some, but to hold your job very long you have got to show up some intelligence and a good deal of energy. Neither good looks nor fine clothes nor elegant manners "produce the goods" around the ordinary every day law office.

The next clerk that an almighty and austere providence sent to us for our sins was Mr. Shirk. He came from the same law school as Mr. Gay, but whether or not he was gifted with an equal learning we were never able to discover. His powers, whatever they may have been, were restrained and impenetrably hedged about by a great and consuming fear. A good, strong, vigorous fear is all right in its way, provided its way is all right. Somewhere in the Scriptures I believe it says "the fear of the Lord is the beginning of wisdom," and anyone who has ever employed prominent attorneys can tell you that a fear of the law saveth the pocket book. Probably we all of us have some great consuming fear though few of us can afford to flatter ourselves that we have more than a beginning of wisdom. I remember one of my college friends who had a large and terrible horror of ever finding himself so situated as not to have enough to eat. As a result he was constantly eating while he could. So too, I, myself, am constantly consumed with a fear of growing so stout that I cannot cross my legs or successfully run for a trolley car. Owing to that fear and the slender rewards of real legal ability my trousers have outgrown me and I have to wear

a high collar to hide my ever increasing Adam's apple.

Well, to come back from our digression, Mr. Shirk's great and particular fear was that he might do more work than he was paid for. His weekly insult, as he termed it, was all of \$10, and there was no possible ground or foundation for his fear. None the less it was probably stronger because of its very lack of solid and reasonable foundation — and it showed itself in many forms and in various guises, sometimes as to quantity of work and again as to quality. Our worthy clerk could not be bothered to copy letters, write up the register, serve papers, or look after small collections, because he certainly could not be expected to waste his time upon such profitless drudgery at \$10 per. Nor on the other hand could he afford to meet the senior partner and a wealthy client at the Bar Association rooms in the evening to get up a contract — he certainly would not be fool enough to sell the firm twenty-four hours per day for the insignificant sum of \$10 per week. The net result of these and similar self-imposed limitations upon his work, was that he was kept very busy dodging assignments and at the same time regretting that there was nothing for him to do. If he saw the senior partner coming in his direction he might assume an important and abstracted air and hurry down the hall where he would take a drink of water and wait till said partner had retired to his den. Perhaps a little later another member of the firm might make threatening advances in his direction, and he would hurriedly grab his hat and hasten out to lunch. Or if it didn't happen to be lunch time, as likely as not he ran out "to mail a letter" or "to look up a little matter at the library."

We somehow never felt impelled to

ask Mr. Shirk to argue any cases in the Court of Appeals and we never could afford to raise his salary sufficiently to make it worth his while to do the sort of work we had for him. All this probably weighed on his soul for he finally left us. His reason for departing was that we didn't have work enough for him and that he thought he would best look for a busier office where there would be more opportunity for advancement.

Ten years have passed and we seldom run across our friend Shirk. He lives in Brooklyn or the Bronx and is married and father of a healthy son. His wife does the cooking and baby tending and incidentally does a little private tutoring to help out the food supply. He himself seems to have some sort of a "stand in" with one of our political police magistrates and is forever defending cases before that jurist. Of course he cannot afford to do very much work for the prices that police court clients can pay. But then it is rumored that he does not have to do a terrible lot of work to get his clients discharged by that particular magistrate. Law clerks, like some other things known to nature, seem to seek their own level.

Mr. Stillman was our next experiment and in many ways he was an excellent man. He was not the brightest or quickest lawyer that I ever saw but he had lots of common sense, considerable ability in handling men and was an earnest worker. But perhaps he was brighter than he seemed, for he never talked much and gave us very little opportunity to judge him. His great specialty was work — from early morning till late night he was always working hard. We did not have many small matters that we could turn over bodily to a clerk, and that is probably why we really never learned the full extent of

our clerk's abilities. As an assistant to look up law or help in court, he was not the greatest success. His mark at Law School was not high and his efforts with the authorities were very laborious and not brilliant. On close technicalities of the law, or in close discriminations of decisions he was almost no help. During the two or three years that he was in our office he never made any serious mistakes nor was he ever of much real assistance. We were all very fond of him personally and were constantly surprised that so conscientious a worker should be of so little real value.

But the qualities which we needed in our clerk are not perhaps the only ones out of which a successful lawyer can be made. Clients began to retain Stillman long before he left us and he got so much business of his own that it seriously interfered with his attention to our work — in fact that was why he left us. His growing clientele was a real and continuing surprise to me until I began to know the service that he rendered. Whether his business was a trial in court, or was the negotiation of a difficult deal involving many differing interests, he was almost universally and brilliantly successful. He will never win a case on technicalities, nor on very close points of law but on the other hand, he will always work up his facts and more obvious law points so thoroughly that he will usually win in court or force an advantageous settlement without resort to difficult reasoning or abstruse distinctions. It may be that with our mediocre judges a lawyer of only moderate legal ability is at an advantage, for perhaps he understands the train of thought and the mental attitude of the Court better than the brilliant and close reasoner on deep legal subtleties.

At any rate the clients seem to like Mr. Stillman and Courts and juries are deciding his litigations in his favor. He is doing good work and his practice is growing not too rapidly, but surely and constantly. In a few years he will probably pass by us, his former bosses, both as to income and quantity of work and clients. We can never be partners because he doesn't do business our way, but we agree with his clients that somehow or other he is a good lawyer and if we had work or clients to turn away we would turn them towards Mr. Stillman's shop.

The particular thing which Stillman has brought to my mind and has indelibly fixed there, is that a man may have the making of a good lawyer without being a brilliant student or a useful law clerk in our office and without having the faculty of looking at legal problems in just the way that we do.

I am not going to tell you about all of the clerks we ever had, because some of them would not interest you and because some of them I am trying hard to forget. But there is one more young man whom I wish to parade before you, and that is Mr. Golightly. He was the quickest, cleverest and in many ways the most useless man we ever had. Whatever he undertook was easy for him. In college it was easy for him to be a Phi Beta Kappa man and at Law School he had no difficulty in making the *Law Review*. At golf he had won many prizes, in tennis he had won many tournaments and at whist, pool and many other amusements he was almost an expert. So, too, he was a musician of far more than average ability, and I believe he could speak fluently in several languages.

We didn't know all this when we hired Mr. Golightly, but we did know enough to realize that we were getting an

exceptional man. We soon found that he was the quickest man we ever saw in running down authorities, in fact he was so remarkably fast that at first we doubted whether he ever really looked at the authorities at all—we suspected him of taking his law and decisions solely from the digests. In these suspicions we were wrong, for what he did do was to skim over his reading and get the meat out in the time that I would be reading the head note.

Now I and all my ancestors have always been slow and when I see one of these wonderfully quick men, I always envy him and at the same time always suspect that he is superficial. That, I came to feel, was the real trouble with our new clerk. If he were told to look up the authorities on a particular point, he would return in an incredibly short time bringing in a few decisions that were positive in tone and apparently law. Upon being asked if they had been overruled or modified by any later decisions or statutes, he would reply without embarrassment, "Why, I don't suppose so, but I can look that up if you wish." In fact his idea was always "I can look that up if you wish," and sure enough he could. But on the other hand, it never occurred to him to study and hunt out the problems on his own initiative. In the two or three years that he was with us, I think he never suggested a new theory or a new defense, nor a point of law or fact that had been previously overlooked.

At first I thought Mr. Golightly's trouble was solely due to inexperience and that in a few months he would understand and appreciate how laboriously and carefully the modern lawyer searches the authorities for support upon every point that can possibly come up. It is all very well for a brilliant

man to be somewhat superficial in his amusements and at the University, but in the law offices that I have seen there is little or no room for a superficial law clerk. Mr. Golightly never learned to take a real and deep interest in the work of the office and his quickness in getting away at five o'clock even excelled all his other efforts. I have spent hours trying to give myself the reason for this brilliant man's inefficiency. Perhaps it was that everything had always been so easy for him that he was bound to make the law business easy also. Perhaps the very breadth of his interests and wonderful abilities took his mind off the serious business of the law. Or perhaps he was merely intellectually lazy, or was so impressed with the greatness of his powers that he hesitated to waste his energies on any work that might ultimately prove to have been unnecessary. I have never solved the problem. When we turned him loose on a new job he went over it with such speed that he only touched the high places. We would then have to lead him back over the whole ground and point out all that he had overlooked and assure him that we really would like to have him look up this and that point in addition to the ones that he had regarded as important. If we held his hand and told him what to do he could do it with a speed and ability that I have never seen surpassed. But we had something else to do than lead around and direct a law clerk, and anyway the process was a bore and we were not receiving salaries for acting as Mr. Golightly's assistants.

I have been interested to follow Mr. Golightly's work since he left us to start in for himself, and I hoped that he could treat his clients' affairs with a greater thoroughness than he did ours. He has never had a great practice but

must have a considerable private income, for he lives in delightful surroundings and spends his winters in the South and summers abroad — practising law in between vacations. You will see his name in the papers in connection with golf and tennis but he never goes into the great tournaments, being entirely content to shine in the lesser affairs. So there you have my best appreciation of the quickest and cleverest man that I have ever run across in the law — he was delightful but useless.

You may wonder why I have given you only fault finding accounts of law clerks — the reason is simply because I have never found the perfect law clerk. So now in closing this commencement address, which is already too long, let me tell you some of the characteristics of my ideal of a law clerk. I am not going to try to go over in detail all the elements that make up such an unseen and perhaps impossible person, but I confine myself to the four most important ones.

First. He should have good clothes and attractive manners like Mr. Gay, so that he will be ornamental about the office and pleasing to the clients who happen to see him.

Second. He should be a constant and steady worker like Mr. Stillman, so as to help maintain about the office an atmosphere of business and busyness. But his work should not be for looks,

but rather with an aim at thorough preparation, and with a knowledge that in the end careful and perfect preparation is worth more than all else in the legal practice of to-day.

Third. He should have a breadth of experience and culture, and a quickness of intellectual powers that we saw in Mr. Golightly. On sudden calls and hasty jobs, that sort of quickness of thought and agility of mental processes is of the utmost value.

Fourth. Most important of all, the young man should have an overpowering interest in the firm's business about which he is employed. That should be his interest in life for the time being and the interest should be so strong that no social engagements nor personal business can impair it. He should have the employer's interest constantly at heart, from the smallest item of office expense or office arrangement up to and including the firm's most difficult and important legal matters. Such a man will not dash for the elevator as the clock strikes five, nor will he hesitate to work and study half the night at the Bar Association. He will never be afraid that he may do more work than he is paid for — but no such clerk could last very long, because we would very quickly insist upon his becoming a member of our firm and then we would have to start the clerk hunt all over again.

The Right to Change One's Name¹

JUDGE JAMES E. WITHROW of the St. Louis Circuit Court, who recently passed on a question which in-

¹See 22 Green Bag 282.

involved the right of a person to change his name, has collected some interesting data on the ways in which such changes can be brought about. His conclusion is

that the law places no obstacle in the way of any one wishing to change his name, provided such a change does not interfere in some way with the rights of others, and that, while the change may be made informally, under the common law, a statutory process is desirable for the sake of supplying an authentic record.

According to the data which he gives, there are six ways in which the names of persons have been changed. The first change of name on record took place by divine command, when the name of Jacob was changed to Israel. "Thou shalt not be called any more Jacob, but Israel shall be thy name. And he called him Israel." (Genesis, xxxv, 10.)

The second method, and possibly the most common, is under the common law. In this connection, Judge Withrow says that as far back as historical records go, people have changed their names when they they have seen fit. Many illustrious men have done this for various causes; among them Napoleon I., who wished to hide from the French his Italian origin, and altered the name Buonaparte to Bonaparte. The ancestors of the Duke of Wellington were not Wellesleys, but Colleys. The baptismal name of Gen. Grant was Hiram Ulysses. He changed it after he entered West Point to Ulysses Simpson Grant. In like manner Grover Cleveland was originally Stephen G. Cleveland. Honoré de Balzac was born a Guez, which means beggar, and he grew to manhood under that name. The practice common among actresses of adopting a pseudonym to conceal their family names is well known.

The method of changing names by legislative enactment is one of the safest, but slightly cumbersome. In this connection the judge said:—

"Prior to 1864 the Legislature of Mis-

souri passed numerous acts changing the names of both adults and children, and declared minors to be of full age, to enable them to make contracts. The last change of name made by the Missouri General Assembly was that of Augusta Shilling to Augusta Winter, February 15, 1864. She was also declared to be the lawful heir of Charles and Mary Winter at their request."

The method of changing names by decree of court is considered by Judge Withrow to be the most satisfactory. It is very little trouble, and leaves a record that will effectually prevent disputes as to identity.

"What would be sufficient to warrant the ordering of a change would depend very much upon the grounds alleged in the application and the facts of each particular case.

"Inasmuch as prior to the passage of this act a common law change of name was valid in this state, and the statute does not provide that a change not made in conformity therewith shall be void, a change may still be made by either method.

"The statutory method is no doubt far the most desirable, because it is speedy, definite and a matter of permanent record, and can easily be proved even after the death of all contemporaneous witnesses. For instance, take the case of a man who had acquired the title to real estate under the commonplace name of Adam Swineflesh. Having become tired of that appellation, either because he has suddenly struck oil or otherwise prospered beyond his expectations and does not deem his name sufficiently dignified or euphonious, or because he has unfortunately been required to serve a term in some penal institution, he concludes to make a change without invoking the aid of the court, and assumes the more distinguished cognomen of Madero Diaz.

"Having made no record of the change, when he concludes to sell his property he may experience some difficulty in satisfying a would-be purchaser as to his identity."

In commenting on the change that occurs in a woman's name on her marriage, the judge observes that this is really by process of law, since it becomes a matter of legal record. "The ladies," he adds, "always reserve the right to change their names or their minds at pleasure."

In cases where a woman obtains a decree of divorce, the court, on her request, is required to make an order changing her name to that of any former

husband, or to her maiden name, if she desires.

Judge Withrow's conclusion is that "the well-defined road to a change of name, marked out by the statute, is ordinarily much safer and more desirable than the dim pathway of the common law."

"It is well settled, however," he adds, "both by the elementary writers and the adjudicated cases, that, in the absence of fraud or injury to the rights of others, a person may change his name at pleasure and transact business and execute contracts, sue and be sued in any name he may assume."

A Recent Georgia Peonage Case

THROWING A SIDELIGHT ON LEGAL AND SOCIAL CONDITIONS IN THE SOUTH

JUDGE EMORY SPEER of the United States District Court for Georgia presided recently at the remarkable and lengthy trial of four citizens of Pulaski county, William Chauncey, Luke Dupree, John Ross Rodgers and Joan Horne, charged with the crime of peonage. The defendants had for their counsel the Attorney-General-elect of Georgia, who used such language in his uncomplimentary references to the negroes in the case as to bring upon himself the displeasure of the court.

The facts will impress many of our readers as singular. Two negroes, Clyde and Maud Wimberly, burglarized the home of one Bill Talmadge, taking six plates and other articles of small value. Talmadge asked Judge Pearce of the city court of Pulaski county

what he had better do about it, and was advised to swear out a warrant, which Talmadge accordingly did, though the burglary was committed by his wife's own daughter and son-in-law. Judge Pearce also told Talmadge that as his wife had died and he did not need the stolen articles, he might well accept money from the culprits and drop the charges, and suggested that he notify the justice of the peace and the bailiff to let the matter drop if he were paid.

Accordingly, an officer named Harp, accompanied by one Hunt, called at the plantation on which the negro couple were employed, armed with Talmadge's warrant for their arrest. The owner of the plantation, Dupree, met them, learned their business and in response to appeals from the negroes to save

them from going to jail, reluctantly paid over \$34 to the officer on the assurance that Clyde's mother and brother would be responsible for the debt.

After that there was some conflict in the evidence as to whether Clyde and Maud worked as hard as they should have on their crop. One witness said that Clyde would report his crop "as clean as the big road," and another testified that he was seen asleep in the "jam" of the fence. However, Dupree insisted that his two croppers had not done their work properly and decided that they should go to jail for what they owed him. He swore out a warrant under the Georgia labor contract law, charging them with cheating and swindling and failing to work.

Clyde and Maud accordingly went to jail. Rodgers, the jailer, loses the warrants and has no entry of their names on the jail books. He calls on Dupree and the latter says he is willing for anybody to have the prisoners for \$100. At the end of eight days, the negroes get out of jail through the kind intervention of one Chauncey, who advances the necessary money to Dupree and sets them to work to satisfy the debt which he has transferred to himself.

On these facts Chauncey, Dupree, Rodgers and Horne were indicted for conspiring to commit the crime of peonage; Chauncey having warned the negroes that they must stay in his employment to work out an illegal debt to himself, Dupree having deprived them of their personal liberty to collect what he claimed they owed him, Rodgers having held them in jail without right and released them for a consideration, and Horne having served, without reading it, the warrant through which Dupree placed them in jail.

Judge Speer's charge to the grand jury was notable as a recital of the history of the federal District Court of Georgia and as a discussion of the crime of peonage, from which we select the following interesting passage:—

"To abolish slavery and involuntary servitude has been for centuries the loftiest task of the enlightened, the human and the far-seeing. It existed generally among nations in their primitive condition. 'The early law of Rome, while prohibiting contracts of usury, still gave the legal creditors the speedy remedy of dividing the carcass of their debtor and selling him and his family into slavery.' The slavery of white men once existed in England. You will recall in the majestic, historic novel of 'Ivanhoe' how Gurth, the swineherd, is described as wearing the metal collar indicating that he was the thrall, or slave of Cedric, the Saxon. The character, while fictitious, is typical of the conditions of slavery as they existed in the days of Richard the Lion Heart, and for years afterward in that wonderful land whence we draw our own laws, and where, in the familiar lines of Tennyson:—

"Freedom broadened slowly down from precedent to precedent.

"The great men who framed our republic, while the greatest of them were slave-holders, almost to a man were opposed to the institution of slavery. Many of them manumitted their own slaves, and others predicted the calamities the institution would bring upon our country. Indeed, the fact that the British King obliged the Americans to receive shipments of African slaves was incorporated by Mr. Jefferson in his first draft of the Declaration of Independence as one of the reasons why we should sever all connection with Great Britain. Mr. Jefferson, John

Adams, Benjamin Franklin, James Madison, Alexander Hamilton and Patrick Henry, among the most illustrious of the patriots and sages of the Revolution, all deprecated the principle of the system, and Mr. Jefferson, who has been rightfully termed 'The Father of Democracy,' declared that in the presence of the institution he trembled for his country when he remembered that God was just. This great man was indeed the author of that clause of the ordinance of the government of the great Northwest territory, which had been ceded by Virginia to the United States, which included the territory of the states of Ohio, Indiana, Illinois and much else, which forever prohibited the introduction of slavery into that portion of our country. In the very acme of our own great Civil War — 'The Brothers' War,' as it has been called by a gifted Southern writer — after that loftiest type of Southern manhood, Robert E. Lee, had overthrown the massive armies of the union on the blood-stained snow of Fredericksburg, the incomparable Southern chieftain set free and sent across the river and into the Northern lines the slaves which had been bequeathed to his family by the will of George Washington Park Custis, the adopted son of Washington, and the father-in-law of Lee. By one stroke of the pen, the Czar of Russia struck the shackles of serfdom from millions of his subjects. But never, even when slavery was rife everywhere, would the constitutional law of any government justify a private individual or individuals in seizing upon the person of any one to whom they had no title as a slave and under threats or actual force hold and work the victim to advance the avarice, or the gain, or the necessities of the wrongdoer. The Southern people, when it existed, might justify slavery because

it was authorized by law, but peonage in a certain sense is not only slavery without authority of law, but in absolute violation of law.

"The usual expedient, as I have been informed, is for the person who desires the services of the laborer, who has either broken his contract or been guilty of other misbehavior, to swear out a warrant and take the prisoner before a justice of the peace, have him bound over to the next term of the court, go on his bond or secure him bail, and then in a compulsory way take the man to his farm or plantation and compel him to labor. Sometimes after a prisoner has been convicted, the fines are paid by a person desiring the labor of the convict; the convict is then taken and compelled to work out the fine. Other pretexts are used, as the indictments and convictions in the records of the court will show, to unlawfully obtain possession of persons accused of crime, and under the abuse or misuse of the process of the courts in one way or another to hold them in involuntary servitude, and compel them to work out a debt thus contracted. This is all utterly violative of law; everybody concerned in it is guilty except the peon himself.

"There is no power in a private person, under guise of settling a criminal case, to imprison or otherwise deprive any person of his liberty for the payment of a debt, whether that debt is for a fine imposed by a court, or for advances in the usual course of farming operations, or for any other debt of any other character. Imprisonment for debt is abolished in the state of Georgia. Such imprisonment, and deprivation of liberty, would be false imprisonment under the Georgia law, and, if the facts conform to the definition of the offense of peonage, and satisfy the jury that the charge of peonage is true, it is peonage

under the statute and Constitution of the United States. The consent of the persons thus arrested and imprisoned, and thus worked to pay such debt, is no sort of defense to peonage, if it be otherwise proven. It is sometimes attempted to justify these facts because Georgia has made a contract labor law, but the contract labor law of Georgia does not authorize imprisonment at the will of private persons."

During the conduct of the trial Felder, counsel for the defense, used language which Judge Speer thought appealed to race prejudice in an effort to influence the jury. The following colloquy interrupted his address to the jury summing up the evidence:—

The Court—Mr. Felder, don't you think the future Attorney-General of the state of Georgia can spare us this "nigger, nigger, nigger"? It sounds so unworthy of a great court of justice, and so unworthy of your own position at the bar to be alluding to these poor unfortunate creatures constantly in the lowest terms of degradation.

Mr. Felder—Your Honor, please. I think I know my duties and rights as a lawyer, an American lawyer practising in an American court.

The Court—The Court thinks you are exceeding those rights, and if you continue on this line and insist upon using this language, which is nothing but an appeal to the lowest race prejudice, I am very much afraid I will have to sever your relations, not only in this case but in all cases in this court. I do not believe the American judiciary will tolerate the use of such language in the presence of a court of justice on the part of a gentleman who as a condition precedent to his admission to the bar has sworn to support the Constitution and laws of the United States. Now, I do not

wish to do anything of the sort, but I do beg of you to use the language of which I know you are capable, the language of a cultivated gentleman, and save us that never ending "nigger, nigger, nigger." I want you to act as becomes a lawyer in this court.

Mr. Felder—I submit I am doing that.

The Court—The Court thinks otherwise.

Mr. Felder did not press his claims any further. The *Providence Journal*, reviewing the incident, has expressed the opinion: "This lawyer is the Attorney-General-elect for Georgia. It seems that he has learned something to his advantage for sustaining the dignity of the office, assuming that the state courts will not permit him to forget the lesson in good behavior imparted by the federal Judge."

In his address to the grand jury Judge Speer had offered such clear considerations regarding the law of peonage, and the facts adduced during the trial are so free from ambiguity, that the reader will jump to the conclusion that a clear case was made out by the prosecution. Not so the jury.

The taking of evidence occupied several days, the trial being one of unusual length, and the Court's charge summing up the evidence was so comprehensive and clear as should have been of the utmost help to the jury in forming an intelligent judgment. Yet the verdict was for acquittal, and the effort to crush out of existence certain unfortunate institutions in Georgia has failed.

The charge of the Court, however, contained a ruling that the Georgia contract labor law was unconstitutional, and this may be a partial victory. After devoting considerable attention to the crime of compounding a felony, com-

mitted by accepting money to suppress a prosecution, the Court said in part:—

“It is said that under the law of Georgia that where a laborer has received advances and fails to work, or, I believe, to use the expression ‘abandon the crop,’ an arrest is proper. Can it be fairly insisted that these people had abandoned their crop? Is a crop abandoned because it is grassy, and because the plowman on more than one occasion is seen to sleep in the daytime? Do you recall Sidney Lanier’s poem, ‘We are mightily in the grass’? The proper corrective for that is the eye of the master, and according to the testimony of Dupree, he did not go to the field for two weeks at a time. And where is the proof of abandonment? But if they did abandon the crop, I now solemnly, in the performance of my duty as a judge of the United States courts, and in obedience to the direct mandate of the Supreme Court of the United States, the final arbiter of disputed questions under our Constitution and laws, declare to you that the labor law of Georgia which makes the laboring class of our people, black and white, amenable to penalties and procedures which are not imposed on people engaged in other occupations, is unconstitutionally null and void, and is no defense to an arrest sought to be justified thereby, for such abandonment.

“But if the labor law of Georgia was of force, it was not observed. There is no provision in the law which authorizes a settlement of criminal cases thereunder for the benefit of private parties. An attorney for the defense has stated that

it is constantly done in the superior courts. Surely not with the assent of the judges of those elevated and most important tribunals. The fruits of the crime belong to the public and not to individuals. If Clyde and Maud committed burglary, the people of Georgia were entitled to the labors of the one on the public roads, and of the other on the prison farm. If they committed cheating and swindling, likewise the fruits of their labor belonged to the people of Pulaski County and not to Dupree. This whole transaction is utterly abhorrent to law, and if, as claimed, it is constantly done, the investigation here will at least inform the judiciary and the people of Georgia of how the public by private, and as we have seen criminal graft, is being deprived of its right to the application of the labor of criminals to the public welfare. . . .

“You should try this case, gentlemen, with the same conscientious carefulness, the same unswerving integrity as if a manly young farmer, with his Saxon blood mantling his cheeks, his pride of race gleaming through his clear eyes, and his lovely young wife had been the peons save these two humble Africans. They are perhaps the very least of God’s poor unfortunate creatures, but has not the Blessed Master said to us ‘even as ye have done it unto one of the least of these, my disciples, ye have done it unto me’?

“Remember that your clear-sighted countrymen, and that the all-seeing eye which in the exquisite metaphor of the Scripture we are told watches the sparrows as they fall, is regarding your action.”

The Modern Science of Criminology¹

THE publication of two important series of translations of European treatises in this country has been begun, and when these series are complete the legal learning of the Continent will for the first time be in a fair way to become a permanent and indispensable element of the education of the American lawyer. One of these sets of books is that known as the Modern Legal Philosophy Series, edited by a committee of the Association of American Law Schools, in which translations of Korkunov and Gareis have already been published, and those of notable works by German, French and Italian jurists are about to appear. The other one, to which we here advert, known as the Modern Criminal Science

Series, is issued by the Committee on Translations of the American Institute of Criminal Law and Criminology, and the three volumes here noticed are to be followed by others by Saleilles, Ferri, Tarde, Bouger, Garofalo and Aschaffenburg. In both cases the attempt is to set before the American reader the best specimens of contemporary Continental philosophical or scientific treatises.

Gratifying as the publication of these translations must be, this feeling of pleasure is accompanied by one of painful wonder, regarding the mysterious causes which thus far have rendered all this literature accessible only to the few. The most obvious explanation is that the powers of the American legal scholar, who in acumen is scarcely the inferior of his European *confrère*, have thus far been largely absorbed in the task of mastering an intricate body of case law of his own country, quite as recondite as the majestic system of Roman law, and that when he has had the desire to look beyond this national horizon, he has turned to England first of all for guidance, and derived from the native land of the common law most of his knowledge concerning the profounder problems of jurisprudence and legislation. Why English scholars have so far ignored contemporary Continental writers as unconsciously to belittle the importance of their work would not be easy to explain, but we Americans, influenced as we are by English discussion, owe the peculiar provincial turn given to juristic philosophy in this country chiefly to these English influences, whereas normally we should have absorbed not only all the best that England has produced but the ripest of

¹ Modern Theories of Criminality. By C. Bernaldo De Quiros of Madrid. Translated from the second Spanish edition by Alfonso de Salvio, Ph.D., Assistant Professor in Romance Languages in Northwestern University. With an American preface by the Author, and an introduction by W. W. Smithers, Esq., of Philadelphia, Secretary of the Comparative Law Bureau of the American Bar Association. Modern Criminal Science Series, v. 1. Little, Brown & Co., Boston. Pp. xxvii, 249 (index). (\$4 net.)

Criminal Psychology: A Manual for Judges, Practitioners and Students. By Hans Gross, J. U. D., Professor of Criminal Law at the University of Graz, Austria, formerly Magistrate of the Criminal Court at Czernovitz, Austria, Editor of the Archives of Criminal Anthropology and Criminalistics." Translated from the fourth German edition by Horace M. Kallen, Ph.D., Assistant and Lecturer in Philosophy in Harvard University. With an American preface by the author, and an introduction by Joseph Jastrow, Ph.D., Professor of Psychology in the University of Wisconsin. Modern Criminal Science Series, v. 2. Little, Brown & Co., Boston. Pp. xx, 492 + 22 (appendices and index). (\$5 net.)

Crime: Its Causes and Remedies. By Cesare Lombroso, M.D., Professor of Psychiatry and Criminal Anthropology in the University of Turin. Translated by Henry P. Horton, M.A. With an introduction by Maurice Parmelee, Ph.D., Assistant Professor of Sociology in the University of Missouri, author of "Principles of Criminal Anthropology," etc. Modern Criminal Science Series, No. 3. Little, Brown & Co., Boston. Pp. xlvi, 451 + bibliography and index 27. (\$4.50 net.)

France and Germany likewise. We may now, at last, be at the beginning of a wholesome cosmopolitan tendency which will eventually lead to the production of theoretical and scientific work in America worthy to rank with that of European philosophical jurists.

In countless ways the problems of law are intertwined with those of the social sciences, but in no field is this dependence more strikingly apparent than in that of the criminal law. A sound system of criminal law can exist only with the principles of the science of criminology as its foundation. The science of criminology thus has an immediate practical usefulness, in helping to solve the numerous problems of the indeterminate sentence, probation and parole, criminal insanity and juvenile delinquency which are being agitated on every hand, and in assisting the development of a humane penal system which shall not merely reflect the sentimental prejudices of society, but shall be based on inexorable scientific facts.

The first volume in the Modern Criminal Science Series is the best existing Spanish work on criminology, first published in 1898, and its value consists not in the independent theories of the author, which he in fact chooses to repress, but in the exposition of recent history of the various elements which have been uniting to form the new science of criminology. De Quiros reviews the work of leading writers particularly of France, Spain and Italy. Of German investigation he has little to say. His summaries are brief, being designed to extract only the meat of each theory considered. His criticisms are not copious, but adequate to present his materials in orderly perspective, and while his book suffers somewhat from desultoriness of treatment and inattention to minutiae, the section

on the present status of criminology is illuminating, and the writer, inclining neither to the position of the anthropologists nor of the sociologists, but fusing the two tendencies after the fashion of the best thinkers of Italy and France, is able to set forth a fairly good interpretation of the goal and methods of the science. At the same time, he approaches the subject from the standpoint of the Latin race, and to round out the discussion the idealistic philosophy of Germany might require to be noticed; at all events, a little more of Teutonic thoroughness in working up his materials would have increased the value of his treatise. The book serves admirably, however, as an introduction to the series, and will be prized for its bibliographical information.

The writer does not overrate the claims of that criminal anthropology which, starting a generation ago in Italy, Austria and England in the works of Lombroso, Benedikt and Maudsley, is gradually adjusting itself to normal relations with the science of which it forms a part. The name of Lombroso, he tells us, will form a landmark in history. His work has given rise to many opinions, many favorable, many unfavorable, and everywhere to great interest. "In spite of errors and hasty conclusions, the book contains pages of real value, which will survive and be recorded in the future digest of science. Its future merit, however, will consist in having influenced thousands of men to unite in the study of a subject of supreme importance." Its importance, he says, is seen in the fact that attention is centred in the study of the nature of the delinquent as one of the chief factors in the revision of modern criminal law.

These observations would suggest that De Quiros is a believer in a specific criminal type, distinguished by psychic

or somatic characteristics. He does say that if one should say that the delinquent is the same as other men, "he must surely have a more complicated conception of human nature than that represented by simple free will."

The question of the existence of distinct criminal types is of course bound up with that of the action of social factors, and if the latter have great importance it must be more difficult to indicate general characteristics common to criminals in the mass. The sociological theories have thus viewed the criminal in an altogether different light from Lombroso and writers adopting his method, and the socialistic theorists, to whom De Quiros devotes a section, have carried this tendency to an extreme, treating crime solely as a social phenomenon. Colajanni maintains that there is a direct relation between economic misery and crime.

That De Quiros does not go so far as this in the sociological direction is plain. He disagrees with Colajanni's emphasis on the economic factor; the relations between this factor and criminality, he says, are not yet definitely known. Of Bouger's "Criminality and Economic Conditions," which is to appear later in the Modern Criminal Science Series, he remarks that it is based more on the opinion of the author than on facts.

Where, then, does the author belong, and what is his position with reference to the question of distinct criminal types? He himself tells us that the polemic waged around this question whether the criminal is born so or made so "completely fills the history of the modern theories of criminology." And the seriousness of this problem De Quiros apparently fully realizes, approaching it with the caution becoming the truly scientific investigator and modestly refraining from any over-confident

assertions. Speaking of the marked anti-Lombrosian tendencies that have developed in Germany particularly, he seems to side partly at least with the German writers, including Aschaffenburg, whose "Crime and its Repression" is also scheduled to appear in this series. "According to Sommer, even if there be no criminal type in the Lombrosian sense, it does not follow that there does not exist a born or *endogenous* delinquent, as the Germans have called the individual or anthropological factor of the Italians." Therefore Sommer can say that Aschaffenburg has "placed in relief the basis of that doctrine which rests on the endogenous origin of crime."

This non-committal position of the author is much to his credit, and it makes it impossible to class him with the extremists of either the anthropological or the sociological school, though he evidently leans toward the theory of criminal types. The problem, he says, is essentially that of human personality, thus recognizing its complexity.

Criminal anthropology, as he remarks, has been the chief factor in revising our conceptions, but De Quiros perhaps fails to lay sufficient emphasis on the origin of the attitude of modern penology partly at least in the perception that the criminal is the victim not only of inherent forces but of those operating upon him externally from society. Besides the anthropological factor, another that has been changing our penological conceptions, he says, is that tendency, so complex in its origin as to be difficult to describe, which leads toward the goal of penal tutelage substituted for punishment. These two factors need to be combined, he tells us, for criminal anthropology without the principle of penal tutelage leads to a crude or indifferent penology, while the penal tutelage movement,

without anthropology, degenerates into a barren sentimentalism.

The title of Professor Gross's work is misleading, for "Criminal Psychology" suggests the psychology of the criminal. As a matter of fact the book is concerned with the psychology of the witness, rather than of the criminal. Instead of giving a German view of the methods of the science of criminology in general, it is concerned only with the practical application of psychology by those who have to do with the administration of the criminal law. In contrast with the style of treatment adopted in Señor De Quiros' treatise, that of Professor Gross is extremely thorough, and so copious in illustration as to furnish most agreeable reading.

The writer's learning is vast, and he draws upon an enormous fund of illustration, in his voluminous discussion of factors entering into the mental states of judges, jurors, experts and witnesses. Correct observation of outward expression is of great importance. The physical signs of character must be closely studied in examining witnesses, differences between man and woman must be admitted, allowance must be made for the influences of heredity, environment and temperament. Much attention is paid to mistakes of the senses, and to the psychology of error in its innumerable phases. Accuracy of representation in women and children is comprehensively considered.

The volume is in two parts, the first dealing with "The Subjective Conditions of Evidence (The Mental Activities of the Judge)" and the second with "Objective Conditions of Criminal Investigation (The Mental Activity of the Examinee)." The style of the book may be illustrated by quoting a passage typical of the thoroughness with which by-paths are explored: —

"Everybody, I might say, knows the convincing quality that may lie in the enormous leathery fist of a peasant. . . . We feel that we have here to do with a man who is honest, who presents himself and his business as they are, who holds fast to whatever he once gets hold of, and who understands and is accustomed to make his words impressive. And we gain this conviction, not only through the evidence of honest labor, performed through years, but also through the stability and determination of the form of his hands.

"On the other hand, how often are we filled with distrust at the sight of a carefully tended, pink and white hand of an elegant gentleman — whether because we dislike its condition or its shape, or because the form of the nails recalls an unpleasant memory, or because there is something wrong about the arrangement of the fingers, or because of some unknown reason. We are warned, and without being hypnotized regularly discover that the warning is justified. Certain properties are sure to express themselves: coldness, prudence, hardness, calm consideration, greed, are just as indubitable in the hand as kindness, frankness, gentleness and honesty.

"The enchantment of many a feminine hand is easily felt. The surrender, the softness, the concession, the refinement and honesty of many a woman is so clear and open, that it streams out, so to speak, and is perceivable by the senses.

"To explain all this, to classify it scientifically and to arrange it serially, would be, nowadays at least, an unscientific enterprise. These phenomena pass from body to body and are as reliable as inexplicable. Who has never observed them, and although his attention has been called to them, still has

failed to notice them, need not consider them, but persons believing in them must be warned against exaggeration and haste. The one advice that can be given is to study the language of the hand before officially ignoring it; not to decide immediately upon the value of the observations one is supposed to have made, but to handle them cautiously and to test them with later experiences."

In choosing Lombroso's "Crime: Its Causes and Remedies" the Committee on Translations made a wise selection. The first volume of "L'Uomo Delinquente," published in 1876, was devoted chiefly to his doctrine of the "born criminal," and aroused much criticism of his one-sidedness. In the second volume he dealt with other types of criminal — the pseudo-criminal, the criminaloid and the habitual criminal — and thus showed himself to attach by no means exclusive importance to the born criminal. As he grew older his doctrine broadened itself in another direction, for while in the first edition of "L'Uomo Delinquente" he distinguished but one type, the atavistic, in later editions he partly rejected the atavistic theory of crime, and came to view degeneracy as the cause of congenital criminality. This theory is assailable because of the looseness with which the term "degeneracy" is employed and because the doctrine does not rest upon a firm biological foundation. At the same time, as Professor Parmelee says in his able introduction, "this recognition of degeneracy as a cause of crime has made Lombroso's doctrine more catholic, so that it is much easier to connect the criminal with the social and physical conditions out of which he has evolved."

The present work is largely concerned with the social causes of crime, and it presents a summary of Lombroso's

views in their later phase, when he had partly outgrown the tendency to over-emphasize his anthropological doctrine of the "born criminal." The work is instructive on this account, and helpful to a fair estimate of Lombroso's position, and its utility is also to be found in its extended treatment of penological matters. It is a much more representative and useful exposition of Lombroso's philosophy, for the American criminologist, than his "Criminal Man."

Nevertheless it should not be supposed from the attention here devoted to social factors, that Lombroso's original position has been so completely modified as to place him in the ranks of the sociological school, or to convict the anti-Lombrosian criminologists of Germany of ignorance of his actual opinions. Nor can it be said that De Quiros betrays any misinformation in classing him with the anthropologists rather than with the sociologists. For Lombroso's doctrine, however strongly he may emphasize social factors, is built up around a congenital criminal type as its centre. His theory of such a type is, no doubt, partly scientific and partly a product of the brilliant imagination of an enthusiast singularly ill equipped, in knowledge of biology, psychology and pathology, for the task to which he applied himself with such marvelous assiduity. As time goes on only what is true in his system will come to stand out in sharp relief against a background of false generalization, and he will be esteemed more for his convenient classification, his keen analysis of individual cases, and his wonderful divination of some new truths, than for the soundness of his inductions or the harmonious proportions of his theory.

Accordingly the first part of this book, which deals with "The Etiology of Crime," though frequently illuminat-

ing and always suggestive, cannot be accepted as trustworthy in its analysis of the causation of crime. Lombroso, in his interpretation of the various factors, necessarily treats them with partialities and prepossessions that spring from the very nature of a mind carrying to an extreme the preference, characteristic of the Latin race, of the objective and concrete to the subjective and ideal. A physiological conception overshadows and dominates his whole philosophy, and to avoid the perplexities of sociology he too frequently takes refuge in ill digested statistics.

The second part, dealing with "Prophylaxis and Therapeusis of Crime," discusses possible "penal substitutes," meaning measures designed to decrease or suppress crime, and here the treatment is unskilled, garrulous and naive, the author lightly disposing of problems which require deep study, and offering cocksure judgments on questions of political science and economics which often reveal a striking absence of ripe knowledge and keen discernment. He succeeds only in showing the possibilities of an interesting field of inquiry.

"Synthesis and Application," the third and concluding part, is the most satisfactory section of the book. In it he develops his views on penology, from the fundamental idea that penalties must be designed not for the punishment of the individual, but for the protection

of society. Naturally he proceeds on the assumption that a minimum of interference with the freedom of the criminal is desirable, and his views on the general topics of the indeterminate sentence, probation, detention of the criminal insane, and the humane treatment of occasional offenders in general, are right to the point and are made to seem more practical by reference to penal methods actually employed which illustrate his theories. In dealing with specific crimes the writer may sometimes be too bold in expressing novel ideas, but his general position is sound. His evident disposition to minimize the wrongfulness of prostitution, abortion, and infanticide perhaps springs from an ill-considered contempt for moral conventions which really originate in the effort of society to perpetuate and protect the family. Here, as elsewhere, the individualistic and realistic cast of his mind seems to reveal itself in an unfavorable light. In less than a hundred pages he is not able to give very comprehensive study to the more specific problems of modern penology, but the moral elevation of the concluding chapter on symbiosis, pleading for the utilization of the forces of crime by employing them in co-operation with other factors, to advance the welfare of society, atones, despite an indefiniteness of form, for many defects of a brilliant though superficial performance.

The Incapacity of the Judiciary¹

CRITICISM of the judiciary, if just, is desirable, and the main

¹"The Judiciary and the Administration of the Law." 45 *American Law Review* 481 (July-Aug.).

causes for contemporary criticism of the bench, in the opinion of Everett V. Abbot and Charles A. Boston, have been a number of deteriorating influences which

have been at work in lowering the standards of the courts. Among these influences are "the absence of a fixed standard in the selection of the judiciary; the overturning of ancient legal concepts with only a tardy substitution of newer and clearer modes of thinking; and the sudden increase in the mass of litigation — co-operating with the natural frailties of human nature, carelessness, prejudice, and even corruption."

The two authors sent out 350 circulars asking for replies to certain questions with regard to conditions in the several states. The inquiries were addressed to leaders of the bar, political scientists, commissioners on uniform state laws, and other lawyers whose opinion would be likely to be unbiassed. Replies were received from a majority of the states, and though only about 16 per cent of the recipients answered, almost all the replies came from lawyers in active practice and of high standing, some being of national reputation. "Their judgments bear the mark of careful and conservative statement and not one of them seems to be the expression of a radical, or even of an aggressive, spirit of reform."

Positive dissatisfaction with the administration of the law in nineteen states was expressed. In the case of five other states, Connecticut, Georgia, Michigan, New York and South Carolina, there appeared to be a difference of opinion. Satisfaction with conditions in Arkansas, Florida, Maine, New Hampshire and West Virginia was expressed.

Many interesting replies came from correspondents. Many suggestions for reform, for example, "came from New York, such as a differentiation of the work of the courts (as is done already in New York County) by the institution of negligence calendars, commercial calendars and other calendars, presided over by

different judges; a corrected procedure, having adequate machinery for reaching results at the earliest practicable moment, the abolition of unnecessary technicalities and refinements, the total abolition of legislative interference with procedure and the entire separation of the judicial from the legislative power, with the absolute power in the judiciary to regulate procedure."

After summarizing some of the replies the authors continue: —

"We chose no malcontents or rabid reformers or fanatics or recognized agitators, but confined ourselves to prominent and leading lawyers, to their supposedly intelligent and hard working juniors, to studious political scientists, and to commissioners on uniform state laws, and this is what we find by them charged against present members of the judiciary:—

"Intellectual and other incapacity; bad personal habits; improper political activity; proneness to play politics; absence of a sense of obligation to their office, to the legal profession, to the public; that the judges confine themselves too closely by legal technicalities; that they hold cases too long; that they are lazy; that they are dominated by local influence; that they are lacking in legal ability, or are of less than average ability; that they are unduly active for re-election; that they permit delay; that they are temperamentally unfit; that they are influenced by the judges in review of whose decisions they sit; that they misuse their patronage; that they are of mediocre or inferior quality; that they are guilty of conduct worthy of criticism; that they are grossly unfit (one complaint of unfitness because of habitual drunkenness was made); that their individual judicial conduct has been the subject of scandal; that they are subject to corrupt influence;

that they wilfully disregard the rights of individuals; that they are guilty of excessive zeal; that they are of undue temper; that they have too great regard for their personal friends; that they are susceptible to outside influences; that they misconceive their function; that they are partial to certain classes of litigants, notably large corporate and financial interests; that they are under the control of legislators or politicians, or are influenced by political considerations; that they do not command respect or confidence; that they are inferior or second-rate men or of a low order of ability; that they are not the best lawyers, nor lawyers of the highest standing; that the best members of the profession will not take judicial position; that they are physically feeble; that they are intellectually weak; that they are ignorant of the procedure of their courts; that they depart from it; that they decide individual cases and not the law; that they are not well seasoned; that they have not the judicial temperament; that they lack robust courage and independence; that the elective judiciary is not satisfactory; that they abuse the poor; that they pay too great heed to the technicalities of procedure; that they are weak in grasping and holding to legal principle and for that reason their decisions are often conflicting with each other and most unsatisfactory in that they give poor reasons for a correct decision; that it is a common remark that you cannot tell what the next decision of the court on the same point is going to be, and the case law is in a chaotic state; that they decide cases justly enough, but their opinions are written with such a feeble grasp of legal principle that one cannot extract any rule of law from them (and this of a supreme court); that the opinions show a lamentable feebleness both in Eng-

lish style and in logical and lawyer-like reason; that local and minor judges are subject to insidious political influences; that the character and calibre of minor judges is deplorable, and that the minor justices are unfit.

"Now it must not be understood that these complaints all come from one locality, or that many of them were made of the judiciary of any one state, or that in general they were considered to apply to all of the judiciary of a locality, or that all of them are of equal weight and importance, but the sifting and collection of all the specific complaints resulted in this rather horrible display of shortcomings among members of the judiciary. Generally speaking the judiciary is elective, and these are the kind of men whom, it seems, the people have elected as judges. It cannot be said that these faults characterize the entire judicial system of any single commonwealth, they merely exist within it, and are a part of the machinery of justice with which is lodged the power to punish for contempt and to which is due the traditional respect for the ministers of the law, which we give to or withhold as we please from the executive or legislators but must perforce yield to the judiciary and their decrees.

"It lightens the darkness of this dismal picture to know that from Massachusetts comes the assurance that the judiciary are of absolute and unquestioned integrity, and of the highest intelligence and judicial ability; that from Indiana, though every voter, however ignorant, has the constitutional right to practise law, comes the statement that no canons of judicial ethics are necessary, and that Indiana has no better citizens than her judges — that they are honorable and intelligent and have the confidence of the bar; that in New Hampshire there is no criticism of

the bench; that in Connecticut the judiciary has the confidence of the bar; that in Texas, while there is no Mansfield or Marshall, there are no inferior judges, that their character is never impugned, that they are honest and upright; that in Pennsylvania, except the minor judges they are generally upright and honorable; that in Kentucky, *as a rule*, their judges are considered honest; from Iowa that they are *for the most part* honest; from Missouri that it is the system rather than the judiciary which is at fault, and that the criticism of the judiciary is frequently unfair; and from Tennessee that the judiciary are not incapable."

After presenting this somewhat depressing mass of testimony, the writers go on to suggest steps in a possible reform. They favor, first, a formulation of canons of judicial ethics; secondly, improved methods of selecting judges, to insure their being those of highest

calibre at the bar; thirdly, improvement of procedure; and fourthly, elevation of the standard of judicial thinking. On this last point the authors say:—

"We can recognize that the courts have been struggling in the dark quite as much as the bar, indeed, by reason of an inefficient bar, and that, being human, they, too, have often been in error. In other words, we can recognize that judicial decisions, even by courts of the last resort, may be wrong and ought to be changed, not by statute but by judicial decisions. Subject to rights acquired upon the faith of erroneous decisions, it should be regarded by the profession and by the courts themselves as entirely proper for an advocate to point to judicial error in any decision which may be cited against him and to secure a reconsideration of any decision by submitting a respectful and lawyer-like argument in support of his position."

Reviews of Books

HOLLAND'S JURISPRUDENCE

The Elements of Jurisprudence. By Thomas Erskine Holland, K.C., of Lincoln's Inn, Chichele Professor of International Law and Diplomacy, D.C.L. and Fellow of All Souls College, Oxford. 11th edition. Oxford University Press, American Branch, New York. 9th ed. Pp. xxv + 427 + 23 (index). (\$2.50.)

WHILE the author of this well-known treatise is now living, and the first edition of his book appeared as late as 1880, the "Elements of Jurisprudence" begins to look a bit out of perspective. It would be interesting to know what position is to be assigned to it ten or twenty years hence. While Professor Holland is commonly classed with a school of juristic theory that is retreating before the advance of what Professor Pound feels forced, for want of a better

name, to call "sociological jurisprudence," there seems to be something apart from the method of the "analytical" jurist which stamps this treatise with a distinctive character of its own, and the future may possibly inquire how it was that Professor Holland mistook the "grammar" of the law for its logic, and principles solely of description and arrangement for elemental principles. The narrow sense in which he uses the term "jurisprudence" will also be likely to excite growing wonder. Professor Holland has outlined a scheme of arrangement, he has classified principles and shown their interrelations, he has cleared up with marked perspicacity the obscurity and inexactitude of legal ter-

minology. But he is like the botanist who would undertake to write a volume on the classification of plant forms, without seeking to arrange actual plants in their proper places in such a classification, or like the teacher of Greek who would develop a theory of moods and tenses without teaching the conjugation of verbs. If his book had been called simply an "Introduction to Jurisprudence" discovery of its restricted method would occasion less surprise.

There can be no doubt that the title "Elements of Jurisprudence," suggesting a broad scope for the treatise, combined with the inclusion of a large amount of concrete material regarding legal principles examined with reference to substance as well as to form, has created much confusion and misunderstanding with regard to the nature of the book. It is only on close examination that this concrete material is seen to be used solely for purposes of illustration, and that the book deals not with the law but with its formal attributes. As soon as this is perceived, the misconception disappears and the work is assigned its true place in the prolegomena of the science of law.

Of the "analytical" school it is widely believed that they sought, by a use of the comparative method, to set forth principles of a general system of law common to countries of advanced civilization, and this impression has also led readers to misunderstand Professor Holland's treatise, the object of which is really to set forth, not principles of law, but their nomenclature and syntax, and thus his discussion yields no actual results in the way of knowledge either of law or of the objects it seeks to attain. Consequently one looks in vain for a comprehensive application of the "analytical" method.

The eleventh revised edition, published

in 1910, testifies to the vitality of this treatise, but in spite of the author's contention that he is treating of "jurisprudence" purely and simply, with no qualifying adjective, it is impossible to suppose that the narrow sense in which he uses the word "jurisprudence" will ever come into general acceptance, or that his labors will influence future writers on legal science in its higher forms to neglect the ideal content of the law, on the one hand, or its phenomenal attributes as a product of social forces on the other. So transitory a position has already been left behind.

HOW TO DISPOSE OF ONE'S PROPERTY

Post-Mortem Use of Wealth; Including a Consideration of *Ante-Mortem* Gifts. Legal Point of View by Daniel S. Remsen of the New York Bar. Ethical Point of View by Felix Adler, Charles F. Aked, James J. Fox, David H. Greer, Newell Dwight Hillis, F. De Sola Mendes, Henry W. Warren and David G. Wylie. G. P. Putnam's Sons, New York and London. Pp. 128 + 5 (index). (\$1.25 net.)

POST-MORTEM Use of Wealth" is a very readable and suggestive little volume, and it will be of value to the man who is thinking of making a will and also to the lawyer who is called on to advise upon such matters. The author has sufficient experience and learning to give the general lawyer many helpful suggestions that he will find difficulty in running across elsewhere; and at the same time the thoughts are put in such clear terms that they will be fully and readily understood and appreciated by the layman.

The book is not meant to be a treatise on how to draw wills or a complete description of the different methods of disposing of property after death. It rather tells us of many considerations that should be kept in mind by the man who is making provision for the use of his wealth after his death, and that should be kept in mind by such man's

legal adviser. Those considerations cover both the method of disposition and the selection of beneficiaries. The author leaves very much to the legal adviser and to the wealth owner, for obviously the best methods of disposition and the best selection of beneficiaries will hardly be the same in any two cases. If one wishes to be told exactly what he should do with his property upon his death, and precisely how he should do it, this book will not satisfy him. It assumes, correctly, we think, that practically all men are seriously interested in the use to which their property, whether great or little, is to be put after their death. Whether one leaves everything to his widow, or divides his property between his several children, or establishes some charitable foundation, he does it only after serious and mature consideration. And to all those who are seriously considering such problems the present volume will furnish excellent food for thought.

On the ethical side of the question the book is rather slight. The author has left that part to eminent divines of various beliefs, but as we read what they have to say we are forced to conclude that perhaps less eminent personages might have given us a deeper and a more thoughtful treatment. The reason for asking these men to write about the ethical side of disposition of wealth after death, doubtless was that their profession and habits of thought fitted them especially to give us helpful ideas in that direction. Unfortunately, however, the minister of the gospel probably is so concerned with the post-mortem disposition of the immortal soul that he devotes comparatively little attention to the post-mortem use of wealth. We wish that Mr. Remsen with his large experience and deep understanding had written on the ethical side himself in-

stead of leaving it to others whom he modestly deemed more competent.

On the whole, we heartily commend this small volume to all who are considering the disposal of the property that they cannot take with them to the next world. This means that we commend it to practically everyone for it is our experience that there are very few people indeed but have at least a little of this world's goods whose management they desire to continue even after they have left for heavenly realms beyond.

ANT COMMUNITIES

Ant Communities and How They Are Governed; A Study in Natural Civics. By Henry Christopher McCook. Harper & Brothers, New York and London. (1909.) Pp. xvii, 304 + bibliography 9 and index 7. (\$2 net.)

FROM Dr. McCook's popular account of the habits and social life of ants, the mind not learned in natural history will discover that these beings, in their subdivision of labor, their complete devotion to the collective welfare of the community, their engineering skill, their tender care of their own dependents, and their peaceable communal existence unruffled by dissensions or violence of any sort, come as near to dwelling in a state of civilization, in the human sense, as we can conceive it possible for any of the lower forms of animal life to attain.

From the author's interpretation of those characteristics of ant life which are not so clearly defined objectively, and which may be a matter of opinion, one is led to infer that ants must have some degree, at least, of the power to reason, that they communicate with one another by some means analogous to language, that they live under a government in which crime and outlawry never arise and force is never exerted to enforce any custom or regulation, that the authority of the state seems to be

exercised by no particular individuals, that they have no institution of individual property, and that their life affords a perfect example of communism and of the political and economic equality of all members of a socialistic state.

If the latter conclusions are candidly surveyed, albeit from the standpoint of the ill-informed reader, there may be reasons to doubt whether the life of ants is so destitute of individualism, and whether the comparison to a socialistic colony can be so closely drawn. One thing seems certain: namely, that the dependent males, which perform none of the work of the community, and have in comparison with the queens and workers only a vestige of brain tissue, are in the position of an inferior caste. Sovereignty, then, would appear to reside either in the queens, who, as a matter of fact, do not appear to direct the affairs of the group, or in the female workers, who seem to co-operate *en masse* without any individual leadership. Moreover, the gentleness which ants show toward one another, and the voluntary submission of ants to the collective will, scarcely justify the inference of the want of any means of discipline or of the absence of a system of customary law sanctioned by force. Among ants, as among all other beings, the anarchistic, highly developed state is an unthinkable contradiction of terms.

The lawyer will read this book with interest, seeking parallels between the life of ants and human society, but while he will discover many instances of the apparent existence of laws, he will find among ants no individuals fit to be described as law-givers. The remarkably developed altruistic instincts of ants, and their perfect solidarity, seem to render them unnecessary, but the mystery is how they can perform such wonderful feats without leaders.

GILMORE ON PARTNERSHIP

Handbook of the Law of Partnership, including Limited Partnership. By Eugene Allen Gilmore. Hornbook Series. West Publishing Co., St. Paul.

THIS new Hornbook is not a new edition of the well-known George on Partnership, but a successor to it; for the most part entirely re-written. Like other books in this series, it is intended primarily for students, and its citations, while including the leading cases, are not exhaustive. The aim of the author, as stated in his preface, was to make a clear and definite statement of the leading principles. This he has done with admirable clearness, and in this will be found the great merit of this book.

The subject of partnership, which should be essentially simple, has been made exceedingly complicated by the failure of the courts to recognize the practice of merchants and the insistence of judges on the application of technical, legal principles derived from two or three different sources which different judges, from time to time, thought to be applicable to this subject but which, in fact, were entirely foreign to it. The result is a hopelessly inconsistent body of law which can be unified only by the code which the Commissioners on Uniform State Laws will soon complete. Professor Gilmore's lucid statement of the existing law will clarify our conceptions of the subject, and will aid an understanding of any code that may be enacted.

BOOKS RECEIVED.

RECEIPT of the following new books is acknowledged:—

Maryland under the Commonwealth: A Chronicle of the Years 1649-1658. By Bernard C. Steiner, Ph.D., Associate in English Historical Jurisprudence. Johns Hopkins University Studies in Historical and Political Science, Series 29, no. 1. Johns Hopkins Press, Baltimore. Pp. 178 (index). (\$1.25.)

The Dutch Republic and the American Revolution. By Frederick Edler, M.Dipl., Ph.D. Johns Hopkins University Studies, series 29, no. 2. Johns Hopkins Press, Baltimore. Pp. 252 (index).

Index to Periodicals

Articles on Topics of Legal Science and Related Subjects

Armaments. "Navies as International Factors." By A. T. Mahan, U. S. N. *North American Review*, v. 194, p. 344 (Sept.).

"The question for the United States, as regards the size of its navy, is not so much what it desires to accomplish as what it is willing or not willing to concede. For instance, we have shown plainly that we are unwilling to concede anything as regards the control of the Panama Canal, even to discuss the right to fortify it. The Monroe Doctrine, too, is only a claim to maintain security for that which we possess. In no sense does it propose to add to our holdings. How far is the country prepared to be obliged to concede on these points, because unready to maintain them by organized force?"

Assignments of Choses in Action. "Gifts Inter Vivos of Choses in Action." By George P. Costigan, Jr. *27 Law Quarterly Review* 326 (July).

"Whatever the theory of decision adopted — whether the power-of-attorney theory of Professor Ames or the theory of *Fortescue v. Barnett* (3 M. & K. 136) misapplied in *Edwards v. Jones* (1 My. & Cr. 226) and *Milroy v. Lord* (4 De G. F. & J. 264) that the assignor has done everything that he need be asked to do to effectuate the gift — the English courts should hold, as Professor Jenks contended that the English law really is, that a consideration is not necessary for the validity of the assignment of a *chose* in action, whether the assignment is of a legal or of an equitable *chose*, and whether it operates under the Judicature Act or outside of that act. There should be a return to the state of the law expressed in *Lord Carteret v. Paschal* (3 P. Wms. 197, 199) in 1733: 'And first it was admitted on all sides that if a man in his own right be entitled to a bond, or other *chose en action*, he may assign it without any consideration.' Such is general the law in the United States."

Choses in Action. See Assignments.

Comparative Jurisprudence. See Marriage and Divorce.

Criminology. "Reform of the Criminal Law in Germany." By Dr. Adolf Hartmann. *2 Journal of Criminal Law and Criminology* 349 (Sept.).

"Out of the darkness of the past we see in Germany the first dawning of a new day of humanity. In Germany today it is lawful to release a convicted prisoner on good behavior after one year, if at least three-fourths of his term have expired. The totals of prisoners released by administrative boards have been lamentably small, but are increasing every year. The law under which this is done, it would seem,

will turn out to be the way in which the indeterminate sentence will unconsciously be adopted in Germany."

"Malingering among Criminals." By G. Frank Lydston, M.D. *2 Journal of Criminal Law and Criminology* 386 (Sept.).

"My experience leads me to believe that the malingering of convicts is in itself a manifestation of incapacity — of a lack of physical and moral fibre. The unstable nervous equilibrium of the criminal results in a craving for sympathy, and a craving more particularly for diversion from the monotony of prison life."

See Penology, Police Administration, Self-Defence.

Direct Government. "The Working of the State-Wide Referendum in Illinois." By C. O. Gardner. *Political Science Review*, v. 5, p. 394 (Aug.).

The state-wide referendum "has defeated directly some very desirable legislation, and has accomplished the same end indirectly by preventing the submission of other measures because of the recognized futility of obtaining their adoption."

"Statement No. 1." By Burton J. Hendrick. *McClure's*, v. 37, p. 505 (Sept.).

"The people have absolutely destroyed the old political machine. To what extent, however, has the popular method improved the character and efficiency of Oregon's public men? On this point there is no occasion for unbounded enthusiasm. . . . Whatever faults we may find in Oregon's public men, however, the fact remains that, for the most part, they are of a higher calibre than any the state has had before."

"Law-making by the Voters." By Burton J. Hendrick. *McClure's*, v. 37, p. 435 (Aug.).

An optimistic account of the initiative and referendum in Oregon, viewed as means of freeing the people from the power of the political bosses.

Employers' Liability. See Workmen's Compensation.

Federal and State Powers. "Expansion of Federal Powers." By Francis L. Smith. *17 Virginia Law Register* 337 (Sept.).

"The right of the federal government to condemn land in this state [Virginia] should never have been recognized, much less sanctioned, for it is in derogation of the sovereign attributes of the Commonwealth and an invasion and the destruction of her most sacred rights. These questions are of intense moment, not only to Virginia, but to every state in the Union."

Freedom of Speech. "Obscene Literature and Constitutional Law in America." By J. Andrew Strahan. 36 *Law Magazine and Review* 459 (Aug.).

"We may suggest that if the Constitution of the United States does not permit Congress to forbid the publication of indecent literature, the sooner it is altered the better for the morals of that country."

Freedom of Trade and Occupation. "Principles of Liability for Interference with Trade, Profession or Calling." By Sarat Chandra Basak. 27 *Law Quarterly Review* 290 (July).

At the outset the writer propounds the question, "Is interference with trade or occupation a new ground of liability, or does it form a part of the well-recognized heads of Torts?" The answer to this question is postponed to the end of the article, when the nature of the liability shall have been thoroughly studied. In this first instalment there is only a study of the grounds on which leading cases have been decided, including *Lumley v. Gye*, *Allen v. Flood*, *Mogul Steamship Co. v. Mc Gregor*, and others.

See Monopolies.

General Jurisprudence. "The Development of a Scientific View of Law." By Edward Lindsey. 45 *American Law Review*, 513 (July-Aug.).

"The interest awakened in the ancient nations of the East by the archaeological discoveries in Babylonia, Egypt and Palestine has ensured some attention being paid to their laws. Here again the Germans are in the lead as witness the names of Kohler, Meiser, Winckler, Meissner, Schrader, Strasmaier and others; though of perhaps equal value is the work of Revillout, Oppert, Scheil, Stevenson, Pinches, King, Thureau-Dangin, Radau and Harper among many scholars at work in this field.

"The extension of the field of these historical studies prepared the way for a study of the laws of all the peoples of the earth as a necessary foundation for the discovery of the history and growth of legal institutions in general. This step seems to have been taken, however, only in Germany. Judge Albert H. Post of Bremen proposed such a study and for it the title of Ethnological Jurisprudence. . . .

"Complementary to the historical method . . . we have the anthropological, only awaiting a further application to legal studies. The fruitfulness of the historical method foreshadows what we may expect from the anthropological. Together they furnish the basis for a science of law."

See Legal Education.

Gifts. See Assignments.

Government. "Government by Judiciary." By L. B. Boudin. *Political Science Quarterly*, v. 26, p. 238 (June).

Written to disprove, step by step, Justice Lurton's argument in the *North American Review* (23 *Green Bag* 77) that the Constitution was in-

tended to invest, and did in fact invest, the judiciary with power to annul legislation on the ground of unconstitutionality. "To say," in the face of numerous decisions of the Supreme Court, "that our courts do not exercise any legislative power, seems like adding insult to injury."

"Constitutional Developments in Foreign Countries during 1910." By W. F. Dodd. *Political Science Review*, v. 5, p. 418 (Aug.).

Dealing with developments in the suffrage situation in Norway and Italy, the enlarged autonomy of Alsace-Lorraine, the progress of popular political institutions in Russia, Portugal, Greece and China, the setbacks to proportional representatives in France and Switzerland and the regulation of industrial combinations in Australia.

Australia. "The Legal Interpretation of the Constitution of the Commonwealth." By A. Berriedale Keith. 12 *Journal of Comparative Legislation*, pt. 1, p. 95 (July).

A penetrating study of the Australian constitution in the light of judicial decisions interpreting it.

India. "The Government of India." By T. H. Boggs. *Political Science Quarterly*, v. 26, p. 290 (June).

A descriptive account of the government of India, with some reference to its history. The writer thinks that "the extension of Indian political reforms ought to be cautious and deliberate for in India there is no notion of representative or elective government except among a relatively small number of educated men."

See Direct Government, Federal and State Powers, Local Government, Regulation of Rates.

Hindu Law. "Indian Law and English Legislation." Justice C. Sankaran Nair. *Contemporary Review*, v. 100, p. 213 (Aug.).

"Our Indian judges have not the traditionary instincts of the English lawyer, who regards law as a living and growing organism; and in their hands, therefore, the law has a tendency to become not progressive, but re-actionary. It is a matter of common observation that almost all the rules of Hindu law in favor of progress were laid down by English judges against the protest of Indian judges of great eminence. That English judges have not yet succeeded in stopping the consecration of young girls to prostitution in temples, and that they hesitate to enforce the provisions of the Penal Code and root out the institution of dancing girls by treating their usages as immoral, is perhaps one of the latest concessions to Indian judicial opinion."

Judiciary Reform. See p. 535 *supra*.

Labor Questions. "Organized Labor's Attitude Toward Industrial Efficiency." By Prof. John R. Commons. *American Economic Review*, v. 1, p. 463 (Sept.).

"The trade-unionist has merely secured power to do what the others would like to have done. I know of one huge 'trust' which suc-

ceeded long ago in driving out organized labor, but which finds in all of its shops an inexplicable arrangement that prevents any man from earning more than a certain amount of money at piece rates. Perhaps scientific management and the bonus system would break down this apparent conspiracy, but I should expect it to recover after the men became familiar with the new devices. Nothing is more surprising often to employers and the merely scientific man, than the unanimity with which thousands of unorganized laborers will suddenly turn out on strike at the call of a few hundred organized laborers."

"Why Men Fight for the Closed Shop."

By Clarence Darrow. *American Magazine*, v. 72, p. 545 (Sept.).

Presenting forcibly the case of the closed shop, from the standpoint of a leading protagonist of the labor unions.

Legal Education. "The Place of Jurisprudence in Legal Education." By H. J. B. Martin. *36 Law Magazine and Review* 418 (Aug.).

It is urged that "Jurisprudence should be retained in its position at the commencement of the training, but it should also be given a place later on in the curriculum. So far as the author is aware, the only English-speaking teaching body which adopts this course is the Panjab University."

Legal History. "Mr. Pike's Latest Year Book." By W. S. Holdsworth, D. C. L. *27 Law Quarterly Review* 278 (July).

Professor Holdsworth recognizes the value of Mr. Pike's work. "Mr. Pike," he says, "is the pioneer who has taught us to use the Year Books to guide us to the cases of interest on the Rolls, and to use the Rolls to correct the inaccuracies of the Year Books." Much attention is given to Mr. Pike's theory that the earliest Year Books were the work of the clerks of the court, instead of the unofficial note books of the apprentices, as Pollock and Maitland have supposed. Prof. Holdsworth thinks he has not adduced evidence which disproves Maitland's theory. There are some observations on the contents of this latest Year Book, of 20 Edward III (second part).

"The Origin of the Petty Jury." By Charles L. Wells. *27 Law Quarterly Review* 347 (July).

"Mr. Maitland, in his Introduction to the Pleas of Gloucester of 1221, published in 1884, said: 'The petty jury is still in the future and perhaps we should look for its germ in the *quatuor villatae* to which recourse is had when the *juratores* say that a man is guilty.' . . . It is undoubtedly true that the trial or petty jury emerged out of the presentment jury, which was the only jury at first. As a matter of fact 'the four vills' formed a part of the presentment jury in cases before the coroner, as well as by their presence in the county court. The remark of Mr. Maitland that 'recourse is had to "the four vills"' as if there were two separate references of the case, the first to the twelve jurors of the hundred, and a second one to 'the four vills,' seems to point only to an earlier method, as we may gather from some cases in the reigns of Richard and of

John, when the jury was used in connection with the ordeal, and indicates, I believe, the introduction and first stage of the evolution of the trial jury, namely, requiring their verdict not to decide guilt or innocence, but to decide what shall be the form of the ordeal or other mode of trial."

See General Jurisprudence.

Literature. "The Lawyers of Charles Dickens." By George Packard. *45 American Law Review* 534 (July - Aug.).

"As Molière made mad to their own destruction those very few social sinners whom he did not overwhelm with delight, so Dickens holds up to wholesome ridicule the objects of his keen observation among a profession that is certainly open to attack, but whose back is usually broad enough to laugh with the rest of the world, as it attempts to sit a little bit straighter in response to the artist's wit. No lawyer, it seems to me, can really afford to take offense at Dickens' art, or Dickens' method."

Local Government. "How Not to Draft a Charter." By Rabbi Stephen S. Wise. *North American Review*, v. 194, p. 367 (Sept.).

Rabbi Wise thinks the adoption of the proposed charter would be a civic calamity. In its drafting "every interest has been consulted save the public interest, and no principle has been followed save that of political self-preservation."

Maritime Law. "The Declaration of London, II." By G. D. Valentine. *23 Juridical Review* 103 (July).

Concluded from the April number (*23 Green Bag* 363).

"We may repeat what we have already pointed out, that this agreement is of the nature of a compromise. Its leading object was to obtain a solution of doubtful questions of international law, which have been canvassed without definite result for very many years. . . . Of such moment are these considerations that they have produced what is so rarely seen, a readiness on the part of every state to yield something to the general well-being."

"The Immunity of Private Property at Sea." *Quarterly Review*, v. 215, No. 428 (July).

This "theoretical" portion follows a historical sketch of the movement for immunization which appeared in the opening paper (*23 Green Bag* 204). The writer opposes immunization as a serious deprivation of military advantage, particularly in the case of island states.

Marriage and Divorce. "Extra-Territorial Effect of Decree for Divorce on Constructive Service." By Henry Berger. *45 American Law Review* 564 (July - Aug.).

"The sole purpose of this paper is to discuss the validity of a decree of divorce rendered by a foreign court, in so far as the validity is dependent on the jurisdiction which the court acquires over the defendant, when such jurisdiction was acquired in the manner provided by the law of

the sovereignty under which a divorce was granted."

"Austrian Divorce Law." By Prof. E. Tilsch. 12 *Journal of Comparative Legislation*, pt. 1, p. 44 (July).

A succinct statement of the law, as contained in the General Civil Code.

Mistaken Identity. "Mistaken Identity." By George Stronach. 23 *Juridical Review* 194 (July).

"It is this very same willingness to be satisfied by the presentation of things that of themselves are incapable of misrepresentation that, absurd as it may seem, too frequently leads juries, with regard to the identification of things and persons, to forget that what is presented by a skillful tempering hand may be made to misrepresent. I hope to adduce a sufficient number of cases to put this statement quite at rest, and if any are then unsatisfied, I am sure after a perusal of the authorities I shall cite at the close they will be convinced."

Monopolies. "The Supreme Court and the *Standard Oil Case*." By Prof. Andrew Alexander Bruce. 73 *Central Law Journal* 111 (Aug. 18).

"A large part of the jurisdiction of our courts is self-assumed and is the result of judicial construction, and the power to set aside a statute as unconstitutional is not specifically granted in our constitutions, either state or national. We can change if we will, and our courts, if we really desire it, can do as those of France and of England. But we should think long and seriously before we advocate the change. . . . The limitations of human language are so great that it is seldom that a legislative body can make its meaning absolutely clear."

"The Trust Decisions." By William L. Royall. 73 *Central Law Journal* 57 (July 28).

"Competition must be left free, even if a competitor is destroyed and even though it ends countless competitors. The public safety is in preventing anyone, rich or poor, from making an improper use of his power. . . . The destruction of an existing state of competition may be necessary to carry forward a great enterprise of the utmost importance to mankind, but the freedom of all men to compete with each other to the death must not be interfered with in the smallest degree."

See Freedom of Trade and Occupation.

Penology. "An English View of the American Penal System." By Sir Evelyn Ruggles-Brise. 2 *Journal of Criminal Law and Criminology* 356 (Sept.).

"Before long it is anticipated that public opinion, which is beginning to realize that the United States stands almost alone among the civilized countries of the world in having no formal and official index of the movement of crime (that is, of the moral state or standard of the community), will bring such pressure to bear upon the federal government that criminal statistics analogous in form and comprehension

to those issued yearly by European governments will before long be instituted. Until that time it is impossible to judge the "indeterminate" sentence by the only valid test to which it is possible to apply changes in criminal law and procedure, viz., their effect on the volume of crime over a given period of years."

"The Indeterminate Sentence." By a Prisoner. *Atlantic*, v. 108, p. 330 (Sept.).

"To be effective, to be practical, the indeterminate sentence must be just what the term implies. The indeterminate sentence with a predetermined maximum is an emasculation."

"Punishment and Crime." By Hugh S. R. Elliot. *Nineteenth Century*, v. 70, p. 306 (Aug.).

"My proposal is that criminals should be used, where desirable, for purposes of scientific experimentation. Suppose, for instance, that a man has been convicted of a particularly brutal rape, or of swindling poor people out of their life's savings; and suppose that an important discovery towards the cure of cancer might be made by inoculation experiments on living men; will any sentimentalist be so blind to reason, so deaf to the plainest calls of humanity, as to say it would be wrong to inoculate that criminal with the cancer and make the observations which might be followed by untold benefit to the whole race? I confess I cannot understand the mental attitude of anyone who will object to this."

"Discretion in Penalties." By R. S. De Vere. 27 *Law Quarterly Review* 317 (July).

This author favors "the appointment of a Commission composed of persons possessed of the highest legal authority, whether as judges or jurists, for the purpose of assessing the average penalty for each legal offence, upon a first, second or further conviction. These scales of punishment, strictly, of course, within the limits of the particular statute dealt with, would merely represent the normal penalties which it would be reasonable to inflict in cases presenting no unusual features. The recommendations of such a Commission would have moral weight only, and would imply no form of compulsion whatever upon the judges and magistrates for whose benefit they were designed."

"Humanizing the Prisoners." By Morrison I. Swift. *Atlantic*, v. 108, p. 170 (Aug.).

"The state of Vermont contains a prison where the inmates are treated upon a novel plan. They are trusted and treated like other human beings; they come and go almost as freely as the members of the jailer's own family; as far as possible whatever suggests punishment or disgrace is banished; and they are made to feel that their imprisonment is designed to improve them as men, and to restore them to social life not only with full self-respect but with the cordial respect of the community."

See Criminology.

Police Administration. "Mayor Gaynor's Police Policy and the 'Crime Wave' in New York City." By Arthur W. Towne. 2 *Journal of Criminal Law and Criminology* 375 (Sept.).

"The department needs more than the present five hundred plain clothes men assigned to the central office. Police captains should have a limited power to use men in plain clothes to repress disorder and apprehend roughs. In some parts of the city policemen should have a freer use of their clubs."

Procedure. "The Reform of the Law and of the Lawyer." By Prof. Andrew Alexander Bruce. 73 *Central Law Journal* 76 (Aug. 4).

"There is nothing . . . in the Constitution of the United States which either directly or impliedly commands that the old distinctions between the technical form and the methods of pleading of suits at law and of actions in equity, shall be maintained. The judges who have so held or intimated, have done so merely because of their inability to distinguish between the form and the substance, between the remedy which is sought and the method in which the request is made. . . . The only difference, indeed, between an action at law and a suit in equity is that in the former damages and sometimes the possession of personal property are sought to be recovered, while in the latter a change of status may be brought about or a wrong may be prevented. Even in the latter damages may be recovered, and the distinction is entirely ignored in the so-called extraordinary legal actions. The Constitution merely says that the federal courts shall have jurisdiction of actions at law and of suits in equity, that is to say, of all actions. It says nothing as to the form of the action."

"Criminal Procedure in France and England." By Léon de Montluc. 12 *Journal of Comparative Legislation*, pt. 1, p. 157 (July).

Mainly concerned with details of the French system, its advantages over the English in specific matters being incidentally considered.

"German Courts at Work." By Julius Hirschfeld. 12 *Journal of Comparative Legislation*, pt. 1, p. 149 (July).

A short account of the organization and procedure of German courts.

"The Bankruptcy of our Legalism." By Ignotus. *Westminster Review*, v. 176, p. 191 (Aug.).

"It is no exaggeration to say that the difference between the abuses of our legal system, and those of its offshoot in America, is one of degree, not of kind. In America most, in this country many, criminals escape punishment."

Public Utilities. "Aspects of Public Ownership." By Sidney Brooks. *North American Review*, v. 194, p. 356 (Sept.).

"In the United States — or so at least it appears to a foreign onlooker — the private management of public utilities has displayed both its greatest strength and its greatest weakness; it has won there triumphs such as it has gained nowhere else, and it has also developed abuses that go considerably beyond the experience of Europe. What the world expects from Americans, so far as this problem is especially concerned, is that they will demonstrate the possibility of main-

taining the benefits of private ownership while doing away with its disadvantages."

See Regulation of Rates.

Regulation of Rates. "Central Utilities Commissions and Home Rule." By Balthasar H. Meyer. *Political Science Review*, v. 5, p. 374 (Aug.).

The former chairman of the Wisconsin Railroad Commission, now member of the Interstate Commerce Commission, indicates a number of the difficulties which have arisen in disputes between public service corporations and local authorities. His paper, however, is not a mere argument for centralization, as he considers that the problems of regulation should be faced candidly, with the endeavor always to discover what agencies are best fitted to carry out the system of control.

"Rates for Public Utilities." By J. Maurice Clark. *American Economic Review*, v. 1, p. 473 (Sept.).

Discussing the making of a cost schedule which would do away with uniform charges for gas and other public utilities. Differential rates should be extended to other services besides those of railways and electricity. A suggestive study is made of various electric rate systems.

"Street Railway Rates, with Special Reference to Differentiation." By G. P. Watkins. *Quarterly Journal of Economics*, v. 25, p. 623 (Aug.).

"The problem of a proper standard for rush-hour service should be regarded in its relation to differentiation. Crowding during the rush hour should be defined by reference to prime costs as well as to physical conditions. Most important of all, the limit of carriage to residence districts distant from the business centre should be determined by a rather refined application of doctrines of prime cost and of secondary profits, and as regards the surface lines, with reference to the self-limiting nature of the service."

See Public Utilities.

Roman Law. See Succession.

Self-Defense. "The Function of Private Defense in the Repression of Crime." By Prof. Giulio Q. Battaglini. 2 *Journal of Criminal Law and Criminology* 370 (Sept.).

"I have said that the citizen has an ethico-social duty of self-defense. Does morality then approve the taking of life? Not at all. But morality does impose the duty of combating crime with every available means, and in this end even the taking of life is justifiable."

State Insurance. "National Health Insurance in England and Germany." By E. J. Schuster. 12 *Journal of Comparative Legislation*, pt. 1, p. 11 (July).

Describes the English bill in detail, criticizes it at length, and concludes with a comparison with the German scheme.

Succession. "The Origin and History of Succession in Roman Law." By C. M. Brune, LL.D. *36 Law Magazine and Review* 429 (Aug.)

"The writer is quite aware that the almost, if not quite, universal division made by writers on the subject gives prior historical sequence to intestate succession. . . . In attempting to maintain the position that, historically, testamentary succession should be accorded prior sequence, use will be made of not a few quotations from these same authorities who adhere to the opposite view."

Taxation. "Taxation in Illinois." By Prof. John A. Fairlie. *American Economic Review*, v. 1, p. 519 (Sept.).

The state has a system of taxation inherited from an earlier and simpler régime, and a historical account of it is given, while some space is devoted to recommendations of the taxation commissions of 1886 and 1910.

"Recent Tax Reforms in Ohio." By Ernest L. Bogart. *American Economic Review*, v. 1, p. 505 (Sept.).

A detailed account of recent measures and of plans for the future.

Workmen's Compensation. *Case and Comment*, v. 18, No. 4 (Sept.).

Containing these articles: "Assumption of Risk," by Walter M. Glass; "The Doctrine of Contributory Negligence," by Duke Stone; "Is the Fellow Servant Rule Becoming Obsolete?" by Hon. J. F. Gordon; "Compulsory Compensation without Litigation," by George H. Parmele; and "Obligatory Industrial Insurance," by James H. Boyd.

Says Mr. Glass: "Many cases have stated broadly and without any apparent qualification that a servant never assumes the risk of dangers created by the master's negligence. Passing over for the moment the decisions in Missouri and North Carolina, it can be said that, in the absence of statute, such statements contain but a half truth. . . . The general rule is that the servant does not assume the risk of the master's negligence *except where he knows of it.*"

Miscellaneous Articles of Interest to the Legal Profession

Banking. "Masters of Capital in America; The Seven Men." By John Moody and George Kibbe Turner. *McClure's*, v. 37, p. 418 (Aug.).

The "seven men" are J. Pierpont Morgan, J. J. Hill, John D. Rockefeller, James Stillman, George F. Baker, William Rockefeller and Jacob Schiff.

Biography. *Gentilis.* "The Great Jurists of the World; XIII, Albericus Gentilis." By Coleman Phillipson. *12 Journal of Comparative Legislation*, pt. 1, p. 52 (July).

Not only a biography, but a study of the important contributions of this predecessor of Grotius to international law.

Harlan. "A Friend at Court." By James

W. Davis. *American Magazine*, v. 72, p. 450 (Aug.).

"His perception of the plain natural truth of things is as sensitive as a microphone. Man and Democrat first, he is secondarily a great lawyer. But he does not write like a lawyer. His opinions read like simple good sense."

Morgan. "The Life Story of J. Pierpont Morgan: The Man Himself." By Carl Hovey. *Metropolitan*, v. 34, p. 579 (Aug.).

Notwithstanding his aloofness and sternness of manner, "If he had ever undertaken to hold a difficult public office, so great is the admiration of the American people for efficiency and personal force, they would have made him a hero in spite of himself."

Taft. "President Taft." By R. Newton Crane. *12 Journal of Comparative Legislation*, pt. 1, p. 9 (July).

"Mr. Taft's faults as a President are his virtues. He is too great a scholar, too eminent a jurist, and too just and broad-minded an administrator to be a successful politician."

Scarlett. "Scarlett and His Methods." By J. A. Lovat-Fraser. *36 Law Magazine and Review* 407 (Aug.).

Brougham gives a proof of Scarlett's familiarity with Cicero by saying that the great advocate had called his attention to the remarks on the evidence and cross-examination in the speech for L. Flaccus. Brougham adds, "As a more consummate master of the forensic art in all its branches never lived, so no man is more conversant with the works of his predecessors in ancient times."

Camorra. "The Truth about the Camorra." By Ernesto Serao. *Outlook*, v. 98, p. 717 (July 29).

This article, by a Neapolitan novelist and magazine writer, describes the origin of the Camorra in Spain, the form it took in its introduction into Naples and Sicily, and its peculiar code of laws and the tribunals with which it enforces them.

"The Neapolitan Camorra and the Great Trial at Viterbo, II." By Walter Littlefield. *Metropolitan*, v. 34, p. 555 (Aug.).

Dealing with the work of the three musketeer detectives, and the confession of Affatemaggio.

"The Neapolitan Camorra and the Great Trial at Viterbo, III." By Walter Littlefield. *Metropolitan*, v. 34, p. 707 (Sept.).

"No criminal trial, however successful, can utterly destroy the Camorra. It is not only a society for the propagation of crime but an institution presenting curious psychological and sociological phenomena. Its nurturing elements have been egotism, laziness and ignorance."

Detection of Crime. "The Dynamiters." By Harvey J. O'Higgins. *McClure's*, v. 37, p. 347 (Aug.).

The story of Burns' capture of the Los Angeles dynamiters, told partly by himself.



The Editor's Bag

THE MEETING OF THE AMERICAN BAR ASSOCIATION

HOW much influence the American Bar Association exerts, in directly molding public opinion, is uncertain, but its indirect influence may be incalculable. One thing is evident, the chief addresses delivered at its meetings are widely commented upon by the press of the country, and may sometimes give rise to as much discussion as Governors' messages or speeches in Congress. No unofficial utterances are more statesmanlike or more helpful to the right solution of pressing public problems.

These problems require something more than the eloquence of the popular orator; they call for ripe knowledge and disciplined judgment. Leadership at the bar, on the whole, is more likely to be attained through intellectual than through oratorical gifts. The leader of the bar is therefore apt to be a better statesman than politician, and for the same reason his method is oftener constructive than destructive, and he is oftener conservative than radical.

The atmosphere and influence of what might be called a constructive conservatism were particularly in evidence at the recent sessions in Boston. The proposed recall of the judiciary, that plan to demolish the barriers wisely erected by our organic law to withstand the tyranny of the mob, was scored by more than one speaker, and denounced in a resolution of deep significance. Former

Justice Brown's remarks on the proposed popular election of United States Senators belong to a similar category and probably met with the approval of a majority of his audience. The address of Mr. Hornblower expressed the satisfaction of the conservative element of the community with the wisely constructive opinions of Chief Justice White in the *Standard Oil* and *Tobacco* cases, and a sound constructive attitude was exhibited in President Farrar's argument for the necessity of uniform state laws of incorporation. Constructive statesmanship of the highest order was apparent throughout President Taft's address. The only possibly radical note of the meeting was sounded in Mr. Farrar's paper, in his contentions that the holding company, which many think has come to stay, necessarily tends to the creation of unlawful monopoly, and that the "gentleman's agreement" must needs be in every case opposed to public policy.

In the work of its committees, the American Bar Association doubtless accomplishes all that could reasonably be expected from members whose services are gratuitous, and possibly more. Here the ability to treat large questions constructively and at the same time prudently is conspicuous. The work of the most important committee, that to suggest remedies for defects of procedure, goes on steadily, the committee not only standing by what it has recommended in the past, but earnestly pressing

onward, to formulate measures abolishing the difference between forms of action at law and in equity and to perfect the right of appeal from decisions of highest state courts on questions of constitutionality of statutes. That the Committee on Uniform State Laws is also a progressive body may be seen from the adoption by the Association of the Uniform Family-Desertion Act and Uniform Foreign Wills Act.

The work done by other organizations in the past year has been of the same temper. The Conference on Uniform State Laws has now approved the final draft of two important bills, the Uniform Child Labor and Marriage and Marriage License Acts. Progress is being made on uncompleted drafts of the proposed Uniform Incorporation and Uniform Partnership Acts, not to speak of the Torrens System. The American Institute of Criminal Law and Criminology has definitely formulated principles of indeterminate sentence and parole, and is doing much to solve the problems of medical expert testimony and the defense of insanity. Of the work of other organizations it is unnecessary to speak in this fragmentary account.

There is undoubtedly no other organization in the United States, apart from these legal bodies representing the whole nation, which is doing so much to work out the practical problems facing legislators and publicists. For that reason, the annual conventions of the American Bar Association and the associated societies are an annual event of profound importance, and of an importance which seems to increase from year to year, as the labors of the societies gradually extend themselves over an increasing field.

They tell a good story of Judge Baldwin, Governor of Connecticut, when he was a small boy. He was subjected to punishment for something

or other by being shut up in the closet, where he raised an awful row, screaming and kicking. Finally the row ceased, and his mentor approached the closet, to whom the youthful Baldwin replied: "I ain't good, I'm simply resting."

— *Waterbury American.*

MARRIAGES OF MINORS NOT VOIDABLE

AT THE recent annual Conference of Commissioners on Uniform State Laws, held in Boston, there was a striking disagreement on the question whether a marriage should be voidable, under certain conditions, because contracted by minors without the necessary consent of parent, guardian or curator. The section which gave rise to the controversy was as follows:—

Sec. XXVI. A marriage contracted by a person requiring the consent of a parent, guardian or curator, without such consent, shall be voidable upon the application of such person, or of the parent, guardian or curator of such person; but no such application shall be made after the party requiring consent has reached the age of legal majority and has voluntarily cohabited with the other party, nor in any event more than one year after such party has reached the age of legal majority. If the application is made by the parent, guardian or curator, the court may refuse to grant the same, if such refusal shall appear to be to the interest of the party who required the consent, and such party does not join in the application. Any court having jurisdiction to grant divorces shall have power to annul a marriage as provided by this section.

This ground of annulment was favored by representatives of twelve states—Illinois, Louisiana, Massachusetts, Michigan, Mississippi, Missouri, Nebraska, New York, North Dakota, Pennsylvania, Vermont and Wisconsin. It was opposed by thirteen other states, Connecticut, District of Columbia, Florida, Kansas, Maryland, Minnesota, New Jersey, Oklahoma, Rhode Island, Ten-

nessee, Texas, Virginia and Washington. In consequence the section was stricken out of the Uniform Marriage Act which was approved by the Conference.

The requirements of the Uniform Marriage Act are of two classes: (1) substantive, involving a sound public policy with regard to the essentials of a valid marriage, and (2) merely formal, non-compliance with them implying no serious fault on the part of the contracting parties. For failure to meet with the first group of requirements, the Act makes marriages null and void, but violation of formal requirements entails no such consequences. The consent of parent or guardian, in the case of minors, is not treated as a substantive requirement, and the Act does not make marriages void where such consent has not been obtained. In this respect the Act follows the example of many states which have statutes requiring parental consent, but have no legislation declaring marriages void when contracted without it, with the result that the requirement has been construed by the courts as directory rather than mandatory.

The object in making such marriages voidable, which is very different from making them void, was to protect those who had been inveigled into imprudent marriages before coming of age. The section was carefully drawn to prevent such marriages from being dissolved by a parent acting from other than disinterested motives. But possibly it was so drawn as to make it too easy for young persons to free themselves from obligations which had grown irksome or which were never soberly assumed. We find it hard to accept the latter view; and one can judge of its soundness only in the light of conditions in communities where there is a strongly marked tendency to early marriages.

As the Act now stands, with the omission of this section, no marriage of minors is voidable for failure to obtain parental consent. This seems to mean that the state, for whose interest it is to require such consent not as an end in itself, but for the sake of the assurance of proper unions which such consent signifies, does nothing to undo the mischief of youthful marriages entered into under conditions which too often promise nothing but disaster.

CHIEF JUSTICE KNOWLTON'S RETIREMENT

THE resignation of Hon. Marcus P. Knowlton, Chief Justice of the Massachusetts Supreme Judicial Court, was presented to the Governor on August 7. Ill health was given as the reason, Chief Justice Knowlton being known to be a sufferer from failing eyesight. Chief Justice Knowlton, who is sixty-eight years of age, has been a Justice of the Supreme Court since 1887, and Chief Justice since 1902. From 1881 to 1887 he was a judge of the Superior Court. He entered politics about ten years after his admission to the bar at Springfield Mass., being elected representative and state senator before his elevation to the bench. He leaves behind him a mass of written opinions, a large proportion of which have dealt with the constitutionality of statutes, and which exhibit strong qualities of scholarship, largeness of view and clear discernment. The high rank which the Supreme Court of the state, true to its traditions, has maintained of late years, has been due in no small measure to the marked industry, training and quickness of mind of Chief Justice Knowlton, who has been worthy to follow in the footsteps of Gray and Holmes. It has been pointed out that the Court has of late years been dis-

tinguished for its unanimous opinions — a circumstance which usually may safely be taken to indicate a strong Chief Justice. His retirement means a very serious loss to the Massachusetts bench.

THREE SALEM STORIES

THREE anecdotes have been handed to us by a lady, as she heard them from the lips of her father, an honored citizen of Salem, Massachusetts, since deceased. Two of them dealt with his own experiences.

Hon. Mr. N., a well-known member of the Essex bar, had the reputation of carrying great weight with the jury. He had just won a difficult case against a man who seriously resented the verdict. He was overheard complaining to his friends: "I expected sure to get that case. My lawyer did well and I did not worry until that old N. got up. He straightened himself up, turned toward that jury; he opened his mouth and his great onion eyes stuck out, and I knew that my case was a goner."

Mr. N. had graduated a large number of students from his office in the days when law schools were not yet. One day in the court house, a very cantankerous man had just lost his case to one of Mr. N.'s boys. Meeting the young man soon after he gave way to very unjust and abusive remarks — with the result that he was kicked out of the room. Smarting under this treatment he encountered Mr. N. and turned his unbridled tongue upon him:—

"One of your students, Squire N., has just kicked me out of the room; it is not so long since another man from your office pounded a fellow just outside the court house. It must be that you teach your students such tricks."

Mr. N. stopped, looked the man carefully over, and calmly replied:—

"Yes, sir, that is right. I teach them always to kick a skunk when they meet one."

The third anecdote is that of a Baptist clergyman who was being cross-examined upon the witness stand on a very shady matter. The opposing lawyer, after asking his name, said, "And what is your occupation?"

Drawing himself up and assuming his most pious look, he solemnly replied, "Sir, I am a candle of the Lord!"

"O," said the lawyer, "you are a clergyman then — of what denomination, may I ask?"

"I am of the Baptist denomination."

"Ah, then you are a dip candle."

DRUNK AND DISORDERLY?

THE accused, a private in the United States Army, was on trial before a General Court Martial on a charge of drunkenness and disorderly conduct. The main witness for the prosecution had turned rather hostile and was being severely cross-examined by the prosecutor, the Judge Advocate, as he is called.

"How, in your opinion, was the accused drunk and disorderly?" he asked.

"He was drunk, but not disorderly," replied the witness.

"Is not a man who is drunk also disorderly?"

"No, sir, I wouldn't say the accused was disorderly."

"Answer my questions. Is not a man who is drunk, also disorderly?"

"No, sir."

"Could a man be drunk without being disorderly?"

"Yes, sir."

"Could he be disorderly without being drunk?"

"Yes, sir; I think it possible."

"Could he be both drunk and disorderly at the same time?"

"No, sir — in my opinion, he could not."

"Well, now then when do you consider a man drunk?"

"When he is so intoxicated that he can't stand up — when he falls down in a heap — then he is drunk."

"I agree with you. When do you say he is disorderly?"

"When he is disorderly — the accused was so drunk he couldn't move — he couldn't even say a word — how could he be disorderly?"

"Yet he was not disorderly?"

"No, sir; he was not — he never even moved."

"Take the witness," angrily concluded the Judge Advocate.

A DUN OUTDONE

THE Keefe-Davidson Company of St. Paul, Minn., inform us that they recently devised a rubber stamp for use in collecting bills, bearing the following motto: "Of all the words that are spoke or writ, the saddest of all are, 'please remit.'"

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, facetia, and anecdotes.

USELESS BUT ENTERTAINING

"I was counsel for the railway," said a lawyer recently, "and I won the case for the defense mainly on account of the testimony of an old colored man, who was stationed at the crossing. When asked if he had swung his lantern as a warning, the old man swore positively:

"I surely did."

"After I had won the case I called on the old negro," said the lawyer, "and complimented him upon his testimony. He said:

"Thankee, Marse Jawn, I got along all right but I was awfully scared, 'cause I was 'fraid dat lawyer man was goin' to ask me was my lantern lit. De oil done give out befo' de accident.'"

— *Central Law Journal.*

A Nevada lawyer, who evidently was possessed of considerable sense of humor, wrote to the firm annotating the rubber stamp on his bill with the following inscription: "Of all the words that are sung or spoke, the saddest of all are 'I am broke.'"

The rubber stamp was banished forthwith.

FALSE TRUELOVE

"John Truelove was recently sued for divorce in Paterson, N. J. He married two wives both of whom appeared against him. — *News Item.*

JOHN TRUELOVE loved not truly
His first wife, or 'tis sure
He'd not make haste unduly
A second to procure.
He surely loved not wisely
But did he love two well?
We can't split hairs too nicely
When there's a tale to tell.
It made him lots of trouble
To marry twice, forsooth,
An illustration double
True love's not always smooth.

SIRIUS SINNICUS.

Tit-Bits has unearthed an old yarn, but it is good. Counsel was intent on making a point as to time. He thundered at the witness. "You swear, do you, that by the clock in your house it was exactly nineteen minutes past ten?" "I do." The lawyer paused and looked triumphantly at the jury. At last he had entrapped the witness into a contradictory statement that would greatly weaken his evidence. "I think that will do," he said, with a wave of his hand. The farmer picked up his hat and started to leave the witness-box. "I ought, perhaps, to say," he added, "that too much reliance should not be placed upon that clock, as it got out of gear about six months ago, and it's been nineteen minutes past ten ever since."

Latest Important Cases

Agency. See Motor Vehicles.

Bailments. *Liability of Carrier for Loss of Passenger's Hand Baggage—Contributory Negligence.* N. Y.

Plaintiff placed a number of finger rings and some money in the bottom of a dress suit case containing her necessary wardrobe and took it with her on a train. The suit case was not locked, but was fastened with a catch on either side of the lock. She purchased a ticket in New York for passage on defendant's road into another state, where she had to change cars, and when nearing the station a trainman, at her request, assisted her in making the change by taking the dress suit case, which he carried to the other end of the car, where it remained ten or fifteen minutes, the only time it was out of the plaintiff's possession, and when she again opened it the rings and the money were gone. Her ticket contained a printed condition purporting to limit the company's liability for loss of baggage to necessary wearing apparel of the value of \$100. The defendant introduced no evidence and the case rested on the foregoing facts, with additional evidence tending to show that the trainman in taking charge of the plaintiff's luggage to assist her was acting within the line of his duties and that the articles lost were suitable to a traveler in the plaintiff's circumstances.

In *Hasbrouck v. N. Y. Central & Hudson River R. Co.*, decided June 13, the New York Court of Appeals found for the plaintiff-respondent, holding that she could recover. The Court (Vann, J.) said:—

"Although the question was not raised during the trial it is suggested that the plaintiff was guilty of contributory negli-

gence in delivering her suit case when it was neither locked nor fastened except by the catches. Contributory negligence, however, in its ordinary sense, has no application to a bailment made under the circumstances of this case, because the plaintiff proved delivery to the defendant and failure on its part to redeliver to her on demand. That made out a *prima facie* case, as we have held, and called on the defendant to explain why it did not restore the property. So far as appears it may still have the articles in its possession, and it cannot justify detention because when received they were not securely locked in the suit case. . . .

"The law does not require a bailor in an action against a bailee to answer a possible explanation of the latter in advance of its being made, and which in fact might never be made. Such an action rests on the presumption arising from delivery, demand and refusal, without affirmative proof of negligence in any respect. On the other hand, in an action for negligence resulting in personal injury, there must be affirmative evidence that the injury was caused solely by the negligence of the defendant which includes proof that the plaintiff did not contribute to the accident by his own act or default. The distinction between the two classes of actions is very clear and the reason for shifting the burden of proof as to contributory negligence so obvious as to require no further discussion."

After saying that the printed condition in the ticket related only to baggage which had been regularly checked and not to luggage, and that the Public Service Commission Law limiting the liability in such cases to \$150 had no

application to a loss occurring outside the state, the Court continued:—

"The plaintiff took the articles in question with her for personal use at a reception to be held at the end of her journey, and a small amount of money for use in case of emergency. The jewelry was adapted to her tastes, habits and standing, as the court found upon sufficient evidence, and the amount of money was no greater than was found to be reasonable and prudent. Under the facts as thus settled we think that the suit case and contents were baggage such as is frequently called luggage, and that in the absence of any limitation by statute, regulation of the road or inquiry as to value, the defendant was liable for the reasonable value of what was lost. The contract to transport the plaintiff carried with it the duty of transporting a reasonable amount of hand baggage, such as is commonly taken by travelers for their personal use, the quantity and value depending upon station in life, object of the journey and other considerations. *Merrill v. Grinnell*, 30 N. Y., 594; *Carlson v. Oceanic Steam Nav. Co.*, 109 N. Y., 359; *Railroad Co. v. Fraloff*, 100 U. S., 24, 29; Ray on Negligence of Imposed Duties, 561, 564; 4 Elliot on Railroads, 2604, 2605."

Carriers. See Bailments.

Due Process of Law. *Federal Jurisdiction — Municipal Ordinance Passed under Authority of the State — Regulation of Rates — Fourteenth Amendment.*

U. S.

The jurisdiction of federal courts in rate-fixing cases arising under municipal ordinances, which had been considered by the United States Circuit Court of Appeals in *Seattle Electric Co. v. Seattle, R. & S. Ry. Co.*, 185 Fed. 365 (23 *Green Bag* 153), was again dealt with by the

United States Circuit Court of the ninth circuit in *San Francisco Gas & El. Co. v. San Francisco*, decided in August.

The complainant sought to enjoin the enforcement of an ordinance fixing gas and lighting rates in San Francisco, mainly on the ground that the rates were inadequate to afford a due return to the complainant. The Court (Van Fleet, J.) denied a motion made by the respondent that the case be dismissed for want of jurisdiction, holding that, from a number of authorities cited, the following state of the law was deducible:—

"That where it appears from the averments of the bill that the act complained of violates the Constitution of the United States, this court has jurisdiction of the controversy, notwithstanding it may also appear that the act contravenes the constitution or laws of the state, and is for that reason invalid; and that where a state has conferred power upon some one of its agencies to perform a certain function involving the exercise of discretionary power, the performance of such function within that grant, although in a manner to render it obnoxious to the laws of the state, is none the less the act of the state within the contemplation of the constitutional guaranty here invoked; that such an instance is in all material respects analogous to the one where a state has conferred certain jurisdiction upon its courts, where acting within the limits of that jurisdiction, no one may question that the decision of a state court is to be regarded as much the act of the state, whose majesty it represents, when it decides wrong, as when it decides right, since it is still, in either event, acting under the cloak of state authority."

The Court disclaimed any intention of overruling the decision in the *Seattle* case, above cited, of which it approved, and carefully distinguished the facts of

that case from those of the present one.

"There was no averment in the bill that the objectionable ordinance (of which the Circuit Court of Appeals refuses jurisdiction in the *Seattle* case) had been passed under state authority, but to the contrary . . . it was expressly alleged that the second franchise had been 'granted illegally, without right, by the city of Seattle, and that said alleged ordinance is without authority in law, and is null, void and of no force and effect.' . . .

"The Court was there dealing with a case in which the municipal ordinance was, as to any possible illegal aspect it might have, not only unauthorized by the state, but was affirmatively alleged to have been passed 'without right' and 'without authority in law,'—allegations which must be taken to mean that it was without sanction under the laws of the state. It was clearly, therefore, a case in which *the state* was in no manner attempting to deprive the complainant of its constitutional rights as guaranteed by the Fourteenth Amendment, but simply one wherein in legal effect a municipality was alleged to be proceeding in violation of complainant's rights under the Constitution and laws of the state. It was accordingly held that the averment that the enforcement of the ordinance would deprive complainant of its property, contrary to the Fourteenth Amendment, was purely colorable; that the ordinance, if having the effect alleged, was in contravention of the state Constitution, which itself prohibited the taking of property without due process of law, and that it would be presumed that the state courts would protect complainant's rights thereunder; that if the highest court of the state should enforce the ordinance, then only could it be said to 'have received the sanction of the

state, and in effect become the act of the state itself'; in which event, should it operate unjustly, complainant would have its remedy by writ of error to the Supreme Court of the United States."

Monopolies. Sherman Act—Restraint of Competition may not Amount to Restraint of Interstate Trade. U. S.

The United States Circuit Court for the District of Delaware handed down a decision June 22 declaring that the alleged Powder Trust, which is dominated by the E. I. Du Pont de Nemours Company, was a combination in restraint of interstate commerce in powder and other explosives in violation of section 1 of the Sherman anti-trust law. The Court said:—

"As enacted, it [the Sherman law] does not condemn every combination 'to prevent competition.' What it condemns is every combination in restraint of trade or commerce among the several States," etc. "The recent decisions of the Supreme Court in *Standard Oil Co. v. United States* and *American Tobacco Company v. United States* make it quite clear that the language of the anti-trust act is not to receive that literal construction which will impair rather than enhance freedom of interstate commerce. As we read those decisions, restraint of interstate trade and restraint of competition in interstate trade are not interchangeable expressions. There may be, under the anti-trust act, restraint of competition that does not amount to restraint of interstate trade, just as before the passage of the act there might have been restraint of competition that did not amount to a common law restraint of trade."

The Court then came to this conclusion:—

"It matters not whether the combination be in the form of a trade associa-

tion or a corporation, if it arbitrarily uses its power to force weaker competitors out of business or to coerce them into a sale to or union with the combination, it puts a restraint upon interstate commerce and monopolizes or attempts to monopolize a part of that commerce in a sense that violates the anti-trust act."

Motor Vehicles. Warranty of Sale — Agency. N. Y.

In *Levis v. Pope Mfg. Co.*, decided by the New York Court of Appeals June 16, a manufacturer of automobiles was held liable on a warranty made by an intermediate selling agent. (Reported in 45 *N. Y. Law Jour.*, p. 1655, July 11.)

The plaintiff had purchased an automobile of T., a dealer, relying upon his oral warranties and upon the warranties contained in a printed circular purporting to be issued and signed by the

defendant, the manufacturer. The automobile having proved defective, after ten months of use, during which an employee of defendant came at three different times to repair or remove its defects, plaintiff complained to the defendant, who then promised to send a man to put the machine in satisfactory condition.

The Court held that upon these facts the jury would have been authorized to find that T., as the agent of the defendant, made the sale and the accompanying warranties, and that the printed circular permitted the inference that the defendant deemed it necessary or useful that the affirmations of quality which it contained should be made in accomplishing the sales of the car of which it spoke, and expected and authorized its agent to do that which it thus indicated to be essential to the fulfillment of the object of the agency.

The Legal World

THE MEETINGS OF THE AMERICAN BAR ASSOCIATION AND KINDRED BODIES

THE thirty-fourth annual meeting of the American Bar Association was held at Boston, August 29-31, the Massachusetts Bar Association acting as hosts. The meeting opened with the annual address of the president, Edgar H. Farrar of New Orleans, in which Mr. Farrar urged uniform state laws governing corporations rather than federal control, denounced the recall of judges, and opposed the fixing of prices by a federal commission and the holding company device as tending to the creation of monopoly. Addresses were also given by former Justice Henry B. Brown, opposing the recall of judges and popular election of Senators, and by William B. Hornblower, decrying legislative interference with legitimate interests and approving the latest construction of the Sherman act. President Taft advocated salaries of

\$25,000 in the Supreme Court and making the Court of Commerce a court of patent appeals. Baron Uchida, the Japanese Ambassador, spoke on "The Teaching of Jurisprudence in Japan."

To show at a glance what was done this year the chief work of the convention is summarized below under separate headings.

The meeting concluded with a successful banquet, James M. Beck of New York acting as toastmaster.

The following officers were elected: president, Stephen S. Gregory, Chicago; secretary, George Whitelock, Baltimore (re-elected); treasurer, Frederick E. Wadhams, Albany (re-elected).

The American Institute of Criminal Law and Criminology held its third annual meeting August 31-September 2. Governor Foss, welcoming the delegates, expressed himself as in

favor of shorter periods of punishment. President Nathan William MacChesney spoke of the organization and functions of the Institute. Prof. George W. Kirchwey made an address in which he spoke of the passing away of the old-fashioned individualistic conception that a citizen's house is his castle under all circumstances. Important committee reports were received, that of the Committee on Insanity and Criminal Responsibility perhaps exciting closest attention. As guests of the city of Boston the delegates went down the harbor to inspect the penal institution at Deer Island. The Institute elected Chief Justice John B. Winslow of Wisconsin as president for the ensuing year; Prof. Eugene A. Gilmore, secretary, and Bronson Winthrop, treasurer. (See under headings Expert Medical Testimony, Indeterminate Sentence, Insanity, and Procedure.)

The twenty-first national **Conference on Uniform State Laws** was held at Hotel Vendome beginning Wednesday, August 23. Chairman Walter George Smith in his annual address laid special emphasis on need of uniform divorce legislation. Commissioner Bergen of New Jersey caused a sensation by introducing a resolution that, the impracticability of bringing about uniformity of laws by voluntary state action having been demonstrated, an amendment to the federal Constitution be drafted providing for the taking over by Congress of power to legislate on subjects dealt with by the Commission. The principal subjects acted upon were Incorporation, Child Labor, and Marriage and Divorce. (See under these heads.)

The **Association of American Law Schools** held its eleventh annual meeting August 28-29. President William R. Vance discussed "The Ultimate Function of the Teacher of Law," and Dean Harlan F. Stone of Columbia Law School submitted a paper on "The Function of the American Law School." Baron Uchida's paper on legal education in Japan excited much interest. Prof. Roscoe Pound was elected president and Dean George P. Costigan, Jr., was re-elected secretary-treasurer.

The **Section of Legal Education** of the American Bar Association met August 30-31, Governor Simeon E. Baldwin, the chairman of the section, delivering an address on "The Study of Roman Law in American Law Schools" and Frederic R. Coudert speaking on "The True Mission of State Boards of Bar Examiners and Their Opportunity in Legal Education." A paper on general educational subjects was read by Hollis R. Bailey, and other addresses were given. Lucien Hugh Alexander of Pennsylvania presented

a report for the committee on standard rules for admission to the bar. For chairman the section chose Francis Lynde Stetson of New York, and for secretary, Charles M. Hepburn of Indianapolis.

At the meeting of the **Comparative Law Bureau** of the American Bar Association, held August 28, Governor Simeon E. Baldwin of Connecticut, in his annual address as Director, spoke of the general tendency toward social unification and increasing uniformity of law, and sketched progress in airship law. The Bureau chose these officers: Director, Gov. Simeon E. Baldwin; secretary, W. W. Smithers; treasurer, Eugene C. Massie.

The **Section of Patent, Trade-mark and Copyright Law** of the American Bar Association, meeting August 30, was addressed by its chairman, Robert S. Taylor of Fort Wayne, and discussed a paper on "The True Relation of the Doctrine of Equivalents to the Interpretation of Claims," read by Edward J. Prindle of New York. Robert S. Taylor was re-elected chairman, J. Nota of Washington being chosen secretary.

Summary of Business Transacted

Aviation. Adverse report of Committee on Jurisprudence and Law Reform, on resolution providing for licensing of aviators, sustained by American Bar Association.

Bankruptcy. Adopting the recommendation of its Committee on Commercial Law, the Association passed a resolution opposing every attempt to repeal the national bankruptcy act.

Child Labor. Draft of Uniform Child Labor Law Approved by Commissioners on Uniform State Laws; this draft embodies best features of existing state legislation.

Expert Medical Testimony. A committee of the American Institute of Criminal Law and Criminology rendered a full report covering this subject and insanity, recommending that the various medical associations establish and maintain a code of professional ethics to govern medical experts, that the various bar associations establish and maintain a code of professional ethics to govern trials where the defense of insanity is raised, and that medical witnesses in cases where the defense is insanity be chosen from a qualified group. The report was recommitted at the committee's own request.

Family Desertion. Adoption of the Uniform Family-Desertion Act recommended by Committee on Uniform State Laws of American Bar Association, the report being adopted by the Association.

Foreign Wills Act. Bar Association adopted report of Committee on Uniform State Laws, recommending adoption of this act in every state.

Incorporation. Second tentative draft of Uniform Act for incorporation of business corporations discussed by National Commissioners and recommitted with various recommendations.

Indeterminate Sentence. The principles of indeterminate sentence and a system of parole for any felony or crime except treason and murder were recommended and adopted by the American Institute of Criminal Law and Criminology.

Insanity. Committee B, on Insanity and Criminal Responsibility, of the American Institute of Criminal Law and Criminology made recommendations that the legal tests of insanity be abolished and that insanity should be held to be a good defense whenever it negatives the necessary criminal intent. The report also contained important recommendations with regard to medical expert testimony (*supra*).

Insurance. Committee on Insurance Law of American Bar Association submitted bill for 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.

Legal Education. Discussed both by Section on Legal Education and American Association of Law Schools, but no important action taken on requirements for admission to the bar.

Marriage and Divorce. Draft of Uniform Act for regulation of marriages and marriage licenses adopted by Uniform State Laws Commissioners, after section 26 had been struck out by a vote of thirteen states against and twelve in favor of the section. The section would have introduced a ground of annulment that does not appear in the Uniform Divorce Act, *i. e.*, in the case of marriage contracted by a minor who had not received the necessary consent of parent, guardian or curator.

Patents. The Bar Association adopted the report of the Committee on Patent, Trade-mark and Copyright Law, which expressed the view that Congress will have to yield to the growing demand for a court of patent appeals.

Procedure. The Special Committee to Suggest Remedies and Formulate Proposed Laws to Prevent Delay and Unnecessary Cost in Litigation made four important recommendations which were approved by the Association: (1) that Congress be urged to enact the well-known measure which the Association has supported for several years, preventing reversals and new

trials on technical grounds unless the error complained of shall have injuriously affected the substantial rights of the parties; (2) that rules of federal practice be changed to permit the taking of testimony in open court, both in admiralty and in equity cases; (3) that differences in forms of action at law and in equity be abolished by adding two proposed sections to the Judicial Code; and (4) that legislation be enacted looking to a review, by the Supreme Court, of judgments of highest state courts holding statutes invalid under the federal Constitution.

The report of Committee D of the American Institute of Criminal Law and Criminology, presented by Roscoe Pound, declared that the federal courts could be strengthened by a system whereby eminent judges specially trained in the various branches of law and equity might be dispatched all over the United States when needed.

Recall of Judges. Resolution adopted by American Bar Association denouncing the recall.

Salaries of Judges. The Association's Committee on Jurisprudence and Law Reform having reported adversely on resolution favoring higher salaries for federal judges, the recommendation was tabled, the resolution being adopted.

"Third Degree." Association sustained report of Committee on Jurisprudence and Law Reform that resolution condemning "third degree" ought not to pass, this being a matter solely for local regulation.

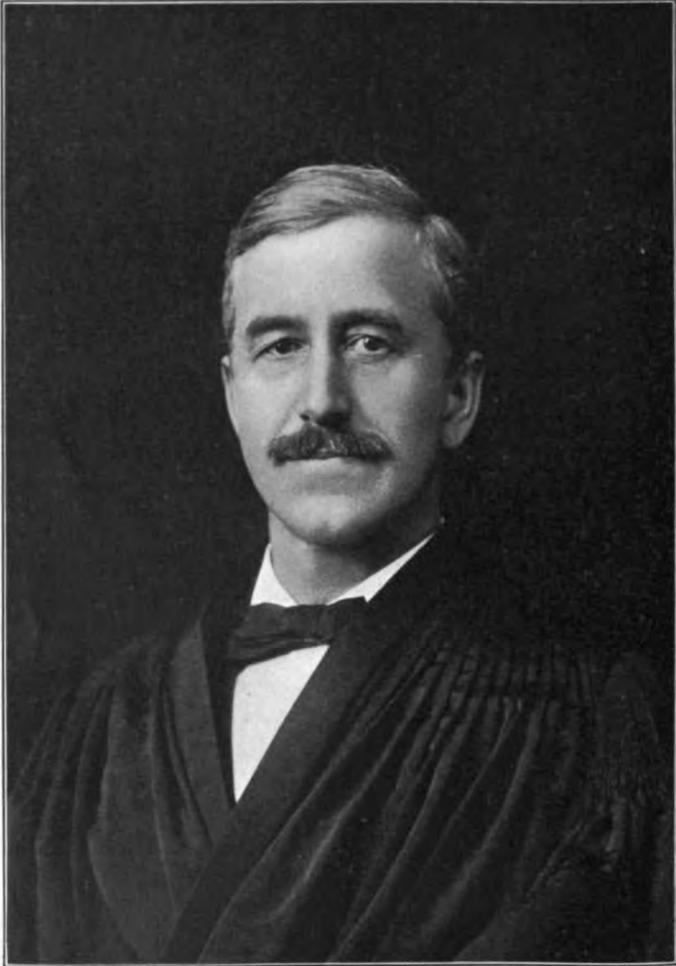
Torrens System. Committee of Uniform State Laws Conference authorized to study the subject further and report next year.

Uniformity of State Laws. As reported by the committee of the American Bar Association, the Negotiable Instruments Act has been passed in thirty-five states, two territories, the District of Columbia and two possessions; the Warehouse Receipts Act in twenty-one states and territories and the District of Columbia; the Sales Act in eight states and one territory; the Divorce Act in three states; the Stock Transfer Act in five states; the Bills of Lading Act in six states; the Foreign Wills Act in four states and the Family-Desertion Act in five states. (See under headings, Child Labor, Family Desertion, Foreign Wills Act, Incorporation, Marriage and Divorce, Torrens System.)

Woman Suffrage. Equal suffrage resolution introduced by Charles A. Boston defeated in American Bar Association.

Workmen's Compensation. The matter was discussed by Commissioners on Uniform State Laws and referred back to a committee.

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ARTHUR PRENTICE RUGG

**CHIEF JUSTICE OF THE SUPREME JUDICIAL COURT
OF MASSACHUSETTS**

(Photo by Chickering)

The Green Bag

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Number 11

Changes in the Massachusetts Supreme Court

CHIEF JUSTICE Arthur Prentice Rugg of the Supreme Judicial Court of Massachusetts took the oath of office Sept. 20. The appointment came as a surprise, but the promotion of the youngest Associate Justice has been well received both by the bar and by the general public. The retiring Chief Justice, Marcus Perrin Knowlton, commended his successor in the following words:—

“Since his appointment as an Associate Justice of the Supreme bench, five years ago, Judge Rugg has done excellent work with constantly increasing power and understanding. His opinions have had a clear and attractive style with good reasoning.

“His cases have been investigated thoroughly and carefully, so far as authorities are concerned. His judicial work has commended itself to all whom it has concerned.

“He has an attractive personality, with sufficient dignity and withal a kindliness and sympathy which commended him. He is a delightful and elegant gentleman, and his qualifications combine to make him popular with the bar in a high degree.

“He will make an excellent Chief Justice. In ten years from now he will be generally recognized as an unusually strong judge. He is that now because of his exhaustive methods in preparing decisions and opinions. It is a good appointment.”

Chief Justice Rugg is a splendid example of a man who started life without any notable advantages and earned by hard work the honors which have come

to him. He was born in Sterling, Mass., Aug. 20, 1862, and was educated at Amherst College and Boston University Law School. He began practice with former Congressman John R. Thayer at Worcester, under the firm name of Thayer & Rugg. He was president of the Worcester Common Council in 1895, assistant district attorney 1893-97, and city solicitor of Worcester 1897-1906. In connection with his duties as city solicitor he became recognized as an authority on water rights and grade crossing litigation. Especial attention was attracted to his ability when he tested the constitutionality of the street railway law of 1898 before the Supreme Court of the United States. Since going on the Supreme bench in 1906, he has written some notable opinions. His amiable manner in court and his personal charm have won him a host of friends among the members of the bench and bar.

The *Springfield Republican* says of the new Chief Justice:—

“He is and always has been a man of the people, of plain habits and sympathies, but ever a student, devoted first of all to that jealous mistress, the law. His professional standing when he went on the bench was conceded, he has made a fine record there, and his elevation to the distinguished company of the chief justices of the Massachusetts supreme court—since 1830 these men have been Lemuel Shaw, George Tyler Bigelow, Reuben Atwater Chapman, Horace Gray, Marcus Morton, Wal-

bridge A. Field, Oliver Wendell Holmes and M. P. Knowlton—will be recognized by the bar of the state as fit. He possesses the judicial temperament and an excellent knowledge of the law."

It has been remarked that an eminent member of the Suffolk bar, shortly after Mr. Rugg's appointment to the Supreme Court, prophesied that he would one day be made Chief Justice. He discerned in the new judge the capacity and disposition to take pains, to be thorough, to work hard, and to elaborate his work to a high measure of perfection.

The retirement of Chief Justice Knowlton, on account of failing eyesight, has been deeply regretted. His work on the Supreme bench, marked by untiring industry, a quick and accurate mental grasp, and an unusual faculty for lucid

expression, have stamped him as one of the Court's great Chief Justices. A man of robust constitution, he is forced to give up his judicial duties at the age of seventy-two by an affliction brought about by the very intensity of the labors which his good general health has enabled him to perform.

The vacancy due to Chief Justice Rugg's promotion has been filled by the elevation of Justice Charles Ambrose De Courcy from the Superior to the Supreme bench. A successful advocate before he was made a Superior Court judge nine years ago, of fine mental powers and eminently judicial qualities, and possessing literary and oratorical gifts as well, he is considered as worthy as any one who could have been chosen from the Superior bench for this honor.

The Progress of the Law in the United States¹

BY FREDERICK N. JUDSON, OF THE ST. LOUIS BAR

WE LIVE in a progressive age and in a progressive country, and the law in such an age and such a country should certainly be a progressive science. When we consider the science of jurisprudence apart from the practical administration of the law, we can not hesitate in saying that it is a progressive, developing science, adapting itself to the ever-changing and developing features of our industrial civilization. We are told by Sir Henry Maine that even in the progressive races of mankind, social necessities and social opinion are always more or less in advance of law, and that legislation is the final agency by which law is brought into harmony with so-

ciety. At no time and in no country has legislation been so active, at least in attempting to adjust the positive law to the social needs, as it is in our own time and country, and we may add that at no time has public opinion, the mighty force by which the world is governed, been as effective as it is now in investigating social needs and in searching for adequate remedies.

But apart from this legislative activity of our time, we have impressive illustrations of the developing power of our jurisprudence to meet the new and complex conditions of a progressive civilization. In our own country, under what Mr. Bryce terms our rigid written Constitution, the power to regulate commerce granted to the federal Govern-

¹Annual address before the Colorado Bar Association, delivered June 30, 1911.

ment in the time of the stage coach and sailing vessel has been applied to the successive development and application of steam and electricity. The necessities of a commercial age led to the introduction of the Law Merchant through Lord Mansfield into the common law. The fundamental principles of the law of contract have been applied to the modern intercourse through the telegraph and telephone. The common law of the innkeeper is applied to our great modern caravansaries; the law of the road to the motorcycle and the automobile, and the law of trespass to the modern air ships.

When we turn from this progressive development of the law through legislative activity, and the judicial construction and application of the rules of the common law and the words of our rigid constitutions, and turn to the actual administration of the law, we hear on every side complaints that the progress of the law is not commensurate with that of human society. At no time in the history of the world have such means of thorough and systematic education been afforded to lawyers as in our time, and yet we hear on every side the complaint that the actual administration of the law, both as to public and private rights, is unsatisfactory. Not only has this been voiced by popular journals, but by the conspicuous leaders of our profession, in our legal journals and in our American and state bar associations.

It is a very grave situation, when the administration of the law of the country and the efficiency of our judicial system are distinctly arraigned by our foremost citizen, the President of the United States, who said in an address shortly before his election as President:

"If we are asked in what respect we have fallen farthest short of our ideal conditions in our whole government, I think we would be justified in answering, in spite of the glaring

defects of our municipal government, that it is our failure to secure expedition and thoroughness in the enforcement of public and private rights in our courts."

This sentiment has been repeated by him in public addresses and in official messages to Congress since his election. Thus in his first annual message to Congress, the President said: "In my judgment, a change in the judicial procedure with the view of reducing its expense to private litigants in civil cases and facilitating the dispatch of business to final decisions in both civil and criminal cases constitutes the greatest need in our American institutions."

No one in the United States was better qualified to speak on this subject, as President Taft had rendered many years service on the federal bench, and as Governor of the Philippines had observed the practical working of different systems of jurisprudence. These words, challenging the efficiency of our judicial system in the practical administration of justice, have made a profound impression upon public as well as professional opinion and deserve our most thoughtful attention.

It is obvious that the delay of justice is in effect a denial of justice. This was true in the time of Magna Carta, which contained a solemn promise of the King, for himself and his heirs, that he and they would not sell or deny or defer right or justice to any men. Shakspeare makes Hamlet enumerate the law's delays among the unsupportable ills of life. Yet we are told that in our own time, under our boasted free American institutions, the delay of justice, in civil as well as criminal causes, is greater than in any other civilized country of the world.

The subject of delay and uncertainty in the administration of justice was exhaustively considered by the American

Bar Association some twenty-five years since, and the most searching investigation was made by a committee composed of such men as David Dudley Field, Judge John F. Dillon, Col. James O. Broadhead and others. It was found that the average length of a civil lawsuit varied in the different states from a year and a half to six years. The committee reported that if it were possible to put into ten words the chief causes for present delay and uncertainty in our judicial administration, they would say: "Complex procedure, inadequate judiciary, procrastination, retrials, unreasonable appeals, uncertain law."

The subject has been frequently discussed in the American Bar Association since that time. A special committee was again appointed in 1907, charged with the duty of considering evils in judicial administration and remedial procedure, and suggesting remedies and formulating proposed laws. This committee confined its recommendations to the federal procedure, and recommended that the finding of a jury upon issues of fact should only be set aside when it was clear to the appellate court that some error had intervened which caused a miscarriage of justice.

The general subject of delay and uncertainty in the administration of justice has been discussed in numerous bar associations and in the organs of public opinion throughout the country. Public as well as professional opinion has also been directed to the very great contrast presented between the administration of justice in the English courts and those of this country, and the vastly greater expedition in the procedure of the courts in the former than in the latter. This contrast is the more noticeable in that we have inherited the common law and the jury system for the trial of issues of fact from England, and we

really preceded England in simplifying our rules of evidence and in the adoption of codes of procedure. But the legislative reorganization of the English courts under the Judiciary Act of 1873 was carefully prepared and matured by the best legal minds of the country before enactment into law. Under this act, not only were the ancient forms of action abolished, but also the ancient courts, and provision is made, as far as it can be made by legislative act, for the fusion of law and equity. While the right of trial by jury is preserved in all matters appropriate for jury trials, it also is provided that wherever there is a conflict between the rules of law and the principles of equity, the latter shall prevail. Any division of the court may grant an injunction, when it shall appear that it is just and convenient that such order shall be made, and may award damages for and in substitution for such injunction. It is provided by statute that the holder of a promissory note or other negotiable instrument may have summary judgment, unless the defendant show upon oath reasonable grounds of defense. In the criminal prosecutions, the contrast between the English procedure and our own is even more noticeable, and has been the subject of frequent comment. It is true that until recently there was no right of appeal in criminal causes in England. But even with that, as was forcibly illustrated in the recent *Crippen* case, the delays which seem necessarily incident to a criminal prosecution in this country, where the defendant has means to pay for a defense, and the technicalities incident to the drawing of indictments, with which we are so familiar in this country, are unknown in England.

It may be said generally, therefore, that the procedure in England, in both civil and criminal actions, is far simpler

than in any state in this country. Law and equity have become practically blended so far as they can be, and under the rules of procedure made by the courts, questions of practice which take up so much of the time of our appellate courts are almost unknown. It was said by a distinguished English judge some twenty years ago that it could be asserted without contradiction that it is impossible for an honest litigant to be defeated by any technicality, any slip or misdirected step in the litigation, for the law has ceased to be a scientific game which may be won or lost by playing some particular move.

We find, therefore, that in the promptness and efficiency of their judicial system in the enforcement of public and private rights, we are in the United States far, far behind England and her colonies, and indeed, any country of the civilized world. Our constitutions contain the guarantee of Magna Carta, that justice shall be administered without sale, denial or delay, and yet justice is delayed, sometimes for years, in the courts of our states and in the federal courts. In my own state, that of Missouri, despite the organization of intermediate appellate courts, our Supreme Court is some three years and over behind its docket. More than this, not infrequently cases duly submitted are held under advisement without decision for months and even years. Our experience, I am told, is not exceptional in this regard, but that substantially the same conditions exist in many of the states of the Union. It is true that criminal appeals are not subject to the same delay in hearing in the appellate courts; but even in such cases, the delays incident to reversals and retrials on account of technical defects in procedure are a reproach to the administration of the law and are fast becoming a national scandal.

In seeking to remedy this admitted inefficiency or our American judicial system, the American Bar Association has recommended that the whole judicial power of the state, at least for civil causes, shall be vested in one great court, of which all the tribunals shall be branches or divisions, that being in effect the English system. The plan contemplated such a reorganization of the judicial system as to prevent not merely needless waste of time, but to prevent all duplications of records, and the like, thus obviating the expense to the litigant and cost to the public. While there is great merit in the suggestion, the difficulty lies deeper than in any matter relating to the formal constitution of our courts.

Those who have followed the course of English tribunals are very much impressed with the rarity of questions of pleading and practice, even in the trial courts, and their almost entire absence from the courts of appeal. Such questions as are frequent in the courts of appeal in this country, as to whether exceptions were properly saved to the rulings of the court, whether matter appears in the bill of exceptions which should have appeared in the record proper, or in the record, which should have been matter of exception, are practically unknown in England.

Those who have attended criminal trials in England are very much impressed with the contrast with such trials in this country. Challenges of jurors, we are told, are as rare as challenges of judges are in this country. Furthermore, both in civil and in criminal trials, questions of evidence are extremely rare; while in this country, in a contested trial, they are almost incessant.

In an address to the Minnesota Bar Association in 1906, Judge Amidon of

the United States Court of South Dakota said that in the investigation by the American Bar Association in 1887, it was found that in sixty per cent of the cases reviewed in the appellate courts of this country the appeals turned upon questions of pleading and practice, and that he had made an investigation and had found that since that time conditions had not improved, but had grown worse. He made a comparison with the high law courts of England for the same period, and found that new trials were granted in less than three and a half per cent of the cases, while in this country, in over forty per cent of the cases. In England, he said, there was no such thing at this time as a bill of exceptions, and that they did not recognize the American rule that prejudice was presumed from error.

In searching for the reasons for the lagging steps of this country in this matter of judicial reform, we must recognize at the outset that the political development of this country, with its complex federal system, with rigid written constitutions both in the state and nation, have not only made the operation of public opinion slower, but they of themselves have tended to intensify professional conservatism and to make our lawyers and judges, from their training, become strict constructionists and so affected with the spirit of what may be termed legalism, that they ignore the substance in searching for technical arguments and objections. The dockets of our courts are crowded with a class of constitutional questions which would not be raised under the English system. Professor Wigmore, in his *Historic Survey of the Law of Evidence*, attributes the backwardness of this country in this department of judicial reform to the partisan spirit of our bar, to its habit of contesting desperately on each

trifle and to the doctrine of presumption of error from erroneous rulings that tempt counsel to push up to the appellate court every ruling on evidence. He thinks future reform must come in the slow formation of professional habits among our lawyers.

In this connection we must not overlook the fact that our government was organized under the distinct theory that the permanent well-being of the people was best secured by limiting the influences of temporarily existing causes, and by this temporary restraint allowing the sober good judgment of the people, through their representatives, to control. This is the political philosophy underlying our complex organization of sovereign representatives of the public under rigid written constitutions limiting the legislative power. These constitutional restraints on men therefore, as well as their liberty, are to be reckoned among their rights.

While these fundamental differences in our political conditions may account in a measure for the lagging steps of judicial reform in this country, and may make an effective reform more difficult, they do not render it hopeless. In the words of Mr. Lowell, our constitutions obstruct the whim, but they do not defeat the will of the people. It would be a lasting reproach to our American system, of which we are justly proud, if we are obliged to confess that we cannot remove the causes which delay the administration of justice.

The evil cannot be remedied by statutory forms of procedure. We find today in the states which have adopted such reform codes, the same complaints of the delays of the law as is found in the states which have adhered to the common law pleading. In my own state, the reform code of pleading was adopted immediately after that of New

York, and yet the delays of the law have in late years grown steadily worse and worse. The opinions of the courts in these states that have adopted the reform code of pleading are filled with questions of practice and pleading, and in this respect excite the amazement of observers from England and the Canadian Provinces.

The situation in this country in the administration of justice is the more intolerable, and indeed indefensible, when we consider that the investigations into historical jurisprudence have disclosed that extreme technicality is the sign of an undeveloped system of law, in which legal rights are subordinate to the procedure to enforce them, wherein the substance is secondary to the form. Centuries ago, the main business of the courts was in ascertaining rules that the litigant should follow this established form or that, and according as he bore the test, he should either be punished or go acquit. Formalism in the early stages of society was a step, but one of the first steps toward a rational system for determining controversies. It was better than private war. Thus the determination by chance or wager of battle was an advance upon the primitive state where men took the law into their own hands.

The important fact, therefore, in this progressive development of our jurisprudence is the growing recognition that the demand for simplicity in procedure does not spring from ignorant reformers or radical iconoclasts, but is a progressive step in a rational advance of progressive jurisprudence. Forms were regarded with superstitious reverence in the early stages of society, but we now recognize that the simpler the procedure, the better it serves the purpose.

If we search for the causes of this progress made in the administration of justice in England, we are confronted at

the outset with the tremendous power of the judiciary in that country. Not only are they appointed for life, instead of being elected for comparatively short terms as is the almost universal rule of the state courts of this country, but the social system there prevailing gives the judges a vastly greater prestige than any judges enjoy in this country. Those who have attended English trials are impressed with the tremendous prestige which there attends the office of judge. Questions of pleading and evidence and of practice are infrequent because we are told the judges discourage them. The contrast afforded by this country, particularly in the case of our state courts, is very striking. Our judges have far less power, and in the state courts, as a rule, cannot express any opinion to the jury upon questions of fact. In some states they are forbidden to instruct the jury except in writing, or at all upon the facts in evidence. The rules of procedure are made, not by the judges as in England, but by statute. The intimate relation of the position of the judges to any prospective reform is emphasized in the recommendation of the American Bar Association already referred to, that the statutes should only deal with the general forms of procedure, leaving the details to be fixed by rules of court. Thus, President Taft in the address already cited has laid stress upon this reform which, he says, lies at the very basis of any hope of progress. He says the English system, consisting of a few general principles laid down in the Practice Act, and supplemented by rules of court to be dictated by the Supreme Court of Adjudication, has worked very great benefit to the litigant and has secured much expedition in the settlement of controversies, and has practically eliminated the discussion of points of pleading and practice in the appellate courts.

It is interesting to note in this connection that public announcement is made that the Chief Justice of the Supreme Court of the United States has appointed a committee of that court to prepare new rules of procedure in courts of equity. As is well known, practice in the federal courts has been conducted under these rules since the foundation of the Government. That great tribunal has realized that the time has come for the simplification of that time-honored procedure. But obviously how much better it is that these revised rules should be made by the court which is to construe and apply them, than that they should be revised by any act of Congress.

In this connection we should observe that much of the current criticism which is directed against our courts for alleged technical decisions and consequent delays in the administration of justice is without warrant and unfair, as it is really more chargeable against the existing system than against the judges who are compelled to administer it. Judges are confronted with mandatory restrictions of constitutions and statutes requiring written opinions, and otherwise preventing expedition in the administration of justice and apparently framed for the very purpose of taking discretion out of our courts.

The true remedy must be found in the repeal of such constitutional and statutory provisions and in giving the judges control over the procedure of the courts, to be regulated by their own rules. It is this reform that has worked such a revolution in the judicial procedure of Great Britain, having practically removed questions of practice from their appellate courts.

The progress of the law is now demanding attention, not only in relation to judicial procedure, but to another cause for delay in the administration of justice,

that growing out of the overwhelming accumulation of case law in our printed reports. The enormous volume of these reported cases is now such that an exhaustive practice by precedent has become impossible. The Fifteen Treatises and as many foreign reports in Lord Coke's time, three centuries ago, have grown to many, many thousands. With the increase in the number of our courts, supreme and intermediate, in the forty-six different states, and the special courts such as the Court of Commerce and the Customs Appeals, in addition to the regular federal courts, the volumes of reported decisions are increasing at an appalling rate. Numerous remedies have been suggested for this overwhelming accumulation of case law, such as restriction of the right of appeal, limitation upon the publication of opinions other than those of general interest as precedents, the non-publication of dissenting opinions; but after thorough discussion, it was resolved by the American Bar Association that such remedies were then impracticable, but declaration was made, however, in favor of writing shorter opinions, especially in cases turning on facts, and those not useful as precedents.

This vast accumulation of case law has had an influence even upon the quality, and certainly upon the length, of judicial opinions.

Stenographers, though indispensable in the exigencies of modern life, have not been an unmixed good in the preparation of judicial opinions. I have heard learned judges say that they had no time to condense, and that they were compelled to give the profession the results of their unrevised dictations. This vast accumulation of case law has not been without its deteriorating effect upon our own profession. It was said by Mr. William Dudley Foulke, in a recent address before

the Indiana Bar Association, that in former generations, the lawyer had Chitty, Blackstone, Kent and the statutes of Indiana, and that if he had a question to solve, he would go out into the woods and think it over, and that the result was that they had good lawyers and good judges. Now, he says, the lawyer hunts up the authorities and finds twenty-five on one side and twenty-six on the other, some of greater and some of lesser authority, and he tries to balance them as best he may. The result was, he said, that we had poorer lawyers and poorer judges, and a great deal harder work in finding out what the law was. And he added that there was no nation in Europe, outside of Russia and the Balkan Peninsula, where the criminal laws were as ineffective as those of the United States.

If we encounter these conditions in this generation, what must it be in those that are to come after us?

Whatever remedies may be suggested, this overwhelming accumulation of case law must necessarily have a profound effect upon the doctrine of judicial precedent, which has ever been the distinguishing feature in the development of American jurisprudence. We have been told that the judicial precedent is the life and soul of our law. Tennyson characterizes it as "The lawless science of the law, and the codeless myriad of precedent, and the wilderness of single instances.

Some tell us that codification is the only remedy. But there is a practical difficulty which really makes such a suggestion academic rather than practical. We have no central government authority, such as was exercised by Justinian and Napoleon, to summon the great jurists of the country to the task of reducing our written law to a code which shall have official sanction. We have,

however, a process of tacit and quasi-codification going on in a manner consistent with the character of our people and with our institutions. Thus there is a tacit codification in the contributions of our treatises and cyclopedias to the statement of the written law. There is also a statutory codification *pro tanto* going on, not only in the different states of this country, but also in England and her self-governing colonies. Thus the American Bar Association, with the co-operation of the commission for the promotion of uniformity in legislation in the United States, have done notable service in proposing drafts of laws which have been enacted in many of the states, such as the Negotiable Instruments Act, the Divorce Act, the Stock Transfer Act and the Act concerning Wills executed outside the state of the testator's residence; and these different acts have been adopted in many of the states of the Union. These measures, however, must in the nature of things be palliative only. However clearly the great guiding principles of the law may be determined, the infinite complexity of human transactions will ever call for new applications of these controlling principles. The only effective remedy lies in the limitation of the writing of formal written opinions to those cases which are presumably important as precedents. I am aware that this may shock some professional prejudices; yet it must be a matter of common knowledge that our printed volumes of reports are crowded with opinions which can be of no conceivable value for the decision of future controversies.

In a recent visit to the state of Tennessee as a guest of the Bar Association of that state, I was informed that the Supreme Court of that state was up with its docket. That was of such interest to me, coming from a state which had

been years behind its docket ever since I had been a member of the bar, that I was interested to ascertain the reason, and I found that for many years the Court had refrained from writing opinions except in cases which in their judgment were important as precedents.

I have been interested in observing that our legal brethren in Colorado are confronted with the same problems in regard to remedying the delays in the administration of justice and the relief of your Supreme Court which have confronted us in Missouri. I find that your Supreme Court, though you have had since the admission of the state to the Union the same reform code of procedure which has been adopted in other states, as in my own, is still some three years behind its docket. That has to me a familiar sound, as that same condition exists in Missouri, although we have had intermediate appellate courts for many years, and a recent session of our legislature established a third; not temporary as in your state in the recent act, but permanent. We also tried once, some twenty years ago, the experiment of commissions to assist the court in the writing of opinions, and this same expedient has been resorted to by our last General Assembly. I cannot advise you from our experience that your remedy will be effectual, as we have found both of these remedies, that of intermediate courts and of commissions, ineffectual, though they may seem to palliate the evils of the existing congestion. I am particularly impressed with one provision of your act of the recent General Assembly, in relation to Courts of Review, which indicates, and may be effective, that its framers had a clear perception of the causes of the evils of the present situation. Thus it is provided in section 7 of the act referred to, with reference to the proposed Court of Appeals, that the

preparation of written opinions giving reasons for the conclusions reached, especially in the affirmance of judgments, shall be discretionary; and the Court may, in its option, dispense therewith in such cases as it shall be so advised.

This suggests that your Supreme Court has held, in harmony with other states, that the requiring of written opinions as to its reasons in decisions was discretionary with the court. This was undoubtedly the rule at common law. Thus it was said by Lord Coke, Coke's Reports, Part III, pref. 5, "In the judicial records of the King's Courts, the reasons or causes of the judgments are not expressed, but wise and learned men do, before they judge, labor to reach to the depth of all the reasons of the case in question, but in their judgment express not any; and, in truth, if judges should set down the reasons and causes of their judgment within every record, that immense labor should withdraw them from the necessary service of the Commonwealth, and their records should grow to be like *Elephantini Libri*, of infinite length, and in mine opinion, lose somewhat of their present authority and reverence; and this is also worthy for learned and grave men to imitate."

If my Lord Coke had this apprehension of the *Elephantini Libri* in the meagre libraries of his time, what would he have thought could he have looked centuries ahead and foreseen the many thousands of law books which are now searched for judicial precedents? Well may he consider his words, that these records would lose some of their present authority and reverence.

Blackstone says on this subject (Book I, p. 71), that the reports are histories of the several cases, with a short summary of the proceedings which are preserved at large in the record, the arguments of both sides and the reasons of the Court

given for its judgment, taken down in short notes by persons present at the determination.

There was a very interesting discussion of this subject of written opinions of judges by Justice Field, then Chief Justice of the Supreme Court of California and afterwards of the Supreme Court of the United States, in *Houston v. Williams*, 13 Calif. 24, in 1859, where the Court, citing these remarks of Lord Coke, held invalid a statute of California requiring the Supreme Court to give the reasons of its decisions in writing. It was said that the practice of writing opinions was of modern origin, and that the legislature could no more lawfully require the Court to give the reasons of its judgment than the Court could require the legislature to give the reasons of its enactments. The reports, he said, were full of adjudged cases in which opinions were never delivered. The facts are stated by the reporter and the points arising thereon, and are followed by the judgment rendered thereon. The practice of giving reasons for judgment, said the Court, had grown into use in modern times. Formerly the reasons, if any, were given orally by the judges and taken down by the reporters.

The opinion of Justice Field in this case is worthy of very careful study by the members of the bar, as well as by the judges of our appellate courts. He said that all right minded judges in important cases, when the pressure of their business will permit, will give such opinions; but it was not every case that would justify the expenditure of time to write an opinion. Many cases involve no new principle, and are appealed only for delay. It could serve no purpose of public good to repeat elementary principles of law which have never been questioned for centuries. The Court must, therefore, exercise its own discretion as to the

necessity of giving an opinion upon pronouncing judgment, and if one shall be given whether it shall be oral or in writing. In exercising that discretion, the authority of the court is absolute, and the legislative department is incompetent to judge it.

This opinion has been cited approvingly by the Supreme Court of Colorado (see *Bullet v. McGerr*, 14 Col. 577); and the same ruling has been made by the Supreme Court of Arkansas (*Vaughn v. Hart*, 49 Ark. 160).

The experience of those of you who have served in the appellate courts, will confirm the opinions that it is not the decision of cases, but the labor of making up the statement of the complicated and voluminous records, which involves the great labor of the court and the consequent congestion and delay in clearing the dockets of our appellate courts. Many cases are in effect decided by the judges upon the oral argument. In the English Court of Appeals such cases are decided in oral opinions by the judges soon after the argument.

Notwithstanding all this, it is well known that in many of our states are statutes, and in some of them constitutions requiring written opinions by the judges. In my own state not only is there such a constitutional requirement as to the appellate courts but there is also a statutory provision requiring the judges of the courts to make statements of the cases in their opinions so that they may be understood without reference to the records. When we connect with these requirements the further very general prohibition of other than written charges to the juries, we cannot wonder that the rule, that prejudice shall be presumed from error, which has been so fertile a cause of the scandalous delays in the administration of American justice, should have become so firmly established

in the judicial administration of this country.

When we analyze this situation we cannot fail to discover that part of these difficulties in our present situation grow out of our depreciation of the judicial office. Reference has already been made to the tremendous prestige of the judge and its potent result in the effective and speedy administration of justice in the English courts. In this country, with our short terms, meagre salaries and prohibition of any discretionary power of the court in charging the jury, we have in effect made the trial judge but an umpire between contending counsel. We cannot hope to remedy this situation until we enlarge and dignify the position of the judge, until we place in the judiciary the power of making rules for the conduct of the business of the courts, and recognize the rightful discretionary power of the courts in determining in what causes they should give the reasons of their judgments. It is no doubt true that the statutory requirements in many states and the general practice of written opinions by appellate courts, was based upon considerations of public policy. A written opinion was evidence of a proper consideration of the cause. That is well enough in its way, but it must yield to the primal consideration of the prompt and efficient administration of justice. You doubtless have heard of the drastic remedy proposed in the California constitution, which required every judge to make an affidavit before he drew his salary, that he had had no case under advisement longer than ninety days.

Reference has been made to the vast difference between the position of the judiciary in this country and in England and Canada, and the profound influence this has had, particularly in the question of the reform of procedure. There is another phase of this question which

cannot be overlooked in a discussion of the future development of our jurisprudence. With a few exceptions, the system of a judiciary elected by the people prevails in all the states of this country. It is not my purpose to discuss the merits and demerits of the elected or appointed systems. This much is clear, however; that the selection of judges in a country of written constitutions, where the courage and independence of the judiciary are essential to private and public security, requires the supreme exercise of intelligence and self-restraint on the part of the people. The judges selected by popular vote for the highest state courts in the states of the United States have, as a rule, ranked high in ability and character, and have compared well with those selected by the appointive system in the federal courts; and these facts bear eloquent testimony to the high and discriminating intelligence of the American people in the performance of this supreme duty of citizenship in the selection of their judiciary. Not only learning and ability, but also independence and fearlessness in the discharge of judicial duty, are essential for the security of private rights, and in this country, for the integrity of our political institutions.

Such a proposition as that of the recall applied to the judiciary, whereunder the discharge of judicial duty would be subject to the continuing threat of dismissal in case of popular disapproval of the performance of duty, I cannot but think is a direct blow to the judicial independence which is an essential to our political system, and would certainly aggravate the existing imperfections in the administration of justice.

The true remedy, therefore, lies not in the further depreciation of the judicial office, but on the contrary in its elevation and increased dignity. We

must elect judges who are worthy to be trusted, and no step can be taken more fatal to the hopes of remedying this existing discredit of our judicial administration than in the further subjecting of our judges to the passing waves of popular whims and prejudice.

Every effective remedy which has been suggested for the existing congestion and inefficiency of our appellate courts involves an increased discretion and independence in the members of our judiciary.

I would not have you conclude, however, that there are no encouraging signs of progress. The fact that we have agitation is itself a cheering sign. Indifference in the face of these depressing conditions would be the worst possible condition. It is far better that reform should come from within the bar than from ill-considered legislation without the bar. Our profession is rightly conservative. Burke said in his speech against Hastings: "Justice is a circum-

spect, cautious, scrutinizing principle, full of doubt, even of itself, and fearful of doing injury."

We have encouraging signs in different states that the public opinion, aided and guided by men of our own profession, is seeking a remedy for these conditions. The Juvenile Court established in Denver has been copied in many states of the country. Chicago has established a Municipal Court, which no doubt will be followed in other cities, where simplicity of procedure and summary remedies have literally brought justice home to the masses of the people. Let us take courage from these examples and illustrate in our day and generation that we are the worthy followers of those members of our profession who, disregarding all personal interest, have been the leaders in the movements for rescuing the law from the shackles of feudalism and barbarism, and in making it an effective servitor of mankind.

To a B. F. P.

BY HARRY R. BLYTHE

DEAR b. f. p., you seem to be
A very happy mortal,
Most favored of unfortunates
Within the legal portal.

Courts never shame your honest name,
They speak of you not lightly,
But dwell, instead, upon your worth
And do it most politely.

Ah! that they would be half as good
To us who argue cases,

But no, alas! our lines are cast
In most unhappy places.

You get the cash and we the lash,
Yet think not we are jealous.
Just bring your pleasant case to us,
You'll find us mighty zealous.

Reconstruction in the South

The Self-Reconstruction of Maryland, 1864-1867. By William Starr Myers, Ph.D., Princeton University. Johns Hopkins University Studies in Historical and Political Science, series 27, nos. 1-2. Johns Hopkins Press, Baltimore. Pp. 131. (50 cts., paper.)

History of Reconstruction in Louisiana (through 1868). By Prof. John Rose Ficklen of Tulane University, author of Constitutional History of Louisiana. Johns Hopkins University Studies in Historical and Political Science, series 28, no. 1. Johns Hopkins Press, Baltimore. Pp. ix, 231 + index 3. (\$1.50 cloth, \$1 paper.)

Legislative and Judicial History of the Fifteenth Amendment. By John Mabry Mathews, Fellow in Political Science. Being series xxvii, nos. 6-7, of University Studies in Historical and Political Science. Johns Hopkins Press, Baltimore. Pp. x, 116. (\$1.)

The Basis of Ascendancy: A Discussion of Certain Principles of Public Property Involved in the Development of the Southern States. By Edgar Gardner Murphy. Longmans, Green & Co., New York. Pp. xxiv, 248. (\$1.50 net.)

AS THE Civil War gradually ceases to occupy a prominent place in the experiences and memories of the American people, it subjects itself more and more to that critical examination which strives only for an impartial estimate of underlying motives. The question of the negro, for whose emancipation the conflict was really undertaken in spite of the various surface controversies, becomes less of a burning issue. The problem what to do with the negro, now that he has been given his freedom, becomes less of a sectional problem. The project of negro enfranchisement,

so recklessly undertaken by the conquerors as soon as their victory was obtained, has met with failure, and the blunders of the reconstruction policy are oftener admitted than denied. The negro question continues serious, but is fortunately one which can now be studied with greater impartiality and debated with less acrimony than not a great many years ago.

Abraham Lincoln was more moderate than his party, but it is not recorded that he opposed the radicalism which molded federal policy during the few years following the War. Even a Lincoln, had his life not been terminated at a crucial moment, could hardly have hoped to withstand that radicalism with any hope of success. As Professor Ficklen says, "Is it likely . . . that he could have prevented the Southern states at the close of the war from exasperating the feelings of the Republican [would not the word "Radical" be more accurate here?] majority in Congress by unwise vagrant laws, and by premature attempts to restore 'rebels' to a participation in state and federal legislation? Or could he have persuaded this Congress to relinquish its determination to deny the suffrage to the 'rebel' for his punishment and to grant it to the freedman for his protection and

for the perpetuation of party supremacy? Such influence would probably have been beyond the power even of Lincoln's greatness."

The party which had devoted itself to the truly noble cause of emancipation, as soon as the War was over gradually fell under the sway of a fanatical extreme left, so to speak. The North was not as a whole in favor of negro enfranchisement, as Mr. Mathews shows in his scholarly sketch of the history of the Fifteenth Amendment. In Pennsylvania the proposal was bitterly assailed. The psychology of the process which resulted in the adoption of the idea of negro enfranchisement as a party policy would afford an interesting subject for investigation. Mr. Mathews has described the coalition which brought about the passage of the Fifteenth Amendment. This coalition united three groups, nationalists, humanitarians and politicians, neither of which succeeded in getting exactly what it desired. It would probably be easy to show that the humanitarians were the strongest factor in the coalition and that the party was practically subjected to their dictation, even if they did not get all that they wanted.

Supported by humanitarian prejudices propagated by the zeal of dangerously one-sided agitators, the political leaders were able to carry out an extreme policy unfavorable to moderation and conciliation. The most substantial element of Southern citizenship which had survived the War and was fittest to rebuild the conquered states on their ruins was completely outlawed to the immeasurable detriment of the South. As Mr. Myers says, it may have been right to deprive men disloyal to the Union of their citizenship, but it was not right to disfranchise the leading men of the South wholesale, on the most shadowy

and trivial pretexts, merely because they might be considered remotely in sympathy with the lost cause. In Louisiana and others of the conquered states this disfranchisement led to a situation gloomy indeed, and a long period of sordid strife was to come before tranquility could ensue. The late Professor Ficklen has described that turmoil in Louisiana with a happy combination of the dispassionateness of the trustworthy historian with the vividness of the writer who gives to his subject a living reality. Maryland, which had not joined the Confederacy, was more fortunate. There, the radicals failed to triumph, and the Democratic party was able to control the internal policies that sooner effected the "self-reconstruction" of this state than of others.

The reconstruction policy failed to attain one of its main objects — the enfranchisement of the negro. Mr. Mathews intimates that the Fifteenth Amendment may already be in process of repeal, so far as it may be said to derive its sanction from public sentiment. The work of completing emancipation, which in a sense may still be before us, lies not in the direction of wholesale enfranchisement, but, as Mr. Murphy eloquently maintains, in that of substituting measures of development for those of repression. The aim should be not to allow the negro to vote regardless of his political capacity, but to lift him to a level which will make it possible to partake of the fruits of our modern democratic dispensation. If we could only have chosen this as the point of departure at the close of the War, a more enlightened and moderate humanitarianism might have sooner rehabilitated our Southern institutions, and have saved us years of inglorious turmoil and failure.

On Wills¹

BY LEE M. FRIEDMAN, OF THE BOSTON BAR

Fair held our breeze behind us — 'twas warm with lovers' prayers;
We'd stolen wills for ballast and a crew of missing heirs;
They shipped as able Bastards till the wicked nurse confessed,
And they worked the old three-decker to the Islands of the Blest.

—Rudyard Kipling.

IN "JULIUS CAESAR," when Shakspeare showed the mob calling on Marc Anthony to read Caesar's will before they decided on what they would do to his murderers, he illustrated both the natural curiosity over how the deceased planned to distribute his estate as well as how tremendously the provisions of a will may change the point of view. It was the fact that they, as the Roman Public, were named as Caesar's heir that stimulated the mob to revenge. So from time immemorial the provisions of wills have made and unmade men, and played an all-important part not merely in the estimate and memories of the dead but in the lives of the living. All literature is so full of stories and romances of the surprises and disappointments of heirs, and of wills, good and bad, curious and unexpected, that Kipling, in this quotation from his delightful little poem on the good old three-volume novel of bygone days, represents wills as part of the regular stock in trade of the novelist.

Most lawyers will agree with Lord Coke that "wills and the construction of them do more perplex a man than any other learning; and to make a cer-

¹Ancient, Curious and Famous Wills. By Virgil M. Harris, member of the St. Louis bar, lecturer on Wills in the St. Louis University Institute of Law, trust officer of the Mercantile Trust Company of St. Louis and author of "The Trust Company of To-day," etc. Little, Brown & Co., Boston. Pp. 454 + 18 (index). (\$4 net.)

tain construction of them exceedeth *jurisprudendum artem*." It is impossible to explain to a layman those principles of law that are involved in such cases as that of the will of the pious Jew who bequeathed his estate for the instruction of the Jewish youths of London in the learning of their religion, which the courts decided was as good as a public charitable bequest, but could not be so applied and carried out what they were pleased to call the testator's intention by using his money to maintain a Christian Foundling Asylum.

It is with a feeling of some fear that a man today writes a will without the advice of a lawyer, so the quaint and picturesque wills of the past are becoming more uncommon. The spread of the news of litigation over wills by the newspapers has done much to teach the public to heed the advice that "a man may work out his religion from within and for himself, but where it comes to writing a will, the advice of a good, level-headed lawyer cannot be overestimated."

Actual wills, as they illustrate the customs and habits of a generation or country, or as they mirror the characteristics of some famous person, are even more interesting and absorbing than the wills of fiction.

While it is curious to observe that the "Father of his Country" misspelled words in writing his will, it is a historic fact of some importance to learn that Washing-

ton made elaborate provisions to liberate all his slaves on his wife's death. He explains that: "To emancipate them during her life, would, though earnestly wished by me, be attended with such *insuperable* difficulties on account of their intermixture by marriage with the dower negroes, as to excite the most painful sensations if not disagreeable consequences from the latter, while both descriptions are in occupancy of the same proprietor; it not being in my power, under the tenure by which the dower negroes are held, to manumit them." In like manner, John Randolph — "Randolph of Roanoke" — gave all his slaves their freedom, "heartily regretting that I have ever been the holder of one," and provided a sum not exceeding \$8,000 "to transport and settle said slaves to and in some other state or territory of the United States giving to all above the age of forty not less than ten acres of land to each." Having made several codicils to his will, Randolph added a final one:

As lawyers and courts of law are extremely addicted to making wills for dead men, which they never made when living, it is my will and desire that no person who shall set aside, or attempt to set aside, the will above referred to, shall ever inherit, possess, or enjoy any part of my estate, real or personal.

Thomas Jefferson and Robert E. Lee also provided for the manumission of their slaves. Chief Justice Marshall, after directing the freeing of his body servant, provided that "if such emancipation should not be consistent with law, Robin might select his future owner from the testator's sons and daughters."

Benjamin Franklin begins his will with an elaborate introduction of himself as "printer, late Minister Plenipotentiary from the United States of America to the Court of France, now President of Pennsylvania," and bequeathed his "fine crab-tree walking stick, with gold head curi-

ously wrought in the form of the cap of Liberty" to his "friend and the friend of mankind, George Washington." He left £100 to the free schools of Boston, from which fund the well known Franklin medals are given to scholars of the High and Latin schools. £1,000 each to Boston and Philadelphia to help young married artificers under the age of twenty-five. It was this fund which has figured in repeated litigation in the courts of Pennsylvania and Massachusetts.

Alexander Hamilton drew his will fearful that his estate would prove insufficient to discharge his debts, and entreated his children to make good any deficiency.

Though conscious that I have too far sacrificed the interests of my family to public avocations, and on this account have the less claim to burthen my children, yet I trust in their magnanimity to appreciate as they ought, this my request.

Paul Revere cut off his grandson Frank "who now writes his name Francis" with one dollar.

John Sherman, whose name has been lately so often in the mouths of the public as the author of the Anti-trust Law, directed that within two years of his death, his books and papers were to be placed in the hands of some competent person who should "preface and publish an impartial biography of me with selections of my speeches and writings." Ten thousand dollars was set aside for that purpose and the testator explains that this is done "not to secure a eulogy for I am conscious of many faults, but I claim that in my duty to the public, I have been honest, faithful and true."

Martin Van Buren begins a will full of domestic affairs, yet carefully conceived and well drawn, by explaining that he has been "heretofore Governor of the State and more recently President

of the United States, but for the last and happiest years of my life, a farmer in my native Town."

Daniel Webster expressed:

My great and leading wish is, to preserve Marshfield, if I can, in the blood and name of my own family. To this end, it must go in the first place to my son, Fletcher Webster, who is hereafter to be the immediate prop of my house, and the general representative of my name and character.

Perhaps the simplest will of all is a short will of seven or eight lines by which Senator Roscoe Conkling left his whole estate to his wife. The will of the late Edward H. Harriman is hardly any longer, and his millions were given to his wife. So; too, Russell Sage's will is a model of simplicity and brevity.

Napoleon's will contains some striking passages:

I die prematurely assassinated by the English oligarchy. . . . The English nation will not be slow in avenging me.

The two unfortunate results of the invasions of France when she still has so many resources, are to be attributed to the treason of Marmont, Augerau, Talleyrand and La Fayette.

I forgive them — may the posterity of France forgive them like me.

I disavow the "Manuscript of Helena" and other works under the title of Maxims, Sayings, etc., which persons have been pleased to publish for the last six years. These are not the rules which have guided my life. I caused the Duc d'Enghien to be arrested and tried because that step was essential to the safety, interest and honor of the French people, when the Count d'Artois was maintaining, by his confession, sixty assassins at Paris. Under similar circumstances I would act in the same way.

Lord Nelson dates his will "October 21, 1805, in full sight of the combined fleets of France and Spain, distance about ten miles," and asks the royal favor for Emma, Lady Hamilton.

Dean Swift in a long and elaborate will among other legacies left his third best beaver hat and his horses to his friend,

the Reverend John Jackson, Vicar of Santry, "lamenting that I had not credit enough with any Chief Governor (since the change of times) to get some additional Church Preferment for so virtuous and worthy a gentleman."

Voltaire left a note endorsed "Mon Testament," which on being opened exhibited these lines in his own hand:

Je meurs en adorant Dieu,
En aimant mes amis,
En ne haissant point mes ennemis,
En detestant la superstition.

Lord Bacon, in 1625, bequeathed his soul and body to God, while his name and memory he left to men's charitable speeches and to foreign nations and next ages.

Philip the Fifth, Earl of Pembroke and Montgomery, with grim sarcasm begins his will:

Imprimis: As for the soul, I do confess I have often heard men speak of the soul, but what may be these same souls, or what their destination, God knoweth; for myself, I know not. Men have likewise talked to me of another world, which I have never visited, nor do I even know an inch of the ground that leadeth thereto. When the King was reigning, I did make my son wear a surplice, being desirous that he should become a Bishop, and for myself I did follow the religion of my master; then came the Scotch who made me a Presbyterian, but since the time of Cromwell, I have become an Independent. These are, methinks, the three principal religions of the kingdom, — if any one of the three can save a soul, to that I claim to belong: if, therefore, my executors can find my soul, I desire they will return it to him who gave it to me.

Item: I give my body, for it is plain I cannot keep it; as you see, the surgeons are tearing it in pieces. Bury me, therefore; I have lands and churches enough for that. Above all, put not my body beneath the church porch, for I am, after all, a man of birth, and I would not that I should be interred there where Colonel Pride was born.

Item: I will have no monument, for then I must needs have an epitaph and verses over my carcase; during my life I have had enough of these.

He goes on to say his last compliments to some of his friends:

Item: I give nothing to my Lord Saye, and I do make him this legacy willingly, because I know that he will faithfully distribute it unto the poor.

Item: I bequeath to Thomas May, whose nose I did break at a mascarade, five shillings. My intention had been to give him more; but all who shall have seen his "History of the Parliament" will consider that even this sum is too large.

Item: I give to the Lieutenant-General Cromwell one of my words, the which he must want, seeing that he hath never kept any of his own.

The Earl of Warwick, by his will dated 1296, gave his wife a cross "wherein is contained part of the wood of the very cross whereon our Saviour died." Lady Alice West, five years before the death of Chaucer and nearly eighty years before the first book was printed in England, in a will dated 1395, gave to "Johane my daughter, my sone is wyf, a masse book, and alle the bokes that I have of latyn, english, and frensch."

Mr. Daniel Martinett of Calcutta made bequests in his will:

Fifthly. To Mr. George Grey, Secretary to the Presidency, I bequeath all my sincerity.

Sixthly. To Mr. Simon Drose, Writer to the Secretary's office, all my modesty.

Seventhly. To Mr. Henry Higgenson, also of the Secretary's office, all the thoughts I hope I shall die possessed of.

Eighthly. To Mr. Thomas Forbes, all the worldly assurance which I had when I had taken a cheerful glass, though in fact a doleful cup.

The Earl of Stafford, one of the ardent followers of James II, by his will gave a permanent testimonial of his unhappy marriage.

To the worst of women, Claude Charlott de Grammont, unfortunately my wife, guilty as she is of all crimes, I leave five-and-forty brass half pence, which will buy a pullet for her supper. A better gift than her father can make her; for I have known when, having not the money, neither had he the credit for such a purchase; he being the worst of men, and his wife the worst of women, in all debaucheries. Had I known

their characters I had never married their daughter, and made myself unhappy.

In 1770, there was admitted to probate at the Deanery Court at York, England, the poetical will of one William Hickington.

This is my last will,
I insist on it still,
To sneer on and welcome,
And e'en laugh your fill,
I, William Hickington,
Poet of Pocklington,
Do give and bequeath,
As free as I breath,
To thee, Mary Jarum,
The Queen of My Harum,
My cash and my cattle,
With every chattel,
Come heat or come cold,
Sans hindrance or strife,
Though thou are not my wife.
As witness my hand,
Just here as I stand,
The twelfth of July,
In the year Seventy.

It is less than a year ago that all Boston was startled by a posthumous joke of a Miss Cora Johnson, who left a will disposing of some \$100,000 while her actual estate was less than \$100. While perhaps a more subtle bit of humor was the provision in the will of a Scotch dissenting minister, who bequeathed a sum of money to his chapel at St. Ives to provide: "Six Bibles every year, for which six men and six women are to throw dice on Whit Tuesday after the morning service, the minister kneeling the while at the South end of the communion table, and praying God to direct the luck to His glory."

A curious custom has come down from bygone ages carrying out an old bequest, on Good Friday, in the churchyard of St. Bartholomew the Great, Smithfield. "After divine service, one of the clergymen drops twenty-one sixpences on a tombstone, to be picked up by as many poor people, widows having the pref-

erence. The will providing for this is lost, and the distribution is now made out of the parish funds. The bequest is said to date several hundreds of years back."

A pretty bit of sentiment is exhibited by the will of the late Hon. James Gregory:

Having had my sympathies often aroused by reason of the extra burden and care entailed on loving mothers, poor in the things of earth, who have brought twins into the world, as an expression of that sympathy, I leave in trust to my beloved town \$1000, with the provision that the interest be divided on January first between all twins born in Marblehead during the previous year. In case no twins are born during a given year, the interest shall be added to the principal.

So the solemn moment of will-making has revealed the characters and hearts of the testators in their least disguised form. The silly and frivolous have made curious wills, the generous and great have made striking and noble and loving

gifts. To turn over the pages of a collection of wills, culled from all ages and all lands, is to get a bird's-eye view of all humanity. Farce and tragedy are curiously intermingled. Perhaps the layman is all the more puzzled and perplexed if he allows his imagination to survey the wide range of possibilities for testamentary disposition. While the emotions that are suggested by this ever recurring exhibition of the wisdom and folly of mankind leads the lawyer to join in the gladsome toast:

Ye lawyers who live upon litigants' fees,
And who need a good many to live at your ease:
Grave or gay, wise or witty, whate'er your degree,
Plain stuff or State's Counsel, take counsel of
me:—

When a festive occasion your spirit unbends,
You should never forget the profession's best
friends:

So we'll send round the wine, and a light bumper fill,

To the jolly testator who makes his own will.

The New York Plan for Commercial Arbitration

THE plan recently perfected by the New York Chamber of Commerce for the arbitration of commercial disputes is thus described by Charles L. Bernheimer, the chairman of the special committee of the Chamber on commercial arbitration:—

"The plan finally adopted by the Chamber of Commerce provides that in any matter of controversy the disputants, in order to secure the Chamber's means of arbitration, must sign a form of submission, briefly stating the nature of the controversy, and containing other simple legal data. The parties bind themselves voluntarily to submit their case and all matters concerning it to the arbitrator or arbitrators, and 'agree to

abide by and perform the decision' award, orders and judgment that may therein and thereupon be made under, pursuant, and by virtue of this submission.' They further agree that a judgment of the Supreme Court of the State of New York may be entered in any county in the state upon the award, and they explicitly waive any right to withdraw from or revoke this submission after the arbitrators accept their appointment hereunder. From the 'List of Official Arbitrators' of the Chamber of Commerce, consisting of about two hundred of its members, willing and qualified to act as such, the disputants have two options in the selection of arbitrators — they may choose one individ-

ual as sole arbitrator; they may select two arbitrators — not necessarily members of the Chamber of Commerce — who in turn shall designate a third person from the 'List of Official Arbitrators.' They may call for arbitration service upon the Committee of Arbitration or a quorum thereof; this is an additional method of arbitration offered by the Chamber.

"The advantages to the commercial world of such an arbitration service as organized by the Chamber of Commerce are manifold. Our courts are congested, the calendars crowded, and cases may have to wait years for judicial settlement. The legal trials mean delays and adjournments that cause loss of time, money and energy and constant annoyance to business men. Often, cases require prompt decisions; a protracted settlement may mean to the innocent party financial loss far beyond the mere amount directly involved, and even though a final decision after long delay may set him right on his original contention, he has suffered far beyond the power of the

verdict in his favor to compensate. Merchants often submit to what they consider injustice rather than face a siege of litigation, thus lowering the standard of business ethics. It is in the settlement of honest differences that arbitration offers its chief advantage. Where one of the parties is dishonest, arbitration is helpless and the machinery of the law must be appealed to.

"The comprehensive classification of the 'List of Official Arbitrators' of the Chamber of Commerce, wherein a great many varieties of businesses, trades and industries are represented, offers unusual opportunity for the simplifying and expediting of settlements of business controversies. Arbitrators may be selected who are long familiar with the special and peculiar details of the line of business under consideration, their qualified judgment eliminating the long discussions and the examination of experts to explain to judge and jury certain details essential for their understanding as in a case at law.

Lord Chief Justice Jeffreys

By ARTHUR P. CHICKERING

THE name of Lord Jeffreys is a synonym for judicial brutality, and his memory has never ceased to be a thing of living detestation among English-speaking people. The official reports of the trials over which he presided as Chief Justice in the reign of James II are witnesses to a depravity which no allowance for difference of times or manners can palliate, and which are

the more unexceptionable as coming censured and licensed from the hand of the judge whom they impeach. Personally he was cruel and vindictive, arrogant and violent in bearing. He was addicted to gross dissipation. In the height of his career he was accustomed to spend the night in debauch and came to the bench in the morning oftener blown with liquor than otherwise, in that

condition to pass upon the lives of the King's subjects. But neither bad habits nor ordinary faults of temper serve to explain the variety of villainy with which he visited the unfortunates brought before him. The following incidents are by no means exceptional, but indeed fall short of some which have been more frequently recalled against him.

One Armstrong, charged with a political crime, had fled beyond seas and sentence of outlawry and death had passed in his absence, subject to his right by law to surrender himself within a year and stand trial. Within the time allowed he returned to England and gave himself up before the King's Bench. Jeffreys refused to hear his defense and proceeded to grant execution of the death sentence. Armstrong was accompanied by his young and beautiful daughter, who now addressed the court.

Dau. — "My lord, I hope you will not murder my father."

C. J. — "Who is this woman? Take her into custody. Why, how now, because your relative is attained of high treason must you take upon yourself to tax the courts of murder? Take her away."

Dau. — "God Almighty's judgments light on you."

C. J. — "God Almighty's judgments light upon those guilty of high treason."

Dau. — "Amen. I pray God."

C. J. — "So say I. I thank God I am clamor-proof."

Armstrong — "I ought to have the benefit of the law."

C. J. — "That you shall have, by the grace of God. See that execution be done on Friday next. You shall have the full benefit of the law."

And the unfortunate man was hanged, disemboweled, beheaded and quartered with all the rigors of his barbarous sentence.

To Chardstock, a lawyer, accused of supplying money to aid Monmouth in his rebellion, but in fact robbed of his coin by Monmouth's soldiers, Jeffreys said after a mockery of a trial: —

J. — "Villain, rebel, methinks I see thee already with a halter round thy neck." And his lordship jeeringly remarked in passing sentence that he desired when possible to prefer lawyers, being one of that profession himself, and therefore Chardstock should be hanged first of the next lot going to the scaffold.

Jurors stood in fear of him. In those few trials where they mustered courage enough to return a verdict of acquittal, the finding was at their peril. In not a few instances they were subjected to vile abuse, sent back to reconsider, and threatened with Jeffreys' vengeance unless they sent the accused to the scaffold. In desperate cases, Jeffreys would call them up one by one to the bench, and there interrogate them as to their verdict. Rarely was the jury made of stuff to withstand the terrifying influence of the ferocious visage of the Chief Justice, and many a verdict of guilty was directly due to such judicial interference.

At the trial of Richard Baxter, the learned and gentle Presbyterian *divine*, Jeffreys startled the bar as well as the defendant and his friends, by *throwing* back his head, closing his eyes and crying out with a nasal twang supposed to simulate the manner of dissenting preachers: "O Lord, we are Thy people. Thy own people. Thy peculiar people." Indeed Dissenters fell under the foulest of his abuse, for he made loyalty to the established religion a prime feature of his policy. Witnesses as well as accused were assailed with insult and epithet. "Whining, canting Presbyterian

knives, I think ye be all the King's enemies." Using a favorite oath he would cry, "Jesus God, how can the truth come from a Presbyterian!"

Returning in 1685 from the trials of the poor peasants in the Western counties on charges of adhering to Monmouth's Rebellion, he boasted of "three

hundred and thirty killed and eight hundred prisoners transported." Three generations later his granddaughter, the Countess of Pomfret, going into those same counties, found the memory of the "Bloody Jeffreys" so fresh in mind that she deemed it the part of prudence to forego her visit.

Boston, Mass.

Stole His Red-Fire

BY EDGAR WHITE

ABOUT once every five years the Missouri papers pass around Senator Vest's tribute to the dog as his prize oratorical effort. Most people have forgotten the many brilliant things the "Little Giant" was constantly sending out on the clear Missouri air, but the tribute to the dog has not been allowed to die.

When the thing was started on its first round in Northern Missouri it was the cause of a disastrous verdict against a poor farmer of the New Wales neighborhood, and what made the matter the more pathetic was the farmer had never heard of Vest and his dog speech till the day of the trial.

The farmer, a large, stolid man, was on trial for disturbing his wife's peace. He was accompanied at the hearing by a yellow dog, the only friend he had, apparently. The dog lay beside his master's chair, an eager observer of the proceedings.

Dan R. Hughes, a young lawyer, appeared for the accused farmer. Dan was somewhat given to poetic flights himself, and when he noticed the

happy combination of his client and dog, he thought of Vest's speech.

"Ah ha!" said Dan; "that hits this case on all fours; the jury can't get away from it; just watch me."

Of course Dan was talking to himself there. When his time came to argify he took up the evidence of the state in his usual adroit style and hammered it to pieces. And then:—

"Gentlemen of the Jury: The best friend a man has in the world may turn against him and become his enemy. His son or daughter that he has reared with loving care may prove ungrateful. Those who are nearest and dearest to us, those whom we trust with our happiness and our good name, may become traitors to their faith. The money that a man has he may lose. It flies away from him, perhaps when he needs it most. A man's reputation may be sacrificed in a moment of ill-considered action. The people who are prone to fall on their knees to do us honor when success is with us may be the first to throw the stone of malice when failure settles its cloud upon our heads.

"The one absolutely unselfish friend that a man can have in this selfish world, the one that never deserts him, the one that never proves ungrateful or treacherous, is his dog. A man's dog stands by him in prosperity and poverty, in health and in sickness. He will sleep on the cold ground, where the wintry winds blow and the snow drives fiercely, if only he may be near his master's side. He will kiss the hand that has no food to offer, he will lick the wounds and sores that come in encounter with the roughness of the world. He guards the sleep of his pauper master as if he were a prince. When all other friends desert he remains. When riches take wings and reputation falls to pieces, he is as constant in his love as the sun is in its journey through the heavens.

"If fortune drives the master forth an outcast in the world, friendless and homeless, the faithful dog asks no higher privilege than that of accompanying him, to guard against danger, to fight against his enemies. And when the last scene of all comes, and death takes the master in its embrace, and his body is laid away in the cold ground, no matter if all other friends pursue their way, there by the graveside will the noble dog be found, his head between his paws, his eyes sad, but open in alert watchfulness, faithful and true even in death."

Mr. Hughes sat down amid applause. There were tears in the eyes of the

jurymen, and even the old Squire's lips quivered as he told Bert D. Nortoni, counsel for state, to close the case. Nortoni was then a young man like Hughes. He is now a judge on the St. Louis Court of Appeals bench. To every appearance he was the only person in the court room who was not affected by Mr. Hughes' fireworks.

Nortoni held a newspaper in his hand. For a moment he looked accusingly at Mr. Hughes, and then turned to the jury.

"Gentlemen," he said, "that was a splendid speech. I thought so when I first read it, and I think so now. But it was about an altogether different dog. It was about a faithful hound down in Saline county, not this yellow mongrel here. Senator Vest made that speech — not Danny Hughes. Do you suppose for a minute that the Senator would have made a speech like that over such an ornery-looking dog as you see here?"

Then to convince the jury that the red-fire in Mr. Hughes' argument had been "lifted" bodily from a newspaper, Nortoni read from the paper in his hand. To the jury that seemed the crux in the case, as Nortoni wanted. There was no possible explanation. Mr. Hughes had made them cry over some other dog beside the one at bar, and they emphasized their disapproval by not only finding the farmer guilty, but putting him under a \$1,000 peace bond. He couldn't give the bond and had to stay in jail six months.

Macon, Mo.

Reviews of Books

LAWS OF THE VISIGOTHS

The Visigothic Code (*Forum Judicum*). Translated from the original Latin, and edited by S. P. Scott, author of "Through Spain" and "History of the Moorish Empire in Europe," member of the Comparative Law Bureau of the American Bar Association. Boston Book Co., Boston. Pp. lxxiv, 409 + 9 (index). (\$5.)

THE legislation of the Visigoths is of historical importance as an interesting stage in the evolution of Continental legal institutions. No barbaric nation during the early Middle Ages was more under the influence of Rome than the Goths. Before the downfall of the Empire, they had been settled for a considerable time on Roman soil and had acquired much of Roman civilization. When the western branch of the nation invaded Spain, it found there a people of Basque and Celtic elements which had become to a large degree Romanized. The resulting legislation was therefore destined to exemplify not so much the gradual reception of Roman law by barbarians, that process having already been largely accomplished, as the vicissitudes of a debased Roman law in its friction with the vaguely defined forces of barbaric custom.

The Visigoths of Spain and France both codified Roman law for the use of their subjects and adopted Roman enactments wholesale. The laws of King Euric, dating from about 464 A.D., are the most ancient Visigothic legislation of which we know, and only fragments of them have survived. In these fragments Professor Vinogradoff has found a number of paragraphs drawn from Roman sources. In 506 King Alaric II codified the Roman law of the Visigoths under the name of the Breviary of Alaric, which was a compendium of the enactments of the later Empire, and

had some points of similarity with the Code of Justinian, enacted some thirty years later. The Breviary became the standard source of Roman law throughout Western Europe during the earlier half of the Middle Ages, being taken over by the Franks with their conquest of Southern Gaul, and is interesting as marking the debasement of Roman law. It has been well edited by a German scholar, Hänel.

The Breviary of Alaric was succeeded by other legislation in the sixth century, in which the Visigoths yielded more and more to the influence of Roman rules. The national edicts of King Recared, at the time of his conversion from Arianism to Roman Christianity, marked the growth of a more national body of laws. In the seventh century the two kings Chindaswind and Recceswind introduced territorial codes based on Roman patterns, and repealed conflicting enactments. The introduction of Roman Christianity marked the beginning of a period of decadence; the Visigoths henceforth grew more luxurious, less powerful in war, and more addicted to religious persecution. Under Recceswind the *Forum Judicum* was promulgated, to which additions were later made by King Erwig and King Egica. Twenty-six years after Erwig had revised the *Forum Judicum* the Visigoths, incapable of resisting the Saracenic invaders, succumbed to conquest.

The document now translated by Mr. Scott is Erwig's revision of the *Forum Judicum*, although he assumes that he is translating the compilation of Chindaswind and Recceswind. He does not say what text he has used. The edition of the Royal Spanish Academy,

published in 1815, surely was not a text desirable to follow.

The translator's introduction is of little value, and throws little light on the place occupied by the Forum Judicum in the history of European law. The declaration that the Teutons and the Goths were distinct (p. vi) is surprising, and the description of the original Goths as typical savages (p. vii) must be taken with a grain of salt. Sufficient emphasis is not laid on the extent to which the Visigoths had been Romanized before their invasion of the Peninsula (p. viii). The total loss of Euric's laws is incorrectly assumed (p. xxiv). The Code of Justinian is wrongly stated to have antedated the Breviary of Alaric (p. xxiv). It does not appear on what ground the editor makes the broad statement (p. xxiv) that the Forum Judicum was formed from the compilations of Euric and Alaric. It is not clear why he supposes it to have exerted so much influence on the destinies of Europe. Full recognition of barbarian usage is not given in the assumption that all the *antiqua*, so called, are derived from Roman sources.

The Forum Judicum is interesting to read, as a mingling of debased Roman law with the intolerant spirit of the Spanish Inquisition. Belonging, however, to the period of Visigothic decadence, it does not faithfully portray the great qualities of the nation, and its importance as a forerunner of Continental legal systems, in comparison with that of the Breviary of Alaric, seems to have been overrated. Indeed, it is doubtful whether the title "Visigothic Code" was a desirable one for the Comparative Law Bureau of the American Bar Association to employ. The translation, however, seems to have been executed with pains and discernment, in the face of considerable difficulties.

LAND ACTIONS IN GEORGIA

A Practical Treatise on the Law and Procedure involved in the Preparation and Trial of Cases of Ejectment and other Actions at Law respecting Titles to Land. Treating particularly of the pleading, practice and evidence, and in a general way also of the principles of the substantive law involved in such actions. By Arthur Gray Powell, Judge of the Court of Appeals of Georgia. The Harrison Co. Atlanta. Pp. 683 + 47 (table of cases) + 121 (index). (\$7.50.)

THIS volume, prepared especially with reference to the trial of land titles in the state of Georgia, deals largely with the law of ejectment. In Georgia the substantive law is in the main the common law. The local code practice and pleading are peculiar and technical, but the practitioner still has the option of using the old common law actions to try his title. Many of the older and intricate technicalities of the action of ejectment have been done away with, and the form of action now used in Georgia, although still based on the old procedure, has been modernized. Thus the practitioner has his choice between an action of ejectment and an action under the code.

Judge Powell says that "while the members of the Bar of this state generally recognize that the fictitious form of ejectment has its advantages, many able practitioners hesitate to use it, because of the inadequacy of their information as to how to use it; they generally bring their action for the recovery of land under the code procedure, taking the hazards of its technicalities and often losing on that account cases which otherwise might have been won." It is his ambition in writing this book to check the decadence into which the practice of land action is in danger of falling by neglecting the opportunity of the practitioner to avail himself of proceeding by ejectment.

The present volume has traced with great ability the history and development of ejectment proceedings at common

law, and then presents the development of these common law doctrines and the adaptation of them to American conditions. To this extent this book has a scope and usefulness beyond the limits of Georgia, and will prove an instructive guide in any state where the common law still prevails in land actions. To the student of law the book will also prove useful in giving a general view of this intricate subject. The propositions are stated simply and intelligently in the main text and exemplified and elaborated in the footnotes. The cases cited are collected with care, analyzed and reconciled so as to present the local development of the law not only chronologically, but logically. The book as a whole is a good example of the best kind of local text-book.

WHELESS'S LAWS OF MEXICO

Compendium of the Laws of Mexico; officially authorized by the Mexican government, containing the federal Constitution, with all amendments, and a thorough abridgment of all the codes and special laws of importance to foreigners concerned with business in the republic; all accurately translated into English. By Joseph Wheless of the St. Louis bar. F. H. Thomas Law Book Co., St. Louis. 2 v. V. 1, pp. lxxxv, 521; v. 2, pp. 462 + 64 (index). (\$10.)

MR. JOSEPH WHELESS of St. Louis in his "Compendium of the Laws of Mexico" has for the first time made Mexican jurisprudence readily accessible to the American student and the American lawyer called upon to advise or act in Mexican matters. The need for just such a work has been steadily growing, and the many who have awaited its coming, as well as the author himself, are to be congratulated upon having the long-felt need so thoroughly and successfully satisfied.

Owing to the derivation of Mexican law from Roman and Civil sources with their minute codifications, and for the further reason that in Mexico the federal

jurisdiction is much more extensive in relation to the state law than in our own country, the "Compendium" presents a completer exposition of the law of Mexico than could any similar treatise upon American laws.

The book begins with the federal constitution, upon which is based the whole structure not only of the Republic, but of its constituent states and territories, and the distribution of governmental functions between state and nation.

After the public or institutional law the personal law, so much more important under the Civil system than under the common law, is then taken up, dealing as it does, in great detail, with questions of domicil, status, marriage, divorce, legitimacy, and so forth. The law of property, personal and real, is next treated. Under this head comes the very full and interesting consideration of servitudes, a branch of law much more developed and refined than our law of easements. After the subject of descents and successions, various distinct branches of law, some of them governed by separate codes, are then dealt with in order, such as mercantile law, corporation law, negotiable instruments, carriers and bankruptcy; and practice and evidence are gone into at some length.

The internal laws, public and private, being thus set forth, the second volume is devoted to the rights of foreigners and to topics of particular interest to foreigners in Mexico, such as public lands, waters and water rights, the especially important new mining law and the ever-necessary notarial law. This volume also includes trade-marks and copyrights, criminal law and responsibility in tort, insurance, the law governing the issue of bonds by corporations, and various matters of such dis-

tinctly practical concern as the tariff schedules and the stamp tax. Almost the most useful part of the work to the practising lawyer is the schedule of forms in Spanish with the translations appended.

Regarded as a whole the work is scholarly in conception, logical in arrangement and thorough in execution. The correctness of the translation and the general reliability of the book as a work of reference are vouched for by the evident care taken in its preparation; the method of its compilation (the whole being in the form of a condensation of sections of the several codes); and finally by the official sanction given the compilation by the Republic of Mexico.

RICARDO

David Ricardo: A Centenary Estimate. By Jacob H. Hollander, Ph.D., Professor of Political Economy in the Johns Hopkins University. Johns Hopkins University Studies in Historical and Political Science, Series 28, no. 4. Johns Hopkins Press, Baltimore. Pp. 137 (index). (Cloth, \$1.50, paper, \$1.)

IN WRITING any commemorative address, there is always the temptation to adopt a laudatory tone. There seems to be a canon of good taste which prohibits a stringently critical attitude, alike at centenaries and at funerals. It was but natural, therefore, that these three lectures, delivered at Harvard to mark the hundredth anniversary of the publication of "The High Price of Bullion," should have been more biographical and appreciative in style than frigidly technical and impersonal. At the same time, Professor Hollander, as was to be expected, exercises a scholarly candor, and concedes, *en passant*, that Ricardo's "data may have been inadequate, his method in part defective, and his conclusions sometimes misleading." He does not dwell on these defects, deeming them sufficiently obvious. The book is chiefly a summary of Ricardo's

lifework, designed to bring out in sharp definition the reasons for his being held in such high esteem by economists. Ricardo "conceived a positive science of political economy constituted of the tendencies or laws prevailing with respect to a clearly defined group of phenomena." These tendencies or laws, deduced with the aid of keen analytical powers sharpened by his experience as a successful financier, he assembled "into a coherent whole, enunciated in unsystematic elliptical form, but characterized by all the essentials of a body of scientific doctrine. By this service he raised economic study to a new dignity, giving it consciousness and impetus."

It becomes very clear, from a reading of these interesting and informing pages, why Ricardo's "Principles of Political Economy and Taxation" marked such a tremendous advance, in scientific method, beyond Adam Smith's "Wealth of Nations," and why it achieved a unique position in the literature of the classical political economy. The book will be found a helpful and stimulating introduction to closer study of the Ricardian system.

NELLIS'S STREET RAILWAYS

The Law of Street Railroads: a complete treatise on the law relating to the organization of street railroads, the acquisition of their franchises and property, etc. By Andrew J. Nellis. 2d ed. Matthew Bender & Co., Albany. V. 1, pp. cxxx (table of cases), 654; v. 2, pp. ix, 688 + 159 (index). (\$13.)

THIS work belongs to that large class of specialized text-books with which lawyers are familiar, the manner of whose execution exhibits no remarkable excellence or distinction, but which, nevertheless, because of the industry which has gone into them, may well serve practical needs of the profession to a very great extent.

Nellis's "Law of Street Surface Rail-

roads" appeared in 1902, and dealt only incidentally with the subject of negligence. The great bulk of accident litigation induced the writer to issue a second work two years later on "Street Railroad Accident Law," in the preparation of which he was assisted by Dewitt C. Moore, Esq. These two volumes were favorably received, and the need of a new edition being felt, the publishers have seen fit to merge the two works in one, avoiding any duplication of material which might have resulted, and bringing the treatment down to date. The outcome is a comprehensive treatise on the law relating to street railway corporations, their franchises and property, their regulation by statute and ordinance, and their rights and liabilities, and of the law of negligence applicable to such corporations, and pleading and practice under it. The new edition seems to have been prepared with accuracy and pains. The topics of negligence are very fully covered.

BLACK ON STATUTORY CONSTRUCTION

Construction and Interpretation of the Laws. By Henry Campbell Black, M.A. (2d ed.) Hornbook Series. West Publishing Company, St. Paul. Pp. 710 + xii. (\$3.75.)

THE method and standard set and maintained by the Hornbook Series of legal text-books is too well known to need explanation. The present volume sustains the high standard of that series. The terse formulation of the rules of law set forth in the manner of a code is useful alike to the busy practitioner and the law student. With the increasing importance of the acts passed by Congress and the state legislatures the usefulness of an adequate book dealing with the interpretation of statutes is apparent. To be effective such a book, however, must be thoroughly up-to-date. Since

the first edition of this work a very large number of citations have been added, and cases cited during the last fifteen years are now made easily available by the full footnotes and classification adopted by the author.

While the principles of law involved are becoming well settled, yet the varied application of these principles to new statutes is constantly before the courts. It is impossible to take up any volume of reports, either federal or from any state, without finding a considerable number of the cases reported dealing with the interpretations of some statute. Courts are increasingly anxious to make a statute carry out the intention of the legislative body that enacted it. They have become more and more impatient of the quibble and technicality which evade or totally destroy the legislative mandate. The author of the present volume has emphasized this spirit in expounding the cardinal and fundamental principles underlying the interpretations of all statutes. This volume will be found a convenient guide, both to the practitioner and to the law student, in easily acquiring an understanding of the difficult points that are only too apt to arise from the hasty legislation that is annually increasing our statute law in appalling quantity. The usefulness of the book has also been much increased by the key number system adopted by the West Publishing Company through all its recent publications.

HUNGARIAN HISTORY

The Development of Hungarian Constitutional Liberty. By Count Julius Andrásy. Translated from the Hungarian by C. Arthur and Ilona Ginever. Kegan Paul, Trench, Trübner & Co., Ltd., London. Pp. 466.

THE eminent statesman who wrote this book rendered distinguished services to Hungary in the conflict with

Franz Josef, leading to the constitutional agreement of 1867 making Hungary a partner in the Dual Monarchy. It is of interest to see what this friend of constitutional liberty and earnest worker on behalf of nationalist ideas finds in the history of Hungary to show the almost continuous existence of a strong national tradition. He has interpreted Hungarian history from a nationalist standpoint, with such zeal as might afford at times some ground for the charge of unconscious partisanship.

The volume is only a part of the work projected, dealing with the period from 896 to 1619 A.D. The writer freely

indulges in reflections and aphorisms which sometimes assume more information concerning the course of historical events than he seems inclined to impart. Much of the book is discursive rather than descriptive, and rather tedious. The opening chapter gives a very vague idea of the origin of the Hungarian people, and the author lacks precision of statement. The book contains neither references nor index. Treating of an important phase of mediæval history, the book will be esteemed, however, as one of the few of value dealing with its general subject in an accessible form.

Index to Periodicals

Articles on Topics of Legal Science and Related Subjects

Armaments. See Panama Canal Fortification.

Banking. "The United States Postal Savings Bank." By E. W. Kemmerer. *Political Science Quarterly*, v. 26, p. 462 (Sept.).

Making a statistical comparison of savings bank and post-office facilities, the writer thinks that a strong case is made out in favor of the post-offices. The provisions of the Postal Savings Bank Act are described at some length.

Civil Service Reform. See History.

Defamation. "Libel in England and America." By Hon. William J. Gaynor. *Century*, v. 82, p. 824 (Oct.).

"We . . . often read of verdicts in civil actions for damages for libel in England much larger in amount and so much more frequent than we are accustomed to in this country. . . . Most people think these differences are because the law of libel in England is different from ours. They ask, Why should not our libel laws be changed to be like those of England, so that we may also punish libelers and stop their detestable trade, the meanest and basest known? They are mistaken. Our libel laws are in all essential respects the same as those of England. The difference is in the failure of prosecuting officers to enforce them, and in the weakness of our courts in the trial of libel cases, criminal and civil. If our jurors also deal lightly with

libels against which the jurors of England sternly set their faces, the fault is still with our judges. In England the judge fulfills his office. He takes and keeps that legitimate control and direction of the case on trial which belongs to him by law. . . . Our judges have always had the same wholesome power, but many of them let it slip through their fingers."

Mayor Gaynor gives an interesting sketch of the history of the law of libel both in this country and in England.

Direct Government. "'People's Rule' in Municipal Affairs." By G. H. Haynes. *Political Science Quarterly*, v. 26, p. 432 (Sept.).

A review of the results of the municipal election of 1910 in Portland, Ore. The writer considers the disadvantage of several unquestionably ill-judged verdicts of the voters more than offset by the widespread interest awakened in government and the more intelligent discrimination shown by the voters.

"The Initiative, Referendum and Recall." By T. A. Sherwood. *73 Central Law Journal* 167 (Sept. 8).

A vigorous argument against these objectionable measures, which might be more convincing if it were less ingenious.

"The 'Recall' in Seattle." By Burton J. Hendrick. *McClure's*, v. 37, p. 647 (Oct.).

Describing the recall of Mayor Gill of Seattle whose administration was marked by an outbreak of vice and corruption throughout the city.

"Is Republican and Representative Government Synonymous?" By Ed. C. Gottry. *73 Central Law Journal* 222 (Sept. 29).

"In so far as the states formerly a part of the Northwest Territory are concerned, they are forever precluded by the Ordinance of 1787 from making any change in their form of government which would make it a democracy. Article 5 of the Ordinance says, 'Provided, the constitutions and governments to be formed' (in this territory) 'shall be Republican and in conformity to the principles contained in these articles.' . . . Are there any 'principles' contained in the Ordinance which throw any light on the meaning of this word 'Republican' as here used in the connection found? There certainly are, and they are most emphatically *representative*."

See Government.

Government. "Representative as Against Direct Government." By Congressman Samuel W. McCall. *Atlantic*, v. 108, p. 456 (Oct.).

"The framers of our Constitution were endeavoring to establish a government which should have sway over a great territory and a population already large and which they knew would rapidly increase. They were about to consummate the most democratic movement that had ever occurred on a grand scale in the history of the world. They well knew from the experiments of the past the inevitable limitations upon direct democratic government, and, being statesmen as well as Democrats, they sought to make their government enduring by guarding against the excesses which had so often brought popular governments to destruction. They established a government which Lincoln called 'of the people, by the people, for the people,' and in order effectively to create it they adopted limitations which would make its continued existence possible. They knew that, if the governmental energy became too much diluted and dissolved, the evils of anarchy would result, and that there would follow a reaction to the other extreme, with the resulting overthrow of popular rights. They saw clearly the line over which they might not pass in pretended devotion to the democratic idea without establishing government of the demagogue, by the demagogue, and for the demagogue, with the recoil in favor of autocracy sure speedily to follow."

Great Britain. "Before and After the Veto." By Edward Porritt. *North American Review*, v. 194, p. 505 (Oct.).

Reviewing the significant events of the past few months, the writer incidentally makes an observation likely to introduce readers to a novel aspect of the case. "There is no ground," he says, "for the apprehension that the House of Lords will sink into a chamber like the House of Lords in the old Parliament of Ireland, or like the Senate at Ottawa. Power of delay for two sessions in a country where the people are so politically well educated, so politically alert, and on whom party ties are so little binding, is an enormous power. It is a power that will give a new importance to the House of Lords, and

furnish an infinitely larger field of political service for its men of ability and distinction."

"The Referendum in Great Britain." By Herbert W. Horwill. *Political Science Quarterly*, v. 26, p. 415 (Sept.).

A summary of the arguments advanced in the recent discussion of this issue by English party leaders. "The referendum, if not yet acclimatized in England as a method of government, has at any rate been acclimatized as a political issue."

See Direct Government, Legislative Procedure.

Hindu Law. "Indian Law and English Legislation, II." By Justice Sankaran Nair. *Contemporary Review*, v. 100, p. 349 (Sept.).

"Are the Hindus to be told that so long as they remain Hindus by religion they must follow the Hindu Law? There is no Hindu Church authorized to declare what Hinduism is. The differences in doctrine and ritual between some of the sects are wider than those which separate them from Christianity or Mohammedanism. Among the sects are some, not small in numbers, who deny the authority of the Vedas, do not recognize the caste system, and accord to women a position very different from that allowed by Hindu Law as interpreted by the Courts. Yet all these are Hindus governed by Hindu Law. Is the British Government justified in coercing the modern Hindu into the profession of a phase of Hindu religion which he believes he has outgrown? . . . For the government the simplest course is to say to the reformers: 'If you are not willing to follow your Hindu Law, give it up. You are at liberty to follow the Indian Succession Act, or a Marriage Act like III of 1872. In our opinion that is a law fit to be adopted by any modern society, but we do not wish to force it on you. You are at liberty to follow it if you choose.'"

History. "Polk and the Oregon Compromise of 1846." By R. L. Schuyler. *Political Science Quarterly*, v. 26, p. 443 (Sept.).

Reviewing the controversy with England regarding the Oregon boundary, the writer seeks to give Polk credit for his share in promoting a peaceable adjustment. He complains that Polk has wrongly been condemned by historians without a fair hearing.

"Cleveland's Administrations." By James Ford Rhodes. *Scribner's*, v. 50, p. 496 (Oct.).

"It may be safely affirmed that Cleveland did more for the cause of civil service reform than any President except Roosevelt, whose work both as commissioner and as President mark him as the chief promoter of this phase of good government; but Cleveland's task in his first administration was the more difficult. . . .

"Had Cleveland understood Congress and possessed the art of facile negotiation that belonged to his successor, McKinley, he could undoubtedly have brought the contest between himself and Gorman to a drawn battle and so secured a

better bill. . . . Gorman was the father of the law, posing as the conservative protector of American industries against what was regarded as the revolutionary designs of the President and the House. Yet if the history and tradition of the party and the platform of 1892, on which the Democrats came into possession of the government, are the test, the faithful Democrat is Cleveland, not Gorman."

International Arbitration. "The Concept of Legality in International Arbitration." By Prof. Paul S. Reinsch. 5 *Journal of International Law* 604 (July).

Possibly the most important article of the month.

"In the drafts for general arbitration treatise recently submitted by the American Government the term 'justiciable' is used, it being provided that arbitration shall not be obligatory in case one of the nations considers the subject-matter of controversy not internationally justiciable. It will be necessary to determine how far this new term coincides in its application with the concept of legality.

"Legality in international law has heretofore, in the absence of authoritative judicial and legislative organs, been associated with the idea of universal acceptance or custom. . . . It is, however, apparent that clear thinking demands that the term legal should be associated with some such definite external criteria as universal acceptance or declaration by a definite, authoritative tribunal. In this sense comparatively few principles of international law can be said to have achieved the status of recognized legality. . . .

"It is apprehended by many writers, among whom Mr. Baty may be cited, that the application of the concept of legality in international arbitration is inopportune and dangerous, as it involves the subjection of the flexible life of the state to the rigid criteria of legal reasoning. They object to having the atmosphere of civil law courts brought into international affairs. It is true that the development of law, both in Rome and in England, has followed out certain very rigid standards. We need only think of the doctrine of consideration and of real property law in England. In awarding its remedies, the English common law has strictly adhered to the idea that nothing could be measured in terms of law that did not have money value. Actions were, therefore, not allowed unless pecuniary damages could be alleged. We have noted the reflex effect of this reasoning in the reluctance of international commissions to take up questions of national dignity and honor, which manifestly cannot be adjusted according to mere money standards. But it must be remembered that the other portion of English law, the system of equity, is more flexible in its remedies, that it grants injunctions and decrees specific performance. The general concept of equity is, of course, even broader than that contained in the English system of that name. It involves the application of general standards of justice, and the determination of what in good faith ought to be performed. Questions involving such considerations have now already

come before international tribunals. The *Cass Blanca* controversy involved the relation of two sovereign Powers and might well have implicated their dignity and honor. . . .

"It will be seen, therefore, that in international arbitration the concept of legality tends to broaden out into interpretations which are based upon ideas of equity, justice and fair dealing. The term 'justiciable' is, therefore, not confined to what is legal in the strictest sense of the word, but it also, if we consult the recent experience of nations, would be held to cover any matters in which a definite ascertainment of international duty and propriety is desirable. Whenever the rightfulness and justice of conduct is capable of determination by a body of impartial judges, a judicial question exists. To confine the word 'justiciable' to narrower, purely legal limits would be dangerous in several ways. . . . Sovereignty is not a question of law, but of fact. . . . Each sovereign society still has to rely upon the virtue within itself alone for the maintenance of its political power. . . . The matter of the distribution of populations over the globe will be determined yet for a while by other forces than legal rules. This is also true of such great national policies as that which is known as the Monroe Doctrine. . . . When international justice has been given a sword, then, indeed, her sway will cover some, if not all, of the matters here mentioned."

"The Function of Private Codification in International Law." By Hon. Elihu Root. 5 *Journal of International Law* 577 (July).

Address of the President, delivered at the fifth annual meeting of American Society of International Law last April.

"What subjects shall be 'ripe for embodiment in international regulation' when the next great law-making council of the nations convenes; where lies the greatest need; in what direction are the lines of least resistance; upon what subject is general opinion most nearly ready for crystallization? That some subject shall be ready with opinions sufficiently matured to make it possible for a conference within the short space of a few months to reach effective conclusions is vital to the continuance of the progress in which we are all so deeply interested. Now, as heretofore, the work of preparation must be done chiefly upon private and unofficial initiative. Codifiers must draft and systematize and clarify. Associations must discuss and obviate objections, and reconcile the philosophical and the practical, and work out conclusions and educate opinion. Industry, learning, accurate thought, knowledge of practical affairs, and breadth of view must prepare the definite expression of what has been found to be just and reasonable, so that there may be that formal acceptance which shall make it international law. The necessity of this development of international law to the movement for international judicial settlement is well illustrated by the Conference of London."

International Law. See International Arbitration, Neutralization, Panama Canal Fortification.

Legislative Procedure. "The Syndication of the Speakership." By C. R. Atkinson and C. A. Beard. *Political Science Quarterly*, v. 26, p. 381 (Sept.).

The writers review the parliamentary practice of the National House of Representatives from the first, and describe the dramatic developments leading to the Speaker's being deprived of the power he had previously exerted through the Committee on Rules. They think it too early to determine whether the new arrangement will meet the test of efficiency. How strong a directing body it may produce, in the Committee on Rules, and how successfully the system may meet parliamentary situations as they arise, only the future can determine.

Local Government. See Direct Government.

Monopolies. "The Father of the Anti-Trust Law." By Francis E. Leupp. *Outlook*, v. 99, p. 271 (Sept. 30).

"Looking over the legislative record, we find that what we know as the Sherman act is not a Sherman act at all. Mr. Sherman had nothing whatever to do with it beyond holding a place for it on the Senate calendar by putting in an impossible bill of his own. If it is to be named in honor of anyone, its proper title is the Edmunds Anti-Trust Act."

Neutralization. "Some Effects of Neutralization." By Cyrus F. Wicker. *5 Journal of International Law* 639 (July).

"Permanent neutrality has developed out of a privilege, applied to single states, into a power available to the peace-loving, colony-holding nations of today. It can no longer be misjudged as a restriction upon free development. It has been seen that neutralized states may erect fortresses in their own defense, that they may enter into alliances except those for purposes of offensive war, that they may direct their internal affairs exclusive of foreign control, that they may acquire colonies, and finally that they may conclude treaties for commerce and friendly trade. . . .

"Neutralization is the remedy lying ready to our hands for removing not only the causes of war, but also the intolerable burdens of armed peace. There is no loss of honor to a state in accepting neutralization and no occasion for shame in granting it to colonial possessions. . . . South America in particular may propose it for one or all of her states, and by union in this respect maintain before the world any principle of permanent neutrality to which she wholly gave her support. Not only would her growing nations be freed from the crippling burdens of competitive militarism, but also, once prejudices and the fear of aggression removed, a way would be opened to a friendly and far more stable relationship toward all the world which could not fail to meet with the approval of the Powers. This result in the furtherance of national development and international peace would be inestimable; it is also possible."

See Panama Canal Fortification.

Old Age Relief (Contributory). "Compulsory Old-Age Insurance in France." By I. M. Rubinow. *Political Science Quarterly*, v. 26, p. 500 (Sept.).

The law of 1910 is explained in detail, as "marking an important advance in French social legislation." Earlier bills are described by way of introduction.

Panama Canal Fortification. "The Canal Fortifications and the Treaty." By Crammond Kennedy. *5 Journal of International Law* 620 (July).

"The right of the United States to fortify the canal, as defined by herself in her treaty with Panama, is expressly conditional, and may never need to be exercised if the condition is observed, as it ought to be, by the parties concerned."

The writer makes a strong plea for neutralization.

"If, notwithstanding such examples of neutralization as Switzerland, Belgium, Luxembourg the Black Sea, the Straits of Magellan and the Suez Canal, we have no faith in the honor or common sense of nations, and if we are not willing to depend upon the efficiency of our navy, we might at least postpone the mounting of the guns on the fortifications of the canal until Admiral Mahan's hypothetical power or the President's 'irresponsible force or nation' shows some sign of its existence and of its intention to challenge the civilization of the age by attacking or interfering with the use of the waterway between the two oceans."

See Neutralization.

"The Right to Fortify the Panama Canal." By Prof. Eugene Wambaugh. *5 Journal of International Law* 615 (July).

Professor Wambaugh, briefly reviewing treaty stipulations and Lord Lansdowne's memorandum on the Hay-Pauncefote treaty, concludes that the United States has a clear legal right to fortify the canal, but he intimates that a larger question of public policy remains.

Procedure. "Law and Equity in the Federal Courts — Abolishing the Distinction and Other Reforms." By Prof. Roscoe Pound. *73 Central Law Journal* 204 (Sept. 22).

From a searching examination of decisions of the Supreme Court Professor Pound draws these conclusions: —

"(1) The Constitution gives the courts both legal and equitable jurisdiction, that is, the power to give both legal and equitable remedies, so that neither may be taken away by legislation.

"(2) The Constitution preserves a right to a jury trial of legal issues triable only in an action at law under the common law, which cannot be taken away, though it may be waived by the party entitled.

"(3) If the remedies and the right so secured are not taken away or impaired, the mere manner in which the remedy shall be sought and the issue to be tried shall be presented is subject to legislative control.

"(4) Hence, if anything, legislation only requires the present complete and absolute separation of law and equity in federal procedure. . . .

"In some ways the federal courts are much better situated to allow this desirable practice without legislation than was the Supreme Court of New Hampshire. In the federal courts, the practice at law by statute conforms to the state practice, which almost everywhere allows amendment from law to equity or *vice versa*. The practice in equity, by statute, is subject to regulation by rules of court. With full legal and equitable jurisdiction in all the federal courts, it would seem that, unless the long line of *dicta* above quoted afford an insuperable obstacle, the power to make equity rules might well be invoked and obviate the interference of Congress. Moreover, there is good federal precedent for such amendment without even a federal equity rule. (*Schurmeyer v. Life Ins. Co.*, 171 Fed. 1.)"

Public Ownership. "Aspects of Public Ownership, III." By Sydney Brooks. *North American Review*, v. 194, p. 541 (Oct.).

"The superiority of private over municipal trading in all that appertains to the business side is a factor of the utmost moment and must be held to go a long way towards justifying the exclusion of local authorities from competitive industries."

Real Property. See Torrens System.

Social Reform. "What of the Individual?"

By Samuel P. Orth, Assistant United States Attorney, Cleveland, Ohio. *North American Review*, v. 194, p. 517 (Oct.).

"Every function of society, governmental, social, religious, and economic, will ultimately bring its influence to the adjustment of the balance between the individual and the group. It can be no artificial adjustment, it must be a natural co-operation. Society must not be robbed of the incentive to individual effort and reduced to a common and degrading monotony, a listless indolence fed by the state. Nor can it remain the prey of plutocratic greed. People are not to be plundered, nor are they to be plunderers, but to be co-workers."

State Insurance. See Old Age Relief.

Taxation. "Taxation and Natural Law."

By Prof. John Bates Clark. Columbia University. *Atlantic*, v. 108, p. 485 (Oct.).

As a substitute for a system of taxation wrong in principle, taxing individuals on what they own, Professor Clark proposes a system through which, in accordance with the operation of an economic law, invested wealth may be made to pay taxes with the same fairness to individuals as if the owners of such wealth could be identified and personally taxed on their holdings. His plan is that the state tax all instrumentalities of production. The effect would not be to diminish the entire fund of capital in use, but to keep it intact; nor would the profits of producers be diminished by the burden, which would be shifted to owners of capital, the producer

maintaining himself in as favorable a position as before, not through any increase of the prices on his manufactured goods, but through a general reduction of the rate of interest. Interest always tends to equal the product that can be gotten from the marginal part of social capital.

Torrens System. "Title Insurance Which Does not Insure." By Gilbert Ray Hawes. *Insurance Times*, v. 44, p. 251 (Sept.).

"It is a well-known fact that every policy of title insurance is so loaded down with exceptions in Schedule B, and long conditions printed in fine type on the back of the policy, that it is almost impossible to compel the title insurance companies to pay any loss or damage. It is only where a suit has been actually brought for trespass, eviction or ejection that the title insurance companies agree to defend the same. But they do not agree to cancel the *lis pendens* by bonding the property, and, consequently, the property holder finds himself with a law suit on his hands which may continue for years, and during which time he can neither sell nor mortgage his property."

Workmen's Compensation. "Massachusetts Workmen's Compensation Act." 15 *Law Notes* 105 (Sept.).

A detailed synopsis of the Massachusetts act, to which is appended the opinion of the Justices of the Massachusetts Supreme Court sustaining its validity.

Miscellaneous Articles of Interest to the Legal Profession

Biography. *Gentilis.* "Albericus Gentilis." By Thomas Willing Balch. 5 *Journal of International Law* 665 (July).

"Grotius himself acknowledged his great indebtedness to Gentilis, and as Hallam has pointed out, the arrangement of the first and third books of Grotius' treatise on 'The Law of War and Peace' is practically the same as that of the work of Gentilis on 'The Law of War.'"

Jellinek. "Georg Jellinek." Editorial. 5 *Journal of International Law* 716 (July).

Professor Jellinek, one of the leading authorities of the world on political science, died last January, at the age of sixty. He was the son of an Austrian Jewish Rabbi and theologian, and succeeded Bluntschli at the University of Heidelberg. "*Das Recht des Modernen Staates*" (1900) was his greatest work. It "represents the goal of Professor Jellinek's efforts — the summary of his many notable achievements. It is a storehouse of condensed learning, a model of scientific method, a masterpiece of juristic research."

Besides being a man of most profound intellect, Jellinek was also a splendid type of the university teacher, taking an affectionate interest in all the students his great reputation gathered about him.

La Follette. "Autobiography." By Robert M. La Follette. *American Magazine*, v. 72, p. 680 (Oct.).

The first instalment of Senator La Follette's autobiography, which he claims he wrote solely to exhibit the "struggle for a more representative government." He here writes of his career, beginning at the time when he was a poverty-stricken lawyer, up to his service as district attorney.

Detection of Crime. "The Insurance Agent." By Harvey J. O'Higgins. *McClure's*, v. 37, p. 599 (Oct.).

The fascinating narrative of how W. J. Burns went to Versailles, Indiana, disguised as an

insurance agent, and secured evidence for Attorney-General Ketcham of the lynchings of September, 1897, in Ripley County.

Railway Accidents. "Speed." By Charles Edward Russell. *Hampton-Columbian*, v. 27, p. 444 (Oct.).

"The heart of the trouble with the American railroad is the way it is financed. It is always pleasant to read of the great fortunes that have been dug by a few men out of the American railroad system. It is not so pleasant to reflect that these fortunes have cost us an enormous amount in needlessly high freight rates, and have taken another toll in human life. We pay for them all with our pocketbooks and also with our lives."

Latest Important Cases

Carriers. *Limitation of Liability for Loss of Baggage — Subject for State Regulation — Interstate Commerce Law Does not Apply — Limitation Void in Absence of Express Contract or Assent of Passenger.* Mass.

The Supreme Court of Massachusetts decided in the case of *Hooker v. Boston & Maine R. R.*, 95 N. E. 945, that notwithstanding the provision that a railroad may not be liable for more than \$100 in case of loss of a passenger's baggage, the railroad may still be liable for the full value of the baggage when the passenger knew nothing of the regulation and did not assent to it.

The facts were as follows: The plaintiff passenger in this case left Boston on September 16, 1908, to go to Lake Sunapee, N. H. Her baggage was handled by the agents of the hotel at which she was stopping in Boston and she did not receive her checks for her two trunks and a suit-case until the day after her arrival at Lake Sunapee. On September 17 the station at Lake Sunapee was burned and the plaintiff's baggage was

destroyed in the fire. The two trunks were worth \$35 and \$20 apiece and the suit-case \$12, exclusive of the contents, which were valued at \$1,904.50.

Judge Harris in the Superior Court had awarded a verdict of \$2,133.04, which the Supreme Court sustained on exceptions, saying: —

"The pivotal question is whether the limitation as to liability for loss of baggage transported without extra charge is a part of the passenger rate or tariff, or whether it is a subsidiary incident to the main matter of fare. We are of opinion that it is not an essential element in the fare for transportation of passengers. Limitation of liability by contract in case of loss has not been abolished by the interstate commerce act. Reasonable agreements in this regard are upheld. . . .

"A rate established by a carrier and stated in its schedule as filed to be depended upon certain limitations of liability can have no higher or different character than a like rate conditioned by a contract upon the same limitation

of liability. The carrier cannot make something of a rate merely by calling it by that name. It cannot convert that which is in its essence a subject for regulation, according to the law or policy of the several states, into the inexorability of a rate protected by federal laws. . . . As we have pointed out, there is no doubt that by the common law of this Commonwealth the plaintiff was not bound by the limitation of liability of which she was wholly ignorant. She could have been restricted in right of recovery only by express contract or by assent to a known regulation."

Child Labor Law. *Child Employed in Violation of the Act Has Right of Action for Physical Injury—Private Right Arising from Breach of a Statutory Duty.* Mass.

In *Berdos v. Tremont & Suffolk Mills*, decided by the Massachusetts Supreme Court July 25, the plaintiff was less than fourteen years old, St. 1909, c. 514, s. 56, prohibiting the employment of children under fourteen years of age in factories. He sued the company for injuries received by his being cut by machinery in the cotton factory of the defendant, in whose favor a verdict was directed by the Superior Court. The Supreme Court held the direction of a verdict for the defendant reversible error, and sustained exceptions.

The Court (Rugg, J.) said:—

"It is a general rule of statutory interpretation that a violation of a duty created by statute, resulting in damage to one of the class for whose benefit the duty was established, confers a right of action upon the injured person.

"A difficulty often arises to determine whether a private right arises for breach of the statutory duty imposed or whether the only consequence is to subject the violator to punishment. It is not enough

for a plaintiff to prove a violation of a statute concurrent with his injury, but he must go further and show that a condition to which the statute directly relates has a casual connection with his injury. It becomes necessary to determine the purpose of this statute. . . .

"This statute is a declaration of legislative policy that parents and guardians or children undertaking to act in their own behalf shall no longer be permitted to bargain at all as to the work of children of tender years in specified employments. It relates to a class who are least able to protect themselves by appreciating and avoiding danger, or to request instructions as to matters beyond their understanding, or to arrange by contract for their protection, or to resist any compulsion arising from their own necessities or other circumstances. There would be difficulty in discovering instances of failure to comply with the law arising from a tendency of both parties to such failure to conceal the wrong-doing. The statute has to do with the protection of childhood. It pertains to a subject of universal interest fundamentally vital in its broader bearings to the future of mankind. These considerations require the inference that the remedy intended by the Legislature against the delinquent employer was not confined to the delinquent one. The right of civil action in addition may well have been regarded as a more efficacious means of compelling observance of the law. Therefore, while the public purposes of this act are important, any member of the public so situated with reference to its subject-matter as to suffer special damage by its infraction has a right of action. . . .

"Apparently the sole cause of the injury was the temperamental uneasiness and heedlessness of the consequence of restless movements characteristic of

childhood when placed in the midst of rapidly moving machinery. Hence the violation of the statute may have been found to be a contributing or perhaps the sole cause of the injury suffered. The result is that the defendant is entitled to go to the jury upon the question of his own due care."

Election Laws. Ballots—Statute Preventing Separate Nominations from Appearing in Separate Columns—Independent Voting—Constitutionality of Law Prescribing Form of Ballot. N. Y.

The Tammany amendment to the New York election law, known as the Levy law, passed in the last session of the New York legislature (Laws of 1911, c. 649), so changed section 331 of the Election Law as to prevent the name of a candidate from appearing more than once on the official ballot. As amended the law read:—

"If any person shall have been nominated by more than one political party or independent body for the same office, his name shall be printed but once upon the ballot and shall appear in the party column of the party nominating him which appears first upon said ballot, unless the said candidate shall by a certificate in writing duly signed and acknowledged by him request the custodian of primary records to print his name in the column of some other party or independent body which shall have nominated him, in which event his name shall be printed in such other column only."

The Supreme Court (Gavegan, J.) in a test case declared this provision unconstitutional, on the ground that the Legislature could not so legislate as to induce partisan voting by making independent voting difficult, and that the act was an arbitrary and unlawful discrimination in favor of one class of voters.

This decision coming before the Appellate Division on appeal, Justice Clarke rested his dissenting opinion on a similar ground, saying that this provision was "solely intended to prevent political combinations and fusions, and this is the very thing that I insist there is no right to prevent or hamper."

The Appellate Division declined, however, to take this view of the law, the majority opinion of the Court (Ingraham, P. J., McLaughlin, Miller and Dowling, JJ., concurring), rendered Sept. 28, holding that the regulation applied merely to the form of the ballot and the position of names thereon; "it leaves each political party unrestricted power of nomination; gives to an elector the unrestricted and unimpaired power to vote for any person he chooses for the office to be filled, and gives to each aspirant for the office the right to have his name printed upon the ballot as a candidate of any party or independent body for any office to which he aspires if he obtains a nomination by either a political party or an independent body of citizens. . . ."

"To declare an act of the Legislature void or violating a constitutional provision it is essential that the act of the Legislature should be in violation of some specific provision of the constitution." (*Matter of Hopper*, reported in *N. Y. Law Journal*, Oct. 2.)

The Court of Appeals reversed the ruling of the Appellate Division on Oct. 10, in a unanimous decision written by Chief Judge Cullen. The Court said:—

"Constitutional provisions imply that every elector should have the right to vote with equal facility to other voters, or, to speak more accurately, without undue discrimination against him as to the manner of casting his vote. . . ."

"While the constitution does not guar-

antee that the elector shall be allowed to express his wish by a single mark, our position is that he is guaranteed the right to express his will by a single mark if other voters are given the right to express theirs by a single mark, and there is no difficulty in according the right to all.

"Inequality in the facilities afforded the electors in casting their votes may defeat the will of the people as thoroughly as restrictions which the courts would hold to operate as a disfranchisement of voters."

The opinion argued that if it were provided "that the candidates of the party polling the highest vote at the last election should be printed in one column and the electors allowed to vote therefor by a cross mark, while all other candidates were required to be voted for by writing or pasting their names on the ballots, I think no one would hesitate to condemn the scheme as unconstitutional." (*Matter of Hopper*, N. Y. Law Jour., Oct. 16.)

Federal and State Powers. See Carriers.

Monopolies. *Rights of Patentees to Restrain Competition — Coercive Contracts with Dealers Not Forbidden by Anti-Monopoly Statute.* England.

A recent British case is of interest as involving questions presented by our own law of monopolies as affected by the rights of owners of patents. In *National Phonograph Co. of Australia, Ltd. v. Menck* (1911, A. C. p. 336) the Judicial Committee of the Privy Council dealt with a subject similar to that underlying the pending Massachusetts suits brought against the United Shoe Machinery Co. under the Sherman anti-trust law. The National Phonograph Co. sold the phonographs and phonograph records of which they were the

patentees to jobbers, and the goods reached the retail trade under dealers' contracts with the company, rendering the dealer liable to be withdrawn from the dealers' list of the company if he undertook to undercut prices or to introduce rival goods by way of exchange. The dealer Menck was removed from the company's list, but persisted in dealing in the company's articles, and on being sued by the company was adjudged by the High Court of Australia free to deal with the patented articles as ordinary articles of commerce.

The Privy Council reversed this decision, holding that the law applicable to the case was not that governing ordinary rights in personal property. On the contrary, the right to the privilege under the patent must be treated as distinct from the right of ownership in the article itself. It was demonstrated by a clear course of authority starting with *Betts v. Willmott*, in 1871, and running through all the cases referred to by Griffith, C. J., that it was open to a licensee, by virtue of his statutory monopoly, to make a sale *sub modo*, or accompanied by restrictive conditions which would not apply in the case of ordinary chattels; secondly, that the imposition of these conditions in the case of a sale was not presumed, but, on the contrary, a sale having occurred, the presumption was that the full right of ownership was intended to be vested in the purchaser; while thirdly, the owner's rights in a patented chattel would be limited if the knowledge of conditions imposed by the patentee or those representing the patentee were brought home to him at the time of sale. The right of patentees to restrain competition by means of coercive contracts with dealers was thus conceded.

Patents. See Monopolies.



The Editor's Bag

HOUSE OF GOVERNORS ACTS WITH UNDUE HASTE

IT IS unfortunate that the third annual Conference of the House of Governors should have furnished ground for any suspicion that the chief function of this body may be to antagonize the federal Government and to attack the methods of the federal Supreme Court. If the principal mission of the House of Governors is to champion the cause of state rights, in the face of supposed encroachment by national agencies, it can have so little usefulness that it had better be abolished. If on the other hand it is to take a proper view of its functions, as a body representing citizens of the United States, subject to its laws, and is to take steps to co-operate for the promotion of the collective welfare of the states, for the realization of ideals which a union of states may legitimately entertain, its opportunities for useful service to the American people are unbounded.

The recent Conference was marred by a partisanship which led the members to forget the legitimate objects of their organization. The serious and important work awaiting the attention of the Conference, in outlining beneficent projects of legislation and administration, while not entirely thrust aside, was relegated to a position of minor importance. Chief attention was focussed upon an issue not without a certain importance of its own, but of far less moment than the

prejudiced and somewhat puerile action of the Conference served to indicate. The state rights theory is not in need of so boisterous a vindication as the Conference gave it. There have been no decisions of the United States Supreme Court crippling the rights of the states, nor is there any ground for the fear that the Supreme Court will not act dispassionately in protecting the states from any undue extension of federal power over the commerce within their borders.

Judge Sanborn in the *Minnesota Rate* cases (*Shepard v. Northern Pac. Ry.*, 184 Fed. 765) gave expression to a very moderate doctrine. This is what he said:

"The nation may regulate interstate fares and rates and all interstate commerce. To the extent necessary completely and effectually to protect the freedom of, and to regulate interstate commerce, but no further, it may, by its Congress and its courts, effect and regulate intrastate commerce. To the extent that it does not substantially burden or regulate interstate commerce, a state may regulate intrastate commerce and the fares and rates therein within its borders, but no further. It may enforce regulations of intrastate commerce and its fares and rates which only incidentally or remotely affect interstate commerce. But state laws, orders and regulations concerning intrastate commerce, or the fares or rates therein, which substantially burden or regulate interstate commerce, or the fares or rates therein, are beyond the powers of the state, and unconstitutional and void. And where the attempted exercise of the power of a state to regulate intrastate commerce, or the attempted exercise of any of its other powers impinges upon or conflicts with the constitutional power of the nation to protect the freedom of, and to regulate, interstate

commerce and the fares and rates therein, the latter must prevail because that which is not supreme must yield to that which is supreme."

It is difficult to imagine what there was in this decision to excite the ire of the Governors of twenty-five states. Throughout Judge Sanborn recognized the right of the states to regulate commerce purely of an intra-state character. Can the Governors have read the decision? Governor Harman, in fact, confessed that he had not heard of it before he attended the Conference. Governor Aldrich of Nebraska showed his lack of ability to take an unprejudiced view of the matter, by his intemperate denunciation of those minor federal judges who are "trying to tyrannize state governments." Governor Hadley of Missouri has long agitated too assiduously this issue of state regulation of rates to be in a position to speak with authority. Of the other Governors the majority voted on political party lines, affecting disdain for the centralizing tendencies of the Administration, which are supposed even to impair the independence of the Supreme Court. It was a singular situation, conducive to the triumph of overzealous partisanship, and crowned with a sensational exploit.

While it is scarcely to be supposed that the House of Governors would have passed such an important vote without having the text of Judge Sanborn's opinion before them, we are inclined to the belief that their action is to be explained only on the theory that the majority of those present had taken no pains to study it. We find nothing in Judge Sanborn's decision opposed to the doctrine already laid down by the late Mr. Justice Harlan in the *Western Union* and *Pullman* cases (30 Sup. Ct. Rep. 190, 232), or marking any such advance in "broadening" the scope of

the interstate commerce clause as has been supposed to have occurred.

Not long ago a Southern state official who went West to attend the meeting of Attorneys-General was amazed to hear Westerners talking state rights with an utter lack of moderation. While he was himself a firm believer in state rights in the sense in which that term is generally understood by conservative Southern Democrats, he felt a duty to rest upon him, the representative of a state that had poured out her blood for the sake of Calhounism, to remind his associates from the West that their doctrine of state rights was of an entirely different brand than that with which he was familiar.

The action of the House of Governors, while of itself dramatic rather than argumentative, and offering no criticisms of the law which may be seriously weighed, may nevertheless be a surface indication of the direction in which a certain current of public opinion may have been moving since the doctrine of state burdens on interstate commerce was first declared. The National Association of Railway Commissioners, meeting at Washington, D. C., Oct. 12, approved the action taken by the Governors at Spring Lake, and adopted a resolution providing that no injunction should be granted by a United States court to stay the enforcement of any order "made by a commission authorized by state laws to regulate or control common carriers or other public service corporations." It is possible, therefore, that the Supreme Court will be induced, by a more powerful pressure of local interests than has yet shown itself among the populations of the several states, to introduce some new qualifications into its view of the scope of the commerce clause. But any such modification is sure to be slight, as our Supreme Court

is not composed of the sort of judges whose favorite pastime is to revamp the Constitution.

So far as the procedure adopted by the Conference was concerned, we agree with our esteemed contemporary, the *New York Law Journal*, that "the function of the Supreme Court of the United States as a determiner and settler of important questions of law far exceeds in importance its character as an arbitrator of particular controversies." Consequently, if the states desire a hearing in the Supreme Court in a controversy to which they are not a party, but by which they may be indirectly affected, it may be right in theory to accord them the right to appear, on complying with certain formalities necessary to the dignity of the Court. There is no precedent for such an intervention, and what formalities the etiquette of the Court might require to be observed may be problematic. But the vote instructing representatives of the Conference to present their case, lacking the usual deference shown our highest tribunal, there having not even been a direction to pursue this action "by leave of the Court," undeniably failed to conform to the proprieties which should govern the interrelations of judiciary and executive.

We find it very hard to treat the vote as one of the sort which any deliberative body of publicists might have passed. Minnesota is amply able to defend her own litigation, and a Conference of Governors moved by a proper respect for the ability and fairness of the Supreme Court would have been content with the more authoritative and dignified method of voicing its sentiment in an appropriate resolution. Should the Supreme Court consent to hear the representatives of the House of Governors in the arguments of any of the rate cases,

whether as special counsel or in any other capacity, the outcome can hardly fail to show the futility of their intervention in matters wherein their services are superfluous.

AN AWKWARD QUESTION

A RATHER good story of inept advocacy in Mr. Birrell's *Life of Frank Lockwood*, is pointed out by *Law Notes of London*.

Once in the Court of Chancery a witness was asked in cross-examination by an eminent Chancery leader whether it was true that he had been convicted of perjury. The witness owned the soft impeachment, and the cross-examining counsel very properly sat down.

Then it became the duty of an equally eminent Chancery Q.C. to re-examine. "Yes," said he, "it is true you have been convicted of perjury. But tell me: Have you not on many other occasions been accused of perjury and been acquitted?"

A LAY JUDGE'S CHARGE

IN THE early history of New Hampshire the judiciary consisted of three judges of whom one was a lawyer and the other two were selected from the laity for their recognized honesty and common sense. One of these lay judges, Dudley, was pronounced by that eminent lawyer, Theophilus Parsons, whose circuit in those days included New England, one of the best judges before whom he had ever tried a case. At Raymond, N. H., upon his tombstone may be found this inscription:—

HON. JOHN DUDLEY
DIED MAY 21, 1806
AGE 80
HERE LIES AN HONEST MAN

We are indebted to Dudley Roberts, Esq., of Waltham, Mass., for a copy of the following charge of Judge Dudley

taken from the biography of Governor Plummer of New Hampshire, and to be found in the 57th N. H. Report, *King v. Hopkins*: —

THE CHARGE OF JUDGE DUDLEY

You have heard, gentlemen of the jury, what has been said in this case by the lawyers: the rascals. But no: I will not abuse them, it is their business to make a good case for their clients: they are paid for it and they have done in this case well enough. But you and I, gentlemen, have something else to consider. They talk of law. Why, gentlemen, it is not law we want but Justice: they would govern us by the common law of England. Trust me, gentlemen, common sense is a much safer guide for us — the common sense of Raymond, Epping, Exeter and other towns which have sent you and I here to try a case between our neighbors,— clear head and an honest heart is worth more than all the law of the lawyers. There was one good thing said at the Bar, it is from Shakspeare an English player I believe, no matter, it is good enough almost to be in the Bible. It is this, Be just and fear not. That, gentlemen, is enough in this case and law enough in any case. Be just and fear not. It is our business to do Justice between these parties. Not by any quirk of the law, out of Coke or Blackstone. Books that never read and never will: but by common sense and common honesty as between man and man.

That is our business and the curse of God is upon us if we neglect or evade or turn from it. And now, Mr. Sheriff take out the Jury, and you, Mr. Foreman, do not keep us waiting with idle talk, of which there has been too much already about matters which have nothing to do with the case. Give us an honest verdict of which as a plain common sense man you need not be ashamed.

ESTABLISHED REPUTATION

APPPLICATION for employment was recently made to a Louisville business man by a young chap from the mountain region of the state. The Louisville man was favorably impressed by the stranger, but as no references were offered, he determined to hold the application in abeyance until he could personally look into the young man's antecedents, which he could do when next he visited that part of the state whence the applicant hailed.

It was not long before the opportunity was afforded. The Louisville man sought out the sheriff of the young man's home county and asked:

"Do you know Bill Sparks?"

"Shore, I know him."

"What kind of a young man is he?"

"Pretty fair."

"Is he honest?"

"Honest? Shore. Why, he's been arrested three times for stealin' and acquitted each time!"

STILL OPEN TO QUESTION

WHEN former Senator Spooner was making a very telling speech on the Philippines he presented during the course of his argument a sheet of paper on which he claimed was a letter written by the late General Lawton some time before his death.

Senator Pettigrew of South Dakota, who had expressed doubts as to who wrote the letter, was on his feet in an instant in an effort to cast a cloud of doubt over the authenticity of the paper. Senator Spooner turned toward Pettigrew and after looking at him for a moment he said:

"The Senator from South Dakota reminds me of a lawyer who was defending a prisoner charged with murder. The evidence presented by the state showed

that the defendant stood with a revolver when the other man approached, and fired it, and when he fired it the man fell dead. On cross-examination of a witness who saw it counsel said:

" 'Did you see this defendant?' 'Yes.' 'Where was he?' 'Well, he stood so-and-so.' 'Did he have a revolver in his hand?' 'Yes.' 'Was it pointed at the deceased?' 'Yes.' 'How far from him was it?' 'Twelve feet.' 'Did he fire it?' 'Yes.' 'Did the deceased drop when he fired it?' 'Yes.' 'Did you go to him?' 'Yes.' 'Was he dead?' 'Yes.' 'Now, sir, I ask you to inform the court and the jury on your oath whether you saw any bullet come out of the barrel of that revolver.' "

Pettigrew sat down, and as a tremor of laughter went round the Senate chamber there was no further objection from the Senator from South Dakota.

AN ANECDOTE OF MARSHALL

IT IS related that once, as John Marshall was traveling toward Raleigh, North Carolina, in a stick gig, his horse went off the road and ran over a sapling, so tilting the vehicle that it could move neither to the right nor to the left.

As the Judge was thinking up a way out of his dilemma an old negro came along. " 'Scuse me, sah," said he, "why don't yo' back yo' hoss?"

The jurist thanked him for the suggestion, backed the horse, and promising to leave a dollar at the inn for the good advice, went on his way.

The negro called at the inn, and found the dollar awaiting him. He took it, looked at it and said:

"He was a gen'l'man fo' sho', but" — tapping his forehead significantly, "he didn't have much up heah!"

PHYSICAL MARKS OF IDENTIFICATION

CRIMINOLOGISTS of France and Germany are discussing a plan for placing physical marks of identification on habitual criminals. Branding, of course, would not now be tolerated, and an offender, after the fashion of Balzac's *Vautrin*, is no longer to be identified by the bringing of red letters to view by a smart slap on the back. Nevertheless some means of certain identification might be of some aid in the administration of justice.

German criminologists suggest tattooing as supplemental to the Bertillon system, the character and location of the mark to show the nature of the crime. Taking a hint from the beauty doctor, a French *savant* suggests the injection of paraffin under the skin of the offender. The paraffin in hardening forms a lump and if removed, even then the mark of the knife would leave a scar that would answer in its stead.

Justly, of course, a serious objection to this practice lies in the fact that such marks would stand in the way of a criminal desiring to reform and redeem his past. This difficulty could be obviated, it has been pointed out, by placing the marks in such position on the body as not likely to be observed.

A POPULAR PREJUDICE

"It is not generally known that in order to be admitted to the bar in New York City it is necessary to show moral fitness as well as legal training." — *Hartford (Conn.) Times*.

It is possible that the public, after all, may infer from what it sees and hears that a moral standard is not deemed necessary. But we did not know that so strong a popular prejudice against the lawyers of New York existed.

MOTION DENIED

I STEPPED into the court-room of one of the judges of the Circuit Court in Chicago.

"Mrs. George Jefferson Washington Jones v. Mr. G. J. W. Jones," roared the clerk in his loud bass voice.

"I's representing the complainant in that, Judge. I wants an order for the payment of alimony and solicitor's fees. My client —"

"Anyone here representing the defendant?" inquired the Judge.

"If the Court please, I —"

"No, sir! No, sir, Judge! He can't appear here. He can't talk. Judge, he ain't got no right to say anything here. He has no right to talk in this here court whatever. No, sir! No, sir, Judge —"

"Why not?" inquired the Judge.

"Because, your Honor, he hasn't filed no appearance — he hasn't filed no appearance yet, Judge, and until he files an appearance he has no right to appear here."

"Just a minute," interrupted the Judge. "Let us see here. Who are you appearing for?"

"I's appearing for Mr. Benjamin Thomas Moses, your Honor."

"Who is that?" inquired the Judge, not catching the name.

"Don't you know who Benjamin Thomas Moses is, Judge? Why, he is the biggest colored attorney in this yere city of Chicago. Why, your Honor, he, he, he —"

"No, no, no; I don't care who he is. What I want is his name. Benjamin Thomas Moses. Now I have it.

"What have you to say about this?" continued the Judge, addressing a neatly dressed fine appearing young man. "Are you representing the defendant?"

"Your Honor —" he began, but was interrupted by the colored lawyer.

"No, Judge. No, sir! No, sir, Judge; he has no right to talk in this yere court unless he files his appearance."

"Well, let's hear what he has to say, anyway," replied the Judge with his usual suavity and good humor.

"Now, if the court please, I am not here to represent the defendant or contest the motion. I am simply here to suggest to the court that this suit for divorce was filed yesterday afternoon; and that late last evening the defendant was served with notice that they would appear before your Honor this morning and ask for solicitor's fees and alimony. The defendant has not yet appeared, and has yet ten days in which to do so before he can be defaulted. Until he appears or is defaulted, I suggest to your Honor that the court has no jurisdiction over the defendant and that any order entered against him would be null and void. That is all, your Honor."

"What have you to say as to those facts?" asked the Judge of the colored attorney.

"Them is substantially the facts, your Honor. He didn't think we was going to give him time to come in and beat this here motion, did he? I don't see for the life of me how that lawyer ever got here, as it is."

"Upon examining the files," continued the Judge, "I find they agree with those facts. While some judges do allow motions of this kind, I never have. I hold that the court has no jurisdiction over the man until he appears or has been defaulted, and consequently can render no valid order against him. Motion is therefore denied."

"Ah! ah! ah! Judge, your Honor, I just knowed that there lawyer would defeat my motion if he got here," consolingly added the colored lawyer.

"Motion denied. Call the next case, Mr. Clerk," concluded the Judge.

A PIONEER COURT

A LITTLE off the road leading from Xenia to Dayton, Ohio, was the first court-house in that county, standing with Owen Davis's mill on one side of it, and a blockhouse on the other bank of the stream. It was in 1803 that this spot was selected by the court as the seat of justice, and the first session was held to complete the county organization.

The court opened with a perfectly clean docket, and for a short time it looked as if it would have nothing to do. It might have proved an inglorious failure had not Owen Davis, the miller, come to its rescue.

Everybody took advantage of court day to drive to mill with his grist. Among those who came from a distance was a certain Smith from Warren County, who had the reputation of helping himself to pork wherever he found wild hogs in the woods. Davis, having turned out the grist for his friend, concluded to administer a little pioneer law on his own account, leaving the court to proceed in a more conventional manner.

Accordingly he gave the unfortunate Smith a sound drubbing, and having finished it, burst into the primitive courtroom, where the judges sat round a deal table in solemn state and awful dignity.

"Well," said he, "I'm damned if I haven't done it."

"Done what, sir?" demanded one of the associate justices.

"I've whipped that hog-thief from down the country, Ben, and I've made a good job of it! What's the damage, anyhow? What's to pay?"

Whereupon he pulled out a roll of money and counted down several bills. The Court looked on in silence, too deeply horrified for speech.

"It's a fact," continued Davis, "I've

whipped him, Ben, and if you stole a hog I'd whip you, too!"

This was too much for the Court, and the sheriff was ordered to go out and find the witnesses to the affray and take them before the grand jury. The miller's performance, however, had proved contagious, and when the sheriff got outside, he found a free fight going on, and the grand jurors watching it. Everybody who had a grievance, or thought he had, was trying to settle it in this irregular fashion.

By the middle of the afternoon nine indictments for affray and assault and battery were presented in court, and before evening the court found itself in funds to the amount of forty dollars.

A FINGER IN EVERY PIE

SOME years ago, during the lifetime of the late Gen. A. S. Twitchell of Gorham, N. H., a little incident arose in court at Lancaster which made a laugh for a moment. Lancaster is the shire town of Coos county, N. H., and on this particular occasion the court was in session with the late Justice Blodgett of the Supreme Court on the bench. The docket was being called on the first day of the term, and it seemed to some of those present that General Twitchell was in every case that came along. He represented either the plaintiff or the defendant, or else he had been requested by "Brother So-and-So, who was unavoidably detained from attendance, to ask his Honor" that the case might be set ahead one term, or marked for trial, or entered neither party, or whatever else it happened to be.

Finally they came to a case of, say *Smith v. Smith*. There was a dead pause for some time after Moses Hastings, the veteran clerk of the court, called it out. He repeated the call and gave the num-

ber, and still there was no response. General Twitchell, for a wonder, was sitting silent.

Judge Blodgett looked down upon him with a benignant smile and asked, "What would you suggest in regard to this case, Brother Twitchell?"

The General looked it up in his docket, and with a puzzled expression on his face, replied, "I hardly know, your Honor, but perhaps it would be well to put it at the bottom of the trial list."

"What is the case, anyway?" asked the Judge to Moses, who replied that he didn't recall a thing about it. All there was on the docket was the number and name of the case, no counsel having filed appearances or anything else having been put on. He suggested that it might be a divorce case, judging from the similarity of the names, but he had completely forgotten how it came to be there.

Just at that moment the door flew open with a crash and a mud-bespattered individual flew in and rushed to the bar, called to General Twitchell and handed him a letter. General Twitchell simply turned to the Court and said, "One moment, your Honor," and then opened the letter and glanced over it. There spread over his face a fine smile as he said, "This explains the mystery, your Honor. That case is one of Brother X —'s and he is not able to be here. He sent this letter by the stage and it broke down and the driver has just delivered it to me. He asks that this case of *Smith v. Smith* be put at the bottom of the trial list for the term, as he hopes to secure the attendance of the witnesses by that time."

He sat down and everybody laughed. What had started as a joke of the Court turned out to be just the right thing.

Judge Blodgett explained afterward that his only idea in calling on the General was that this seemed to be the one case of the entire lot that he did not have something to say about, and he did not want to see him slighted.

THE WHO'S-WHO OF CRIMELAND

THE "Who's-Who" of America's criminals is a handsome volume, bound in limp leather, a limited edition of which is issued every year or so. Only members of "the four hundred" of the criminal world find representation in this register, and an entire page is devoted to each individual mentioned.

Officially the volume is known as the Identification Album of the National Bureau of Criminal Identification, an institution having headquarters at Washington, D.C. Data for the album — which is literally a blue book — are supplied by the police departments of over one hundred cities throughout the country, and it is to these departments that the volumes are distributed. Each branch of criminal endeavor has a separate chapter in the book, one telling of pick-pockets, another of forgers, and so on. At the top of each page are reproduced two photographs of a distinguished criminal — a profile and full face. Below come name, aliases, age, height, weight, general appearance, and marks and scars. Bertillon measurements and criminal record fill out the page.

Filed in the Bureau are about 75,000 identification cards dealing with criminals not sufficiently famous to deserve place in the "Who's-Who." Each of these cards is similar to a page from the book. About one-tenth of the total number of cards are for women. About one-fourth are for negroes.

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, facia, and anecdotes.

USELESS BUT ENTERTAINING

Speaker (warming to his subject) — "What we want is men with convictions, and where shall we find them?"

Voice — "In jail, guv'nor!"
— *Penny Paper.*

A West Virginia darky, a blacksmith, recently announced a change in his business as follows: "Notice — De co-partnership 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."

— *National Corporation Reporter.*

"In a Jacksonville court," said a Florida Congressman, "a lawyer quoted Shakspere — 'Who steals my purse steals trash' — to a deaf judge.

"'What's that?' the judge demanded.

"'Who steals my purse steals trash,'" the lawyer repeated. "'Twas something, nothing; 'twas mine, 'tis his and has been slave'" —

"'Louder! I can't hear you!' said the judge irritably.

At this point the crier thought it time to interfere. He bent over the judge and shouted in his ear:

"'He just says, sir, that anybody what steals his pocketbook won't get nothing.'"

The Legal World

The Governors' Conference

The third annual conference of Governors of the States of the Union, held Sept. 12-15, at Spring Lake, N. J., was notable chiefly for the unprecedented action taken, in the appointment of a committee to protest against any invasion of state rights by the Supreme Court of the United States in its decisions bearing upon the regulation of railway rates. Judge Sanborn's decision in the *Minnesota rate* cases excited the warm disapproval of several of the speakers, and the object of this step was to prevent, if possible, the Supreme Court from deciding this case, and others involving the same question which will come up at the next term of the Court in a manner adverse to the alleged rights of the states.

Governor Woodrow Wilson, in his address of welcome, dwelt with satisfaction on the fact that the Governor's Conference was now an independent body, released from federal guidance. Governor Edwin L. Norris of Montana, addressing the delegates on the subject of "Strengthening the Power of the Executive," urged that the power be be-

stowed on Governors to remove inefficient state officers charged with the enforcement of the criminal and remedial laws. He also advocated granting the executive the right to initiate and refer legislation to the voters for their approval or rejection. Governor Augustus E. Willson of Kentucky delivered an address on "Possibilities of the Governors' Conference," and Governor Emmett O'Neal of Alabama spoke on the same subject as Governor Norris.

In the course of his remarks Governor O'Neal took occasion to denounce the initiative and referendum as "an insidious popular vagary." Governor Willson replied in defense of the measures, declaring: "I have known of instances of the caprice of the mob, but I have never known of any instance where the vote of the population was spoken of as a caprice. I have read of gentlemen speaking recently in distrust of the people and using that old, erroneous phrase, 'Mob rule.' What is a mob? A mob is a body of people immediately associated with each other acting under the impulse of passion, but that does not apply to a

thousand men in a community in scattered portions, casting their ballots." Governor O'Neal delivered an energetic rejoinder, saying that he would rather stand with Madison and Hamilton than to stand with some modern prophets and some of our western statesmen. Other Governors spoke on the same topic.

Wednesday, the second day, was taken up with a discussion of "Employers' Liability and Workingmen's Compensation." The principal addresses were made by Governors Charles S. Deneen of Illinois and Eugene N. Foss of Massachusetts.

On the third day, "The Right of the States to Fix Intra-State Traffic Rates" was discussed by Governors Herbert S. Hadley of Missouri and Chester H. Aldrich of Nebraska. Governor Hadley referred to the *Minnesota rate cases* as involving a momentous question, namely, whether rates fixed by state boards of railroad commissioners are unconstitutional as directly burdening interstate commerce, and urged the importance of the states retaining the power to regulate rates within their territory. Governor Aldrich also made a plea to similar effect, for state authority in the regulation of public utilities, and gave the results of the operation of the Nebraska rate law to illustrate his argument. Governor Francis E. McGovern of Wisconsin later spoke in a similar strain.

Another topic discussed on the third day was "The Inheritance Tax and State Comity," addresses being made by Governor Dix of New York and Governor Noel of Mississippi. Dr. Anna Shaw, president of a national woman suffrage association, also addressed the Governors, no final action being taken by the Conference in response to her appeal.

Governor Noel outlined conditions in the several states, and advocated the inheritance tax not only as a much needed

supplement to other sources of revenue but as a means of superseding or making nominal the direct tax system, if aided by fair and equitable taxes from other sources. He praised the New York inheritance tax law. Governor Dix of New York, on the following day, described the inheritance tax law of his state.

Governors of twenty-four states voted Thursday afternoon to unite in protest to the United States Supreme Court against what they considered an invasion of state rights by federal courts. The motion was made by Governor O'Neal of Alabama, and was "that this conference appoint a committee of five Governors to take such action as may be necessary before the United States Supreme Court to see that the rights of the states are properly protected." The proposition excited animated debate, which turned, however, chiefly on minor details. The motion, as finally adopted, provided for a committee of three, and only one voted in opposition, Governor Kitchin of North Carolina, who thought the action would be beyond the scope of the Conference. Governor Harmon heads the committee, and his associates are Governors Hadley and Aldrich.

On Friday the Conference met in executive session, and voted to hold the next annual conference at Richmond, Va., Dec. 3, 1912. Afterward Governors Stubbs of Kansas, Vessey of South Dakota and O'Neal of Alabama made addresses outlining reforms recently adopted by their respective states. Governor Dix delivered his address on taxation. The Conference then dissolved, after Governor Gilchrist of Florida had announced that the executive committee had agreed to place foremost on next year's program a discussion on the advisability of having a uniform divorce law.

President Taft's Speech on the Sherman Act

The speech delivered by President Taft at Detroit on Sept. 18 has been interpreted as exhibiting the purpose of the Administration to enforce the Sherman anti-trust law in accordance with a construction which is distinctly unfavorable to the idea of legalized monopoly. The President said in part:

"I shall not attempt to give it a close lawyer-like interpretation, but I think it is not departing from the declaration of the Court to say that they find any contract in restraint of trade, made for the purpose of excluding competition, controlling prices, or of maintaining a monopoly, in part or in whole, is contrary to the statute and is subject to injunction and indictment under this statute in the federal courts where it affects interstate trade. Now I would like to ask Mr. Bryan or any of the other publicists and jurists who have been denouncing this opinion as the surrender of the rights of the people and a usurpation of judicial power to tell the public what particular contract or restraint of interstate trade he would condemn which would not be condemned within this definition of the Court. . . .

"It is said that the Supreme Court has read something into the statute that was not there before; that it has inserted the word 'reasonable' before restraints of trade, when the same Court had said that this could not be properly done, because Congress had evidently not intended to include such a limiting word in the statute. This is not fair to the Court. It is true that the Court, in the early days of the construction of the statute, had said that it could not limit the statute in effect by excluding from its operation what was deemed reasonable at common law. But as other cases arose it found it necessary to make exceptions to the literal operation of the words

'restraint of trade,' and it did so by excepting what was minor, or incidental, or indirect, and including only those cases where the chief object of the contract or combination was the restraint. In doing so the Court said that it must give the statute a reasonable construction and not one leading to absurd or ridiculous results. In the last two cases the Court did not change the substance of the reasoning and scope of the previous decisions, but only treated the exceptions previously termed 'incidental and indirect,' as excluded from the operation of the statute in the light of reason; *i. e.*, in conformity to the evil sought to be reached. Now, in what way has this injured the public weal? What combinations or arrangements can escape under this interpretation that any sensible man would wish to have condemned? Did the Court not condemn the Standard Oil Company, the father of all trusts, in the history of which every form of criminal illegality was practised? Did it not, on the other hand, condemn the Tobacco Trust, of much later origin and framed under the advice of cunning counsel for the very purposes of evading the condemnation of the statute and at the same time securing and enjoying the monopoly the framers of the statute intended to prevent and punish? . . .

"It needed these two great decisions to teach the business public that at least not in the supreme tribunal of this country would the claim be listened to, that in this day and generation we have passed beyond the possibility of free competition as consistent with proper business growth, or that we have reached a time when only regulated monopoly and the fixing of prices by governmental authority are consistent with future progress. We did get along with competition; we can get along with it. We did

get along without monopoly; we can get along without it; and the business men of this country must square themselves to that necessity. Either that, or we must proceed to state socialism and vest the Government with power to run every business. . . .

"Under these conditions, I am entirely opposed to an amendment of the anti-trust law. It is now a valuable Government asset and instrument. Tested and brought into practical and beneficial use by twenty years of litigation and construction by the highest court, why should we imperil its usefulness by experiment?"

The Sullivan Pistol Law

New York has a new pistol law which went into effect early in September. The Sullivan weapon law (Laws of 1911, c. 195) makes it a felony to carry or have in one's possession without a license any firearm. There has been much condemnation of the law, both by those who regard it as an improper interference with private rights and by those who think it sound in principle but needing amendment. Others commend it as a means of stamping out the evil of carrying concealed weapons, but as a law which calls for discretion in its enforcement. On September 9 a night watchman was arrested for having fired his revolver at a gang of Italians who attacked him when he was guarding some paving materials from depredation. Magistrate Butts refused to convict him, holding that the Sullivan law must be liberally construed, so as not to prohibit the protection of life and property. On September 7 a German subject arrived in New York City at the Pennsylvania station in Day street, carrying a shotgun in a leather case. He was arrested and confined with common criminals for four days, when the matter was

presented to the grand jury and he was discharged. An Italian laborer was arraigned in the Tombs Court September 1 charged with carrying a shotgun which he had just bought to hunt rabbits with; he was paroled by Judge Swann, who was greatly perplexed by the law making such an offense a felony punishable by seven years imprisonment. The first conviction of felony occurred September 27, when Marino Rossi was sentenced to serve a year's imprisonment in Sing Sing prison by Judge Foster in General Sessions. Rossi at the time of his arrest was on his way to take a job in New Haven. He said he carried a revolver for fear of the Black Hand, and that he was an honest working man. Judge Foster said it was unfortunate that this should be "the custom with you and your kind, and that fact, combined with your irascible nature, furnishes much of the criminal business in this country. I must enforce this law and impose sentence to warn every one that this carrying of revolvers must stop."

Miscellaneous

Redmond Barry has been made Lord Chancellor of Ireland, succeeding the late Sir Samuel Walker. He has been Solicitor-General of Ireland since 1905.

Leon R. Eyges, senior member of the Boston law firm of Eyges, Wyner & Freedman, has been appointed lecturer in the course of bankruptcy given in the Suffolk School of Law.

In connection with the vacancy caused by Chief Justice Knowlton's retirement from the Massachusetts Supreme Judicial Court, the name of Professor Samuel Williston of Harvard Law School was one of the chief ones mentioned before

the appointment of Mr. Justice Rugg to be Chief Justice. It has been pointed out that only two judges of this court have ever been connected with the faculty of Harvard Law School. They were Oliver Wendell Holmes, who was appointed Professor of Laws in 1882, shortly afterward resigning to become a Justice, and John Lathrop, who was an instructor in the Law School. Joseph Story, who was Professor of Law at Harvard, 1829-1845, and Justice of the federal Supreme Court, 1811-1845, never sat on the supreme bench of the state.

William J. Forsaith, senior Associate Justice of the Boston Municipal Court, has resigned, at the age of seventy-five. He had been on the bench of the Municipal Court since 1882.

Students and lawyers interested in Continental legal literature will be grateful to the Library of Congress for the announcement that a series of Guides to the Law and Legal Literature are being prepared by the Law Librarian, Edwin M. Borchardt. The first, to be issued in October or November, will deal with Germany, and a second and a third, dealing with Austria and France, will be published by the Library of Congress at intervals of four or five months. The object is to furnish American lawyers with some idea of European legal concepts and in a modest way to prepare for them what Jelf, "Where to Find the Law," is to English lawyers. An unrevised portion of the "Critical Survey of German Legal Literature" is printed in the annual bulletin of the Comparative Law Bureau of the American Bar Association. The charges will be small, probably not more than 15 or 25 cents for each guide.

Professor O. F. Lewis, secretary of the Prison Association in New York, has written an unsparing criticism of penal methods and institutions in New York. He finds the situation there "deplorable." One night in September he found at the Jefferson Market Prison four cells in each of which two men were sleeping, though there was only one cot between them. On the same evening in the Night Court on East Fifty-seventh street the prison connected with it was so crowded that in several cells five or six men were confined so closely as to forbid anyone lying down unless upon the floor. At the Criminal Courts building there are prison pens in which persons not yet convicted are held for hours pending their appearance at some part of the Court of General Sessions. These pens are smaller than the cattle car of a freight train, but on Fridays, the big day of the week, from fifty to seventy-five persons, mostly young men, are frequently packed into them. "No more improper or wretched preparation for a court trial cou'd, it seems to me, be imagined than this," says Professor Lewis. "Fortunately, our foreign visitors to the International Prison Congress last fall were not shown this pen." Professor Lewis's criticism has greater weight for the reason that he lately concluded an extended tour of observation through Belgium, Holland, Germany, England and Scotland, during which he visited about forty prisons, and not in a single instance did he see more than one prisoner in a cell.

Bar Associations

California. — The California Bar Association will hold its next annual meeting at Sacramento, Nov. 13-15. Among the speakers will be President Lynn Helm of Los Angeles, Judge Burnett of the District Court of Appeal of Northern

California and Hon. Peter W. Meldrim of Savannah, Ga.

at Wahpeton, N. D., Sept. 5-6. His subject was "Courts of Review."

Missouri. — The Missouri Bar Association held its twenty-ninth annual meeting at Kansas City, Sept. 22-23. The annual address was read by J. J. Vineyard, the president, followed by a paper on "Artificiality of the Law of Evidence," by Simeon E. Baldwin. "Experience in the Appellate Courts of England" was discussed by Dean John D. Lawson of the Missouri Law School. Former Attorney-General R. F. Walker spoke on "The New Federal Code." Other speakers were Governor Hadley and Judge Selden P. Spencer of St. Louis. Workmen's Compensation received considerable discussion, P. W. Meldrim making an address on "Employers' Liability and Workmen's Compensation Acts." The following officers were elected: — Morton Jourdan, St. Louis, president; Judge James E. Goodrich, Kansas City, vice-president; John Schaich, Kansas City, secretary; E. M. Grossman, St. Louis, treasurer.

Virginia. — The twenty-third annual meeting of the Virginia State Bar Association was held at Hot Springs, Va., Aug. 8-10. The president's address, delivered by Judge George L. Christian, was a biographical study of Chief Justice Taney. Other papers were "Centralization against Decentralization," Prof. Raleigh C. Minor; "The Life and Character of Lord Brougham," Judge A. W. Wallace; "Abolition of Jury Trials in Civil Cases," Walter H. Taylor; and "A Permanent International Court," Helm Bruce. The question of expert testimony was discussed at some length and the bill submitted by Mr. Whitehead at the 1910 meeting of the Association was recommended for passage. These officers were elected: President, J. F. Bullitt of Big Stone Gap; vice-presidents, A. R. Long of Lynchburg; J. S. Harnsberger of Harrisonburg; E. Chambers Goode of Mecklenburg county; A. S. Higginbotham of Tazewell and Hugh W. Davis of Norfolk.

Nevada. — The Nevada State Bar Association was organized at a meeting held in Reno, Nev., Sept. 23. The officers elected were: Hugh H. Brown of Tonopah, president; Judge A. E. Cheney of Reno and Charles B. Henderson of Elko, vice-presidents; Robert Richards of Reno, secretary; and Judge George S. Brown of Reno, treasurer. With the organization of this body, Wyoming now stands alone as the only state in the Union without a bar association.

Washington. — The Washington Bar Association held its annual meeting at Spokane, July 27-29. The papers on the program included "The Delays of Courts," Justice Stephen J. Chadwick of the Supreme Court; "A Visit to the Courts of Germany," F. H. Peterson, Seattle; "State and Federal Conservation," Russell L. Dunn, San Francisco; "Facts in the Case," Federal District Judge Frank S. Dietrich of Idaho; "The Recall of Judges," T. J. Walsh, Helena. The following officers were elected: W. T. Dovell of Seattle, president; C. Will Shafer of Olympia, secretary; Arthur Remington of Olympia, treasurer.

North Dakota. — Chief Justice Orrin Carter, of the Supreme Court of Illinois, was the chief speaker at the meeting of the North Dakota Bar Association, held

Obituary

Carter, Thomas H. — Former United States Senator Thomas Henry Carter of Montana died Sept. 17, aged fifty-seven. An Ohioan by birth, an Iowan by adoption and a Montanan long before that territory was admitted to statehood, Mr. Carter had been the first representative in Congress from Montana, commissioner of the general land office, chairman of the Republican national committee, president of the United States commissioners for the Louisiana Purchase Exposition, and, since last March, chairman of the newly created "international joint commission American section," especially charged with Canadian boundary matters.

Corbin, Charles L. — Charles Lyon Corbin, of the firm of Collins & Corbin of Jersey City, died Aug. 12, in his sixty-sixth year. Having been graduated from Hamilton College and Columbia Law School, he was admitted to the bar of New York in 1869, and immediately afterward began the practice of law in Jersey City. In 1884, with Vice-Chancellor Stevens, he drew the Railroad Tax law. He prepared and published an American edition of Benjamin on Sales. He revised and published two editions of the Rules of all the New Jersey Courts. He revised and consolidated the tax laws of the state and reduced its railroad legislation to order and simplicity.

Frye, William P. — United States Senator William Pierce Frye died at Lewiston, Me., Aug. 8, aged eighty. He was not only the senior member in point of service of both Houses of Congress, but would have been made Speaker but for his transfer to the Senate. The code which now governs the deliberations of the Senate is largely his work, as chairman years ago of the Committee on Rules. He was particularly interested

in the questions that arose between this country and Canada, and took a leading part in the abrogation of the fishery articles in our treaties with Great Britain.

Harris, Edward. — Edward Harris, who died at Rochester Sept. 16, aged seventy-six, was the recognized leader of the bar of his section of New York State. His clients included the New York Central Railroad, of which company his son, Albert H. Harris, is now general counsel and vice-president.

James of Hereford. — Lord James of Hereford, who died in England, Aug. 8, at the age of eighty-three, was called to the bar at the Inner Temple in 1852, and as Henry James distinguished himself at the bar, being made a Q. C. in 1869. He made his mark in the House of Commons, becoming Solicitor-General and later Attorney-General. He refused the Lord Chancellorship because he could not agree with Gladstone on his home rule policy. He was one of the leading counsel for the London *Times* in the Parnell affair. He was raised to the peerage in 1895, and in 1896 was appointed to the Judicial Committee of the Privy Council.

Madison, Edmond H. — Congressman E. H. Madison of Kansas, a prominent Insurgent of the House, died in Kansas City, Sept. 18, aged forty-five. He entered politics by successfully running for county attorney, later becoming a Kansas district judge.

McCook, Col. John J. — Col. John James McCook, head of the old New York law firm of Alexander & Green, died Sept. 17. Col. McCook was the youngest of nine sons of Daniel McCook, who, with five sons of John McCook, distinguished themselves by brave service in the Civil War. Col. McCook was offered the Secretaryships of War, Navy

and Interior by President McKinley, but declined the honor.

Nash, Edwin A. — Judge Edwin A. Nash died at Geneseo, N. Y., July 23, at the age of seventy-five. He was district attorney from 1869 to 1873; county judge from 1878 to 1896, and Justice of the Supreme Court of New York, and Appellate Division, Fourth Department, from 1896 to 1906.

Penrose, Clement Biddle. — Former Judge Penrose of the Orphans' Court of Philadelphia, who was recently succeeded by Judge John Marshall Gest, died Sept. 4. He was born in 1832, and was appointed to the bench in 1878, after twenty-five years' practice at the bar.

Richardson, James B. — Judge James B. Richardson, dean of the Massachusetts Superior Court, died Aug. 30, at the age of seventy-nine. He was corporation counsel of Boston in 1889, being raised to the superior bench in 1892.

Shepard, Edward M. — Edward M. Shepard, a leading member of the New York bar, prominent in Democratic politics, and not long ago one of the chief candidates for United States Senator, died July 28 of pneumonia, at the age of sixty-one. He was head of the firm of Shepard, Smith & Harkness, 128 Broadway. His absorbing pursuits were literature, politics and the law. He was a prolific writer, producing many scholarly monographs on social, economic and political subjects. He was also the author of a life of Martin Van Buren.

Smithers, William T. — William T. Smithers, secretary of state of Delaware, and considered the best orator among the state Republican leaders, died Sept. 15. He had been a member of the Delaware constitutional convention of 1897.

Soley, James Russell. — Well-known as a writer on naval affairs, Professor James R. Soley died in New York, Sept.

11. For nine years he was head of the department of English studies, history, and law at Annapolis. He afterward was a regular lecturer at the Naval War College and assistant secretary of the Navy from 1890 to 1893. Later he practised law in New York City. Professor Soley was counsel for Venezuela in the Venezuela-British Guiana boundary dispute in 1899. He wrote a history of the United States Naval Academy, 1876; "Foreign Systems of Naval Education," a government report, 1880; "The Blockade and the Cruisers," 1883, and numerous other works.

Townshend, John. — John Townshend, who wrote books on legal and antiquarian subjects, died in New York City, Aug. 11. He was the author of "New Practice of Civil Actions in Courts of Judicature in the State of New York as Established by the New Code of Procedure" (1848), which ran through ten editions, and of "Libel and Slander" (1868), which went through five editions.

Walker, Sir Samuel. — Sir Samuel Walker, Lord Chancellor of Ireland, died Aug. 12 in Dublin. Born in 1832, his career was built up in Ireland. In 1892 he was made Lord Chancellor, having filled the offices of Solicitor-General and Attorney-General of Ireland.

Wellford, Beverly Randolph. — Judge Beverly Randolph Wellford, for thirty-three years judge of the circuit courts of Richmond, Va., died Sept. 19 at the age of eighty-two. During the Civil War he was connected in a legal capacity with the Confederate War Department.

Wister, William Rotch. — William Rotch Wister, an honored member of the Philadelphia bar, died in August at a ripe age. He was counsel for several large Philadelphia companies. He had done much for the promotion of cricket in this country.



SAMUEL WILLISTON

WELD PROFESSOR OF LAW IN HARVARD UNIVERSITY

**WHO IS RENDERING GREAT SERVICE TO THE UNIFORM
STATE LAWS MOVEMENT**

(Photo. by Marceau, Boston)

The Green Bag

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Samuel Williston, Professor of Law

By BRUCE WYMAN

SAMUEL WILLISTON was born in Cambridge, September 24, 1861, the son of Lyman Richards Williston and Annie E. (Gale) Williston. He lived in Cambridge continuously until he left college; and private schools in Cambridge and the Cambridge High School gave him his preliminary education. He entered Harvard College in 1878, and of the four years passed in college this history need not go into detail. His name appears on the prize lists, and he was felt to be a youth of high promise by all with whom he came in contact. He was an athlete of sorts also, with enough of a record to have 'Varsity standing.

In the middle of his Senior year at Harvard he had an opportunity to become secretary of Raphael Pumpelly, then at the head of a large survey established by Henry Villard on behalf of the Northern Pacific Railroad and allied corporations. He obtained leave of absence from college and accepted the appointment, returning in June to pass his examinations and take his degree. Mr. Pumpelly's headquarters were at Newport, R. I., and he lived there until 1884, when the financial downfall of Mr. Villard caused the discontinuance of the Northern Transcontinental Survey.

From September 1884, to June 1885, he was an instructor in a boarding-school near Philadelphia — S. C. Shortlidge's Media Academy — teaching chiefly French and German.

In the autumn of 1885 he entered the Harvard Law School, and spent three busy years there. He was almost from the first recognized by his professors as one of the ablest men in his class; and his grades in his courses were extraordinarily high. Among his fellow students there never was any doubt of his capabilities, as his election to the board of the *Harvard Law Review* showed. He won the Harvard Law School Association prize by an essay on the "History of Corporations," and he represented his law class upon the Commencement stage. The next fall he went to Washington as secretary to Mr. Justice Gray of the United States Supreme Court, and had a hand in writing many of his opinions in that year.

On September 12, 1889, he married Mary Fairlie Wellman and moved to Brookline. In 1891 the Willistons moved to Cambridge, and about ten years later they settled themselves on Belmont Hill overlooking Cambridge, where they now reside. They have two daughters, Dorothea Lewis and Margaret Fairlie. Pro-

fessor Williston either has been or now is a member of the Colonial Society of Massachusetts, the American Academy of Arts and Sciences, the Φ Ψ Σ (honorary), the Newport Reading Room, the University Club of Boston, the Varsity Club of Cambridge and the Oakley Country Club. His amusements are miscellaneous reading, playing the piano, billiards and golf.

In 1899 he began the practice of law in Boston as managing clerk for Hyde, Dickinson & Howe. Within a year he was made an assistant professor in the Harvard Law School, but he still continued to give more than half of his time to the office of Hyde, Dickinson & Howe. The strain of double work proved too severe; and in 1895, soon after his appointment as full professor, his health gave away completely. For three years he traveled in search of it, and he found practically all of it ultimately. Since 1898 he has been teaching at the Law School; and he has of late years also resumed practice, chiefly in the way of trusts, consultations and opinions. He has thus always kept in touch with practice, and with the work of the bar. He has been a prominent member of the American Bar Association, and was at one time a bar examiner for Suffolk County.

But, of course, his work as a professor of law has been first with him. He was taken into the faculty of the Harvard Law School as an assistant professor in 1890, without any probationary service as an instructor. In 1895 he was appointed a full professor; and in 1903 he was transferred to the higher dignity of the Weld Professorship. In 1903 he taught as a visiting professor in the Summer Quarter of the Law School of the University of Chicago; and in 1909 he gave a course in the summer session of the Law Department of the Univer-

sity of California. At the death of Dean Ames in 1909, he was appointed to act as Dean of the Law School; but as he did not dare risk the permanent addition to his regular work of this exigent duty, he asked to be relieved of further service in this position. The Harvard Corporation in accepting his decision took this occasion to confer upon him the degree of LL.D., in recognition of his eminence as a teacher of law.

A very important part of Professor Williston's work during the past few years has been in the field of codification. He was employed in 1902 by the Conference of Commissioners for Uniform State Laws to draw an act which should codify the American Law of Sales. In 1903 the first draft of such an act, with some annotations, was widely distributed for criticism, and was considered by the Conference at its ensuing annual meeting. The same course was adopted with a second draft presented to the Conference in 1904, a third draft presented to the Conference in 1905, and a final draft presented to the Conference in 1906, which was finally adopted and recommended for passage in that year.

In drawing the Sales Act, great use was made of the English Act. On many topics, however, the American law of Sales differs from the English law, and in such matters the American law followed. Though the weight of authority was not slavishly adhered to upon doubtful questions, nevertheless it was used as a guide unless strong reasons of principle or policy required a different rule. The final draft of the act contains a number of sections relating to transfer of property by documents of title which were not contained in the original draft, and which are not in the English Act. These sections are intended to embody the modern commercial understanding of

transfer by warehouse receipts and bills of lading.

In regard to some matters the act aroused a considerable difference of opinion, especially in regard to the propriety of many of the sections relating to documents of title, in regard to the broad definition of value (in connection with the phrases "purchase for value," and "purchaser for value"), and in regard to the propriety of allowing a buyer to rescind an executed sale for a breach of warranty. Some able lawyers opposed the provisions of the Act on these points.

In 1904 the Commissioners for Uniform State Laws entrusted to Professor Williston and to Barry Mohun, Esq., the drafting of an act to codify the Law of Warehouse Receipts, and three successive drafts were prepared and considered in the same way as the drafts of the Sales Act, and adopted and recommended for passage in final form in 1906. In that year the subject of bills of lading also was submitted to him, and five drafts were prepared and submitted for criticism in the same way as the preceding acts. Special meetings of shippers, bankers and carriers also considered this act, which was finally accepted and recommended for passage by the Conference in 1909. During the same period, the draftsman had in hand an act to make uniform the Law of Stock Transfers. Three tentative drafts of this act were prepared, and this also was adopted and recommended for passage by the Conference in 1909.

The adoption of the principle of negotiability under careful limitations for warehouse receipts, bills of lading and stock certificates, is perhaps the most striking single feature of the legislation in question. These acts are being adopted generally throughout the country, so that this principle of negotiability is be-

coming thus the law of the land. So diverse were the older authorities in the various states upon this point that here certainly was a case where without uniform legislation that uniformity which is so desirable in commercial matters could never have been attained. In no other way could the general law of the United States have been made to conform to the best commercial usage.

Professor Williston came into the teaching of law by the case method before it had been worked out to the practicable system it now is. The first of the case books were becoming obsolete, as the art of teaching by cases had developed in a way which the founders of the method could never have anticipated *a priori*. His first work in case book making was the editing of an additional volume to go with Langdell's *Cases on Contracts* (1894). The necessity for this was plain, as Langdell never went beyond the mere elements of the subject, finding in them all the material needed for a year's discussion; but Professor Williston saw, as others have seen since, that it will not do when you are purporting to train young men to practice law not to give them as wide a range of information as is consistent with a thorough discussion of the principles involved. At about the same time his *Cases on Sales* (1894) was brought out, in view of the same necessity of making this new idea workable. The second edition of the *Cases on Contracts* (1903) and the second edition of the *Cases on Sales* (1905) are now currently used in most of the schools which have adopted the Harvard system. Like most of Williston's work, they represent the golden mean. They have large divisions so that the student may know what he is studying, but the subdivision is left to the student. There is a painstaking collection of cases *accord*

and *contra* where the law is in doubt, but no indication of the opinion of the editor to relieve the student of the wholesome difficulty of making up his own mind.

In his first work as a law writer, Professor Williston took the safe course of doing the apprentice work of an editor. The eighth edition of Parsons on Contract was annotated by him in a most acceptable manner (1893), the work being confined conservatively to supplementary notes collecting the later authorities. There were, however, many editorial notes, dealing with matters not dreamt of in Parsons' philosophy, which showed the real powers of the modest editor. About this time, also, he made an edition of Stephen on Pleading which has proved useful to many students of that difficult subject. Professor Williston's contributions to legal periodicals cover the whole time of his teaching and the whole range of his work. So many of these are now incorporated in his later treatises that it is not necessary to recite their titles. There have been some historic controversies which Professor Williston has carried on in legal periodicals with other distinguished professors in which the course of his reasoning and the force of his argument have been especially noteworthy. Anyone who has read anything which Professor Williston has written must have felt the charm of his style, but the flow of his language is so appropriate to the subject that one hardly gives it a thought.

Professor Williston has produced within the last few years two treatises of the highest value to the legal profession. It is to be feared that the great worth of the first of these has not been as generally appreciated by the profession at large as it deserves to be. In the making of the third American edition of Pollock's Principles of Contracts (1906), Professor

Williston did a most valuable work in a rather obscure way, effacing himself so that he might thereby preserve the integrity of the original work. Professor Williston's work was not confined, however, to his elaborate annotation of Sir Frederick Pollock's text. Whole chapters were inserted upon subjects not treated in the original work at all, but necessary to make it a complete statement of the general principles of contract law. In these chapters, such as that upon the place of the third party in a contractual arrangement, Professor Williston displayed that originality in the explanation of a situation which is characteristic of the greatest jurists.

The most important book which Professor Williston has written is his Law governing the Sale of Goods at Common Law and under the Uniform Sales Act (1909). The form of this book was dictated by the progression of the sections in the Sales Act; and it is highly significant of the character of his work in drafting that act that this arrangement makes so logical a development of the subject. In the elaborate statement of the common law rules, which accompanies the successive sections of the statute, one may see also what statute making can be in the hands of a master. The statute is only codification where the common law rules can be defended on sound principle; but Professor Williston is unusually catholic in recognizing that there are many sound reasons for holding to established rules, which are not ordinarily given due consideration by a mere scholar. Moreover, where the common law had not yet developed sufficiently to deal with modern business as it actually is, Professor Williston has no hesitation in making that the law for the situation which upon a broad view of the situation ought to be the law. As for the execution of the work, it is gener-

ally agreed that the author has here displayed his powers of exposition at their best; one sees his familiar ways of arguing out difficult problems which anyone who has had the good fortune to have been among his pupils will instantly recognize. Altogether, the book shows that balance between the accurate statement of the particular rules and the full debate of the principles involved which makes the highest type of law treatise.

This is no place to revive the controversy which for a generation after the establishment of the case system by Dean Langdell divided the law schools of this country. By the time Professor Williston began to teach, the superiority of that method of study had become evident, and its eventual success throughout the land was assured. That induction really educates while deduction only instructs is now generally recognized. And the Langdell method made of the law school a scientific school, where the laws governing a situation are found by the methods of the laboratory. This theory of studying law was fully developed by Dean Langdell; what Professor Williston has done is to work it out into practice better than anyone else has yet succeeded in doing. It may almost be said that he found study of law reduced to a science, and that what he has done is to make the teaching of law an art. The basis of that art is as simple as the teaching of Socrates, and as subtle.

Socrates showed his disciples the impossibility of answering a series of questions consistently unless one has got the sound principle. And I do not believe that there have been many teachers since the days of Socrates who have employed the Socratic method with such success as Professor Williston does today. "You think this

case is right, Mr. X? You, Mr. Y, do not? Then Mr. X, what would you say to this? Would you agree with that, Mr. Y? Well Mr. Z, there is something in what you say! But what bothers me is this! You wouldn't say this, would you, Mr. X? Then how can you reconcile that with what you said a while ago? I think Mr. Y was right at first. I do not see any other way to explain," etc., etc. This looks like strange stuff in type, but it is the real thing to the class. Everybody in that class has got the problem long since, and is worrying about it as the discussion advances. One learns law slowly thus, but he never forgets what he has learned. It is not so much that one gets the principle, it is that he has learned to apply it.

There is little that can be reduced to description in writing of Professor Williston as a teacher. His great gift as a teacher is an incommunicable thing, defying analysis as much as the lovely personality of the man. It is impossible to explain just how the discussion, whatever may be its course, is brought finally to its inevitable conclusion. And yet day after day his students are made to feel that they are working out new law with him, and that he is anxious for their aid to help him out. Once a class is made to feel that they are fellow workers in a great cause, their interest is aroused as it could be in no other way. I do not mean to say that there is any artifice in this art; it is probably his inherent modesty of opinion which makes Professor Williston year after year examine his chosen subjects to see what new light a class may have to throw upon them. He realizes the perplexities of his pupils and states them better than they can. He works out the solution with them, but goes further than they could without him. Upon the whole, I feel that it is his ability to make himself

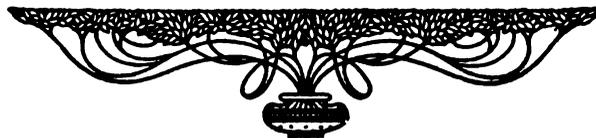
one of his own classes that makes him the great teacher that he is.

Professor Williston has taught at various times various subjects in the Harvard Law School, but from the first he has given special attention to two subjects fundamentally allied. Contracts in the first year and Sales in the second year are his courses which every student advisedly takes and enthusiastically pursues. In a broad sense, this is all contract law; and to such purpose has he devoted himself to these subjects that he is generally recognized as the master of the law of contracts. He is in constant correspondence with other scholars who have made the subject of contracts their specialty, and his opinion upon any of the unsolved problems of the law of contract would almost be considered final. His interest in that subject is world wide; it transcends the limits of the common law. He is well read in the civil law of contractual obligations; and occasionally he writes of it to good purpose. Among the initiated, also, his work in bankruptcy is rated fully as high, as his consultative practice in this subject bears witness.

Professor Williston's career has revealed to many persons who have been inclined to class the teacher of law with other pedagogues how dignified the profession of teaching law may be. In his writings of books, he has confirmed the theory that the teaching of the law to students can make one the best expoun-

der of the law to practitioners. In his drafting of statutes he has shown that no one but a real scholar can work out the highest type of constructive legislation in the field of private law. In his consultative practice, he has demonstrated that a teacher of law brings to a new problem more experience in solving difficult questions than any practitioner can ever have. And, furthermore, in the personal practice, in which he still indulges himself, he has startled many an able lawyer by winning an apparently hopeless case.

Indeed, he has shown that one may be both a professor of law and a man of affairs. The community has many uses for such a man; and so many are the calls for him that every once in a while his school has a momentary fear of losing him. It is reported that some school wants him for Dean at an extraordinary salary, or it is said that he is being considered for a Supreme Bench. It is plain all the time that any time he could make in private practice many times his University salary; and it is clear that he could direct some great reorganization scheme, or some such special work, if he had a few years to give to it. And yet it must be true that nothing can seem better to him than the position he has as a professor of law, with its scope as enlarged as it is with him. It would be strange if one could be so great a teacher of law, and like better doing anything else.



The Outlook for Uniformity of Legislation

BY WALTER GEORGE SMITH

PRESIDENT OF THE CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS

THE Commissioners on Uniform State Laws met in Boston during the five days of August last, preceding the meeting of the American Bar Association. There were present representatives from thirty-three states, sixty-five commissioners in all. This was the twenty-first annual conference and in point of number in attendance the largest, while the reports of committees and the debates upon them were not inferior to any that have preceded. The subjects under discussion covered the Law of Partnership in connection with the tentative draft of a Uniform Act reported by the Committee on Commercial Law from the hands of Dean William Draper Lewis and James B. Lichtenberger, Esq., of the Law School of the University of Pennsylvania, a Uniform Marriage Act, a Child Labor Act, an Act relative to the Probate of Foreign Wills, a Workmen's Compensation Act, an Incorporation Act and the Torrens System of Title Registration. Of these acts but two were finally approved, namely, the Marriage Act and the Child Labor Act, the others being advanced to different stages of completion.

No doubt the readers of this magazine have some knowledge of the history and purposes of the Conference of Commissioners on Uniform State Laws, but in order to refresh their knowledge and because there seems to be an unusual interest in the subject of uniformity, brought about largely by existing industrial conditions, it may be well to give a

brief outline of the history of the Conference.

One of the purposes enumerated in the constitution of the American Bar Association as an object for which it was formed is "to promote uniformity of legislation throughout the Union." In 1889 a special committee on the subject was appointed and it recommended that a Committee of the Association, consisting of one from each state, should meet in convention from time to time and compare and consider the laws of the different states, especially those relating to marriage and divorce, descent and distribution of property, acknowledgment of deeds and execution and probate of wills. The following year an act of the Legislature of New York, authorizing the appointment by the Governor of three commissioners by the name and style of "Commissioners for the Promotion of Uniformity of Legislation in the United States," and making it their duty to examine the subjects of marriage and divorce, insolvency, the form of notarial certificates and other subjects, and to ascertain the best means to effect an assimilation and uniformity in the laws of the states and to consider whether it would be wise and practicable to invite the other states of the Union to send representatives to a convention to draft uniform laws to be submitted for approval and adoption by the several states, marked the formal beginning of the Conference.

When this action was brought to the

attention of the American Bar Association, it was resolved to recommend the passage of similar resolutions in all of the states and by the Congress of the United States, the District of Columbia and the territories, with the additional subjects for consideration of descent and distribution of property and acknowledgment of deeds. Thus the Conference originated with a comparatively small number of states being represented, but now all of the states, territories, the District of Columbia and the insular possessions are represented, with the exception of Nevada and Alaska.

The Conference proceeded with its work and at the end of its sixth year had drafted and approved uniform acts relating to the sealing of deeds and other written instruments; relating to the execution of wills and probate of foreign wills; relating to days of grace and presentment of bills and notes; to establish a uniform standard of weights and measures. Some of these acts have not been pressed for adoption, and some, especially that relating to the probate of foreign wills and the acknowledgment of deeds and sealing of instruments, are under consideration for amendment. In addition to these acts resolutions were adopted in relation to marriage and divorce which have been substantially embodied in the Marriage and Marriage License Act, and in the Uniform Divorce Act, adopted by the National Divorce Congress, and subsequently approved by the Conference.

The best known and most elaborate acts, which alone would have justified the existence of the Conference and proved the value of its work, are the Commercial Acts, viz., the Uniform Negotiable Instruments Act (1896), the Sales Act (1906), the Warehouse Re-

ceipts Act (1906), the Stock Transfer Act (1909) and the Bill of Lading Act (1909). These acts have all been published with annotations in a pamphlet, of which an edition of 12,000 copies has been almost exhausted. As has been well said, this volume should be in the hands of every American lawyer. Separate works on the Negotiable Instruments Act, which is now substantially the law in forty states, territories and possessions of the Union, made special annotation of that act unnecessary, but the other commercial acts are explained section by section by the experts who drew the tentative drafts.

The plan upon which the Conference has worked has been rather to embody the existing law in the form of a statute upon the subjects treated than to introduce any novel principles. Occasionally this rule has been departed from, yielding to what was believed to be the consensus of opinion in the business world, with the object of giving full negotiability to all documents of title excepting Warehouse Receipts and defining value.¹ This action of the Conference has been subjected to criticism, but the acts have been accepted in their entirety by an overwhelming proportion of the states adopting them. Where authorities differ, the Conference has been compelled necessarily to embody the principles supported by the weight of authority. The English statutes on commercial subjects have afforded invaluable aid to the experts of the Conferences, and in the majority of cases it will be found that the English and American acts embody substantially the same principles, following the leading authorities in

¹ Value is any consideration sufficient to support a simple contract. An antecedent or pre-existing obligation, whether for money or not, constitute value where a certificate is taken either in satisfaction thereof or as security therefor.

both countries. Experience has shown that some sections of the Negotiable Instruments Act, criticized by the late Dean Ames and other competent jurists, are susceptible of improvement, and suggestions of amendments are under consideration.

One of the advantages of the Uniform Acts lies in the fact that amendments can be made as time and circumstances show their propriety, through the same agency as that from which they emanated. There will be no danger of loss of uniformity from amendments by statute and that from judicial interpretation will be greatly minimized if the Conference be consulted in all cases before amendments are made.

The Conference has made it a practice to employ a competent expert to make a draft of an act upon any subject it is decided to put in statutory form. This draft has been subjected year after year to criticism by experts and persons interested in the subject treated. Often public meetings have been held, and, finally, after deliberation sometimes extending over a number of years, the draft has been approved. Even with this care mistakes may occur or the changing conditions of business may make changes in the law necessary, but in either event it is obvious no individual efforts to change or modify the uniform laws should be made until the Conference has had opportunity to consider their merits.

The number of states that have adopted the various Uniform Acts is shown in a footnote.¹

¹ *Negotiable Instruments Law*; Alabama, Colorado, Connecticut, Florida, Idaho, Illinois, Delaware, Iowa, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, Tennessee, Utah, Virginia, Washington, West Vir-

The Conference, in pursuance of the purposes for which it was organized, has also given its attention to social questions, and as already stated, has adopted the Uniform Divorce Act as if drawn by itself and sent it out with the other Uniform Acts for approval by the country. It has drafted and issued a Uniform Child Labor Act, a Uniform Marriage and Marriage License Act and a Uniform Family Desertion Act. It has under consideration a Uniform Workmen's Compensation Act, and its committees are considering the advisability of uniform legislation on the subject of the *situs* of property for taxation, insurance in some of its branches, and other subjects as indicated by the summary of the proceedings of the Boston meeting.

The outlook for the continued strength of the movement for uniformity is exceedingly encouraging. The business world begins to realize that there is only one alternative to an agreement among the states upon matters of vital concern to all of them which are not within the jurisdiction of the federal Government. They must agree among themselves or the pressure of sentiment will cause amendments to the federal Constitution that will still further mini-

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ginia, Wisconsin, Wyoming, Arizona, Hawaii, New Mexico, District of Columbia, Philippine Islands.

Warehouse Receipts Act; California, Connecticut, Illinois, Iowa, Kansas, Louisiana, Maryland, Massachusetts, Michigan, Missouri, Nebraska, New Jersey, New Mexico, New York, Ohio, Pennsylvania, Rhode Island, Tennessee, Utah, Virginia, Wisconsin, District of Columbia.

Sales Act; Connecticut, Maryland, Massachusetts, Michigan, New Jersey, New York, Ohio, Rhode Island, Wisconsin, Arizona.

Divorce Act; Delaware, New Jersey, Wisconsin.

Stock Transfer Act; Louisiana, Maryland, Massachusetts, Ohio, Pennsylvania.

Bills of Lading Act; Connecticut, Maryland, Illinois, Massachusetts, New York, Ohio, Pennsylvania.

Foreign Wills Act; Kansas, Massachusetts, Michigan, Rhode Island, Washington, Wisconsin.

Family Desertion Act; Kansas, Massachusetts, Wisconsin, North Dakota.

mize the importance of the states and jeopard the basic principle of local self-government. Business has long since overleaped state lines, and the problems pressing for solution arising from our constitutional limitations are many and complex.

The Conference of Commissioners is the only body absolutely non-political, composed of men, as far as possible, without prejudice, to whom the community can look for dispassionate consideration of questions that should be solved by agreement among the states in the form of uniform statutes. The fact

that practically all of the states are now represented in the Conference and that in a very large proportion of them the commissioners have the dignity of state officers, argues well for the future. The embarrassment arising from lack of money for current expenses has been largely met by appropriations from many of the states, and it is confidently expected that all of them will soon make such moderate appropriations for the expenses of their commissioners and of the Conference as will make it possible to enlarge the work which has already attained such proportions.

Philadelphia, October 31, 1911.

Uniform Commercial Legislation

BY FRANCIS B. JAMES, OF THE CINCINNATI BAR

FOR SEVEN YEARS CHAIRMAN OF THE COMMITTEE ON COMMERCIAL LAW OF THE COMMISSIONERS ON UNIFORM STATE LAWS IN NATIONAL CONFERENCE.¹

UNDER the Constitution of the United States, a central body (Congress) was organized with limited jurisdiction upon a few commercial subjects, such as interstate commerce, foreign commerce, admiralty, coinage, bankruptcy, copyrights, patents, post-offices and post roads. There are many business transactions commercial in nature and national in extent, which, however, do not amount to commerce within the meaning of the Constitution;

others amounting to commerce and confined within state lines yet indirectly affecting national commerce within the meaning of the federal Constitution. Stated more briefly: There are many interstate business transactions which do not amount to interstate commerce; there are instrumentalities of interstate commerce upon which Congress has not yet legislated. There being no central body which could deal with these problems, Commissioners on Uniform State Laws were created with power to recommend to the various state legislatures the enactment of laws, national in scope, although politically limited to each state.

¹During Mr. James' chairmanship of the Committee on Commercial Law of the Commissioners on Uniform State Laws, the acts to make uniform the law of Sales, Stock Transfer, Warehouse Receipts, and Bills of Lading were formulated. He resigned as chairman of this committee on his appointment as chairman of the Committee on Commercial Law of the American Bar Association, not having time to do justice to both positions.

These Commissioners meet in national conference and duly organize with offi-

cers and committees. To the Committee on Commercial Law has been committed the primary work of formulating an American Commercial Code. Its work to date covers acts to make uniform the law of Sales, Transfer of Stock, Negotiable Instruments, Warehouse Receipts, and Bills of Lading.

Some errors crept into the Negotiable Instruments Act, which arose largely from the fact that it had not been subjected for a sufficient length of time to public criticism. Time, however, has demonstrated that these errors are insignificant and have been largely corrected by judicial construction. The possibilities of similar errors have been avoided in the preparation of the other uniform commercial acts by adequate criticism in which the whole public has been invited to participate. This is particularly true of the act to make uniform the law of Bills of Lading, the discussion of which was participated in by shippers, consignees, carriers and bankers. This act received the unanimous approval of the representatives of these four seemingly hopelessly conflicting interests.

As almost every business transaction culminates in a sale, and most sales are between persons residing in different states, the vital importance of an act to make uniform the law of Sales is apparent.

Credit is, today, the medium of exchange by which ninety-five per cent of the business of the world is transacted. That the law governing all instruments of credit should be universal throughout the commercial world would seem to be apparent. These acts, therefore,

adopt the mercantile theory of credit and give negotiability to bills, drafts, notes, checks, warehouse receipts and bills of lading when to "order." The "order bill of lading" plays a peculiarly important part in American domestic and foreign commerce—being in the best sense a "commodity currency" because usually accompanied by a draft wherein is expressed a unit of value.

These commercial acts have been constructed in harmony with actual business usages and customs where such usages and customs rest on sound economic principles and are not contrary to ethics underlying all American jurisprudence. They have brought into existence a new rule of statutory construction that they are to be construed in harmony with such business usages and customs, neither strictly nor liberally, but to accomplish their great purpose of bringing about uniformity of commercial law.

They wisely do not attempt a complete codification of the law upon each subject to which they pertain, but give room for the growth of new uses and customs by providing that "in cases not provided for in this act the rules of law and equity including the law merchant . . . shall govern."

If Congress in its wisdom shall adopt the recommendations of the Aldrich committee and substitute an elastic asset currency for a rigid bond secured currency, the importance of uniform legislation affecting all instruments of credit becomes doubly important, and those who in 1895 suggested a conference of Commissioners on Uniform State Laws will have builded wiser than they knew.

Cincinnati, October 31, 1911.

The Nineteenth Century Revival of Roman Law Study in England and America

BY CHARLES P. SHERMAN, D.C.L., ASSISTANT PROFESSOR OF LAW,
YALE UNIVERSITY

THE present revival of Roman law study in England and America is largely due to Sir Henry Maine. Sheldon Amos' loyal tribute deservedly extols the genius of Maine who "rescued the laws of Rome from the neglect into which they had fallen in England and established forever their essential relation to every system of law having an European parentage."¹

During the twelfth and thirteenth centuries Roman law had been received into England in no small measure.² And this was followed by the gradual development of a native law — the English Common Law. But the "overweening pretensions of popes and emperors" aggravated the narrowing influences of England's geographical isolation from the continent, and the result was not only rivalry between the civil and the common law, but also English hostility to the former as a foreign system.³ The suppression of the study of canon law in the sixteenth century by Henry VIII, followed by the Protestant Reformation, put the study of Roman law into disfavor.⁴ By the time of James I in the seventeenth century little or no attention was paid to it. During the eighteenth and early in the nineteenth centuries the study of Roman law in England almost ex-

pired. In 1852 there was scarcely any Roman law teaching at Oxford University — that ancient English seat of the civil law.⁵ England had become isolated from the current of European juridical thought and legal practice.

Not until very modern times when the isolation of England and the greater isolation of America were diminished by improved and frequent means of communication did the prejudice of English and American lawyers against Roman law disappear. And even now the tradition of such prejudice and indifference still lingers too potently in some parts of the United States.

The year 1870 marks this latest revival of Roman law study in England — a movement second only in importance to the Bologna revival of the thirteenth century in its ultimate influence on the developing English law into a codified jurisprudence. England is now in a position to catch up in law with the rest of civilized Europe. That the law of England has progressed in the last quarter century is proved, ignoring all else, by the familiar codifications of portions of English law.

Very fruitful have been the labors of the modern English Romanists such as Bryce,⁶ Muirhead,⁷ Amos,⁸ Williams,⁹

¹ See Amos, "The History and Principles of the Civil Law of Rome" (dedication to Maine).

² See Vinogradoff, "Roman Law in Medieval Europe," pp. 84 *et seq.*; Scrutton, "Roman Law," pp. 79-124; Guterback, "Bracton and His Relation to the Roman Law"; Hunter, "Roman Law" (4th ed.), pp. 107-116.

³ Bryce, "Essays," pp. 862-863.

⁴ See Bryce, "Essays," pp. 861-862.

⁵ See Bryce, "Essays," p. 890.

⁶ James Bryce, now British Ambassador to the United States, whose twenty-three years of activity as Regius Professor of the Civil Law at Oxford from 1870 to 1893 will long be remembered.

⁷ James Muirhead, Professor of Roman Law at the University of Edinburgh.

⁸ Sheldon Amos, Professor of Jurisprudence and Roman Law in the Inns of Court, London.

⁹ James Williams, Professor at Oxford.

Hunter,¹⁰ Roby,¹¹ Clark,¹² and the Scotch civilians, Mackenzie¹³ and Colquhoun.¹⁴

One result of this movement in England is that the Roman Institutes of Justinian are now a required subject for admission to the English bar. England has joined hands with Scotland¹⁵ in requiring a knowledge of Roman law to form an essential part of a legal education. No longer is the English lawyer totally ignorant of the world-current of jurisprudence.

This nineteenth century revival of Roman law study soon passed across the Atlantic into America. Ground had already been broken for this movement in the United States by the illustrious Chancellor Kent, who was the earliest American jurist to frankly confess the great debt owed by English law to Roman jurisprudence and whose "Commentaries" with their Roman influence, have greater authority in America than those of Blackstone.

Roman law seems to have been first taught at Yale: it was "the first American law school in America or England to establish a course leading to the degree of Doctor of Civil Law."¹⁶ The pioneer teachers of Roman law at Yale include the late Professors Hadley¹⁷ and

Wheeler.¹⁸ The revival of Roman law study has spread to other law schools — Columbia, Pennsylvania, the Catholic University, Chicago, Stanford, Harvard and others. One result of this movement is bound to benefit certain American law schools: it will sooner or later destroy the present over-emphasis by them on the "case method" as the exclusive method of teaching American law.

As compared with the literary productions of the English Romanists, very little as yet has been done by American Romanists. But there are a few who rank with their English brethren, such as Morey,¹⁹ Howe,²⁰ Robinson,²¹ and the Canadian, Walton.²²

Two states now require a knowledge of Roman law for admission to the bar — Louisiana²³ and Kansas.²⁴ That it should be made requisite in Louisiana is not surprising; that it is necessary in Kansas — a common law state — is proof of the progress of the present revival of Roman law in the United States.

But with all the advance made by this movement there is still room for further progress. The rank and file as well as a favored few of the great army of nearly 19,000²⁵ law students scat-

¹⁰ William A. Hunter, whose "Roman Law in the Order of a Code" has never been equaled in English.

¹¹ Henry John Roby, Professor at University College, London.

¹² Regius Professor of the Civil Law at Cambridge.

¹³ Lord Mackenzie, a judge of the Court of Sessions, whose "Studies in Roman Law with Comparative Views of the Laws of France, England and Scotland," is renowned.

¹⁴ Patrick MacChombaich De Colquhoun, whose elaborate "Summary of the Roman Civil Law" is the pioneer work in English.

¹⁵ See Mackenzie, "Roman Law" (7th edition), p. 47.

¹⁶ Yale Law School Bulletin, 1910-11, p. 6.

¹⁷ James Hadley, father of President Arthur T. Hadley of Yale, author of "Introduction to Roman Law."

¹⁸ Albert Sproull Wheeler, who established by will in 1905 the Wheeler Library of Roman Law.

¹⁹ William C. Morey, Professor at Rochester University, author of "Outlines of Roman Law."

²⁰ Judge William Wirt Howe of New Orleans, author of "Studies in the Civil Law."

²¹ William C. Robinson, formerly Professor Yale University and now Dean of the Catholic University Law School. His "Elementary Law," the nearest approximation to a true code of American law, reflects much of the spirit of the Corpus Juris.

²² Frederick Parker Walton, Professor and Dean at McGill University Law School, author of "Historical Introduction to Roman Law."

²³ See "Rules for Admission to the Bar" (5th ed.), 1909, West Pub. Co., "Louisiana."

²⁴ *Id.* "Kansas."

²⁵ Estimated Figures, 1909. See "World Almanac for 1911," p. 481.

tered in 109 American law schools sadly need the uplifting professional and scientific impulses which result from contact with Roman law. Our present system of legal education is defective because it does not give sufficient attention to or ignores Roman law. That distinguished Englishman, Professor Dicey, from his observation of American Rhodes scholars in law at Oxford, recently made the following very pertinent comment, that "there ought to be a wider knowledge of the law of Rome than is given in the celebrated law schools of America, and also an acquaintance, which can hardly be obtained from cases alone, with the principles to be gathered from the works of the best . . . legal writers of England and America."²⁶

Roman Law, as in England, should be required for admission to every

²⁶ A. V. Dicey, "The Extension of Law Teaching at Oxford," 24 Harv. Law Rev. p. 3 (Nov. 1910).

New Haven, Conn., October.

American bar. It would lead, among other benefits, to a diminution of the present professional incompetency²⁷ of too many men called to the bar, and would impart an altogether too much needed ethical uplift to the profession as a whole.

The American lawyer, as well as his English brother, must no longer remain ignorant of the world-current of jurisprudence and the mission of modern Roman law. Then will he perforce naturally plan and strive for the scientific betterment of American law through codification along the lines of the best modern codes—that Herculean but not impossible task of the immediate future. The American revival of Roman law study will then reach its full fruition.

²⁷ On this subject, see address of Frederic R. Coudert, "The Crisis of the Law and Professional Incompetency," Am. Bar Association Convention, Boston, Aug. 30, 1911.

Sir Frederick Pollock on "The Genius of the Common Law"¹

A SERIES of eight lectures on "The Genius of the Common Law" was given at Columbia University October 2-13, by Sir Frederick Pollock. The lectures were the fifth course on the James S. Carpentier foundation, on which James Bryce, Prof. John C. Gray, Arthur Lionel Smith, and David Jayne Hill have already lectured, and were well reported in the *New York Times*. It is of course impossible to publish here

¹ With acknowledgments to the *New York Times*, from whose reports of the lectures this abridgment has been prepared.

a condensed summary of them with any hope of doing justice either to their substance or to their form. At the same time, an abridged statement may succeed in presenting some of the most salient thoughts of each lecture, and in indicating the main drift of an extremely interesting discussion.

In the opening lecture, the speaker declared that it was his purpose to follow the adventures of Our Lady of the Common Law, and to find out how she had fared in all her varied adventures since the Middle Ages. It would

be seen, said he, that her fortunes had been quite as varied as the fortunes of the heroines of mediæval romance. This symbolism furnished the picturesque titles of the lectures.

I. OUR LADY AND HER KNIGHTS

All organized bodies that have any history get a character and reputation that may be stronger than those of the average individuals. For this continuity, which we must admit exists, it is not safe to offer a definition, but better to use a symbol. Let that symbol be the *genius* of the Romans. The genius of the common law is to be comprehended by going back to Germanic origins, and tracing its continuous development.

Taking the Germans as described by Tacitus we find among them four chief characteristics. They had a life of great publicity, with personal command only in the time of war, and ultimate decision as distinct from executive authority and preliminary counsel in the hands of the free men assembled in arms. The family is monogamist.

Morals are simple and, by comparison with Greek or Roman habits, extremely strict; for cowardice and effeminate vice there is no mercy. Gambling, on the other hand, is unrestrained and adventurousness encouraged. Women not only exhort men to valor, but are consulted in affairs of weight, though not in public.

When we look at the modern social ethics of Europe and North America we cannot fail to recognize the persistence of the type. Who taught us respect for women? Our Germanic ancestors. Who laid down for us the faith that the life of a free nation is public and its actions bear lasting fruit because they are grounded in the will of the people? Our heathen ancestors. Who bade us

not only to hate but despise the baser forms of vice and held up an ideal of clean and valiant living which European Christianity could assimilate, so becoming a creed not only of God, but of self-respecting men? Again, our heathen ancestors.

The traditions of a public life and of a common council are typical of those that have survived. The Tudors in England kept within the bounds of tradition, and succeeded in carrying out their policies. The Stuarts went further than the people would permit, and they consequently fell.

The archaic virtues have their drawbacks, and in the next lecture we shall see what some of them are. The common law is the result of human history and human nature, and not at all a monster of perfection. No doubt we want perfection of law, but the assertion that the law is the perfection of reason is sixteenth century pedantry and nothing more. The law ought to be reason, but we can scarcely hope for perfection if the law remains a human and vital thing.

II. THE GIANTS AND THE GODS

The giants are the formalities and tradition of the law. The giants have been known to be tyrants, but, on the whole, they have been the good servants of Our Lady of the Common Law; have brought order out of chaos and made it possible for the gods to reach Valhalla.

At this day there is no need to explain that formality is an essential feature of the archaic law. Persons who talk of primitive simplicity, if they still do, confound rudeness of instruments and poverty in execution with simplicity of ideas. Prehistoric language, customs, and superstitions are exceedingly complex. The history of modern culture is, in essentials, a history of simplifications.

Now, formalism in law and procedure seems to have two roots, one rational and the other irrational. The rational ground is the need of a hard and fast rule to make it clear that the law is the same for all men. The irrational ground goes back to the oldest form of superstition, the prehistoric belief in symbolic magic. It is assumed that words have in themselves an operative virtue which is lost if any one word is substituted for another.

Such formalities were the strange guardians among whom Our Lady of the Common Law was born and cradled. They were her true guardians in their day. Better even bad rules than a rule which is not of law. It was a great and true word that Ihering spoke when he said: "Form is the sworn enemy of caprice. She is Freedom's twin sister."

The giants are stark and grim figures in our sight, yet their force cleared a way for the gods through chaos, and without them the gods would never have come to Valhalla. But the guardians became tyrants when, in a community growing civilized, the judicial results of semi-magical ritual ceased to be tolerable, and the so-called judgments of God were openly deemed unjust alike by men of war and by men of religion. Their ways could not be mended; they must be broken, and a new body must be fashioned for the justice which, in its old embodiment, was too visibly blind, even in the eyes of twelfth century suitors.

It was written of the Church that kings should be her nursing fathers. No less truly might it be said of the common law. The King's overriding power, a power both to devise and to execute, was the only one strong enough for the work. Royal inquests, royal precepts and decisions, ingenuity of royal officers at least as eager to bring fees into the

King's coffers and enhance the reputation of the King's court as to procure ease and satisfaction to suitors, were the means not precisely of abolishing the inflexible and cumbrous old procedure — we had not formally begun to abolish anything — but of relegating it to an obscurity where it was speedily forgotten, and so completely forgotten, too, that professed antiquarian lawyers could, almost down to our own time, believe trial by jury to be immemorial.

Form for form's sake has been a harsh mistress, and the demon of subtlety for subtlety's sake has been the cause of tremendous evils. The evils have not been due to the archaic forms of the law, but, in most cases, to the degeneration of the archaic forms into something else.

III. SURREBUTTER CASTLE

Perverse ingenuity once let loose on the art of pleading, went for some centuries from bad to worse, notwithstanding occasional mitigations. We may see what the bastard formalism of pleading had come to be in England in the second quarter of the nineteenth century if we use the guidance of a very learned person, Sergeant Hayes, afterward a Justice of the Queen's Bench for a short time, who knew the system thoroughly and did his best to bring about its downfall.

Our ancestors of the eighteenth century were not stupid or slothful. They knew the raiment of the law wanted mending, and they mended it as well as they could in their time, having campaigns in Flanders and rebellions to think of. But it was only patchwork, and ultimately the rents were made worse. After the common fashion of English public business, reforms were introduced piecemeal and without any settled plan, and so, while they lightened some of the most pressing grievances,

they raised fresh difficulties almost at every turn, and in the first half of the nineteenth century the confusion of common law pleading had become, as Sergeant Hayes found it, more intricate than ever.

I have not heard that in any American jurisdiction there was any judicial or other regulation whose effects were as disastrous as those of the New Rules made by the English judges in 1834, but I suppose that on the whole complaints of the same kind were pretty common, as otherwise it would be hard to account for the existence of modern codes of procedure in New York and other states, and for various alterations short of actual code pleading, from the simple and almost patriarchal method of Vermont, which Mr. Phelps described to me many years ago, to the more elaborate scheme of Massachusetts, resembling, in a general way, that which satisfied our courts in England under the Common Law Procedure Acts, from 1852 to 1875.

IV. ENEMIES IN THE GATE

So far we have spoken of the dangers to the common law within her own household. Before we can understand the limits and the difficulties of possible remedies in the Middle Ages we must consider the outside foes which had to be fought at the same time. One kind of these, as they were the most shameless, were the most formidable, namely, men who were strong enough, in parts of England remote from the central authority, to defy legal justice and legal process openly. We find the danger of great men defying the law not only recognized, but prominent in the dooms of the Saxon kings.

Next we have to consider the enemies of the law and legal order in modern times. We do not mean ordinary criminals, for lawbreakers, occasional or

habitual, do not undertake at this day to subvert the law, but only do their best to thwart or evade it in their own particular interests.

Various modern theorists, political or economical, are hostile to particular legal institutions or their existing forms; and hence it is easy for their opponents, and sometimes profitable, to charge them with conspiring against the very existence of the law. Concerning Socialism in its many forms there is plenty of room for legitimate criticism, but the antinomian heresy seems to be about the last kind that it can be reasonably accused of. For the one thing in which all Socialistic plans agree is in requiring not less legal compulsion than is imposed by existing civilization, but a great deal more.

Herein we may note that some persons who have been called, or have even called themselves, Socialists, were really Anarchists; William Morris, for example, as shown by his "News from Nowhere," which, whatever else it may be, is the most delightful exposition of pacific anarchism in our language.

Our Lady does not care much by what name the Chief Magistrate is called, whether his office is elective or hereditary, whether he has as much active discretion of his own as the President of the United States or as little as a modern king of Great Britain. What she does care for is that government, whatever its forms, shall be lawful and not arbitrary; that it shall have the essential attributes for which Chief Justice Fortescue's word was "political" as far back as the fifteenth century.

She looks for trusty servants who will stand by her in the day of need. She demands fearless and independent judges drawn from a fearless and independent bar, men who will not swerve from the straight path to the right hand for any

pleasure of rulers, be they aristocratic or democratic, nor be drawn aside to the left by more insidious temptation of finding popular favor in opposition. If Our Lady's servants are not of that spirit, all the learning of all their books will not save them from disgrace or her realm from ruin. If they are, we shall never see the enemy whom she and they will be afraid to speak with in the gate.

V. RESCUE AND RANSOM

Having now seen something of the troubles that beset Our Lady of the Common Law and her servants at sundry stages of their pilgrimage, we may well be curious about the remedies; and here we must deal tenderly with lay common sense, which may be apt to think that we are making a great fuss and mystery about nothing, to magnify the importance of our Faculty.

The plain man is ready enough to believe that the common law has had outworn and cumbrous tools to work with. What he does not so readily see is why we should not scrap our old plant like other modern men of business and say no more about it; or for that matter, why it was not done centuries ago. "So simple a thing," he will say, "for you lawyers to devise new and better forms; you have not even the cost of materials to reckon with; nothing but pen and ink — yes, and brains, I know."

"My dear man," answers Our Lady of the Common Law, "I have to tell you that it was just you lay people, as often as not, who hindered my servants from improving things in the simplest way when they were eager to do it, and drove them into making their improvements by crooked devices, to the great disparagement of my honor and worship and useless charges and vexation of my suitors."

A remedial method the most obvious

and at first sight the most useful is specific amendment by legislation, directed to particular defects as they are discovered or come to be more urgently felt. Without doubt this is a serviceable instrument when rightly handled, but in unskillful hands it can be a remedy worse than the disease. Until our time it was commonly considered as belonging to the technical part of the law and left to the leaders of the profession. It is much older than we commonly recognize.

Even a tinker of genius cannot get beyond tinkering, and tinkers are not men of genius as a rule. Best of all ways of reform is that the courts should never be wanting in the knowledge of their own inherent powers and the courage to use them. This achievement is of a felicity not reducible to classification or rule.

The modern condition of legislative discussion has brought in the danger of amateur meddling and the not very desirable antidote of purposely framing technical amendments in the form least intelligible and most repulsive to the lay mind. Much has been said in the reproach of lawyers, but there is more and worse to be said, if we choose to say it, against the man of business who thinks he knows better.

The latest way of amendment we have to note is the deliberate reconstruction of jurisdiction and procedure on a huge scale; a heroic method adopted in many countries outside the common law, but oftener than not for political or national, rather than for purely legal reasons.

VI. ALLIANCE AND CONQUEST

The common law, like the English language, contains a great deal of mixed and composite material, but has an individual structure and character which are all its own; and, also like the Eng-

lish language, on the whole, has had the best of it in competition with rivals.

Amid the conflicts and compromises of the common law with the canon law, the law merchant, and equity, there is no case, I believe, of the common law having lost ground in the presence of another system. There are certainly many where it has gained, and the question is forced on an inquiring mind, to use the words of a recent ingenious Frenchman: "To what is due the superiority of the Anglo-Saxons?"

The fact that the common law of England has more than held its own with its rivals is not due to the intrinsic virtues of our race or altogether to the superior justice or convenience of our rules. The quality of the common law of England which has enabled it to more than hold its own with its rivals is perhaps the quality of toughness. The boldest champion could never say in our praise that we take any pains to make our ways easy for strangers who have a mind to learn them. The fact remains that the common law shows assimilative power which to all appearances grows by what it feeds on.

There is this great difference, that other laws are special and personal, while the common law is not. It is the law not of a class or of a kindred, but of the whole kingdom, and the men who dwell therein. On the other hand the canon law, to take the case of the greatest rival, is personal though it is universal.

Our Lady the Common Law takes, as a matter of course, whatever other jurisdictions have left for whatever reason, and keeps it with very little chance of losing it again. Moreover, being of a free hand, she knows how to take as well as to give nobly and without false shame, which is a high point of generosity and something of a divine secret. Her cloak will open as wide as the

Madonna's and the children she welcomes under it are adopted for her very own. Where the occasion was not ripe for full intimacy, she has been polite in making friends of rivals and possible adversaries.

About the same time as the annexation of the law merchant in England was completed, Our Lady began to extend her influence beyond seas in various ways. Only one law, the common law, has ever gone forth into the world beyond the narrow seas under or in company with the British flag. Everywhere our system has made its mark, and often without official confidence.

The tendency to imitate English models is strongest in criminal and constitutional law, considerable in mercantile law; while in the private civil law of property (excluding real estate) and obligations it is less though not negligible, and in the regions of real estate, the family and succession, it hardly exists. Indeed, those are not parts of our system which any English lawyer would recommend for general adoption.

Most remarkable is the success of English criminal law, for it would be hard to name a British possession where it does not prevail under one form or another.

VII. PERILS OF THE MARKET-PLACE

Our Lady the Common Law is not a professed economist, yet she is not without certain ideas of economic justice, which her servants have endeavored to apply with such consistency as they might to the circumstances of different periods. Those ideas cannot be confined within the dogmatic lines of any particular school. They cannot be invoked as a universal rule of economic policy.

There is no doubt that the manner in which the standard principles have been

worked out has been largely modified by the doctrines in favor among economists and publicists for the time being, and, accordingly, the tendency of decisions has inclined to one or another with the fluctuation of theory. The oscillations have been less violent in case-law than in legislation, and they have followed expert opinion, or what was deemed to be such, rather than the voice of the multitude or the party. For the men who make law, by judicial methods at any rate, are not mere men in the crowd; they rather belong to the educated class who mediate between the leaders of thought and the general public opinion that sooner or later follows them. Without any aid of legislation, without expressed disapproval of a single authority, the law as to restraint of trade has in our own time effected a change of front that has brought it completely into line with modern business conditions.

The common law favors competition wherever free competition is practicable, but prefers regulation by public authority to restrictions imposed by any combination of private interests; and this, in either case, with a view to the common advantage, and not on any assumption of absolute natural rights.

Now, we must be careful at the outset not to be misled into making familiar historical words bear a purely modern significance. Free competition is favored in the law. That is true, but it did not originally mean unlimited competition between all men. The merchants and the tradesmen of the Middle Ages held to be qualified persons. Before they could exercise their business they passed through a stage of apprenticeship and when they became free of their guild or craft, this freedom was the same (as almost always in mediæval speech) as a privileged condition, as much earned by

a special training as that of the learned professions of this day.

The man who had thus made himself a full member of a craft or corporation had a positive right to exercise his calling, or "lawful mystery," without hindrance, and his neighbors were entitled on their part to the benefit of his skilled work. Our modern notion of letting every man try his chance, and trusting unchecked competition between all sorts of competent and incompetent persons to secure the public interest automatically, may have its virtues, but it is modern, and not mediæval.

The old common law made no objection to the self-government of the trades, nor, with one material reservation, to the number of one trade in any one place being limited. The reservation was that the privilege must not be abused so as to create a monopoly. The craftsman has his rights, which must be protected; it is also his duty to exercise them for the public good, and he may not disable himself from exerting them. Doubtless, abundant mistakes were made in working out such a system, and some which now appear to us childish. Still it was in itself a consistent plan, and by no means contemptible.

It had to pass away with the condition of society for which it was made but it left its mark in a continuing hatred of monopoly which has not lost its vigor in the latest jurisprudence and legislation of English-speaking countries; a vigor which, now as much as ever, needs to be guided by well-advised judgment. If the competition under equal conditions is to be free, then it follows that the consequences must be accepted. A man cannot complain if a more skilful or fortunate competitor diminishes his profits. A monopoly is exactly what the law will not give him.

It is curious that our earliest classical

authority on the necessary toleration of competition relates not to rival tradesmen, but to rival schoolmasters, who certainly would have joined in making short work of any unqualified intruders, a process not unknown, it is said, in modern politics.

It is obvious that in a frame of society, which no longer limits competition, the claim of the individual to be guaranteed against unfair competition becomes much stronger. Indeed, if we insisted on our institutions being or appearing logical (as happily we do not), the individual might say with some plausibility to the state:—

"You turn us all out to compete with one another, and say that if half of us are ruined the other half have only exercised their common rights. You say the result is worth more to the community than it costs. Good: but why should the cost fall wholly on innocent, unsuccessful competitors? If they suffer for the common good, why should not the community compensate them? Either go back to the old plan of limiting competition or insure us as individuals against the consequences of your collective policy."

Thus the Nemesis of unchecked individualism would lead to something which I suppose would be not improperly described as a form of state socialism. There is one answer to be sure which is decisive if accepted, namely, that these matters do not concern the state at all.

VIII. THE PERPETUAL QUEST

What shall be the attitude of a good lawyer and a good citizen toward the problems among which the lot of the common law is cast? He will recognize, in the first place, that they are alive and not to be solved out of a digest and that the work is never finished. If it ever

seemed to be finished the law would have ceased to be a living science, and would be fit for nothing more than to be petrified in an official *corpus juris*. For principles, even the most certain, are capable of infinite application, and the matter is always changing. The Knights Errant of Our Lady the Common Law must be abroad on a perpetual quest; no sooner is an adventure accomplished than a fresh one is disclosed, or arises out of that very achievement. There is no strife in the past which has not some lesson for the future.

Courts have to be guided, legislators have to be warned. Not a word shall be said here in derogation of an advocate's duty to take every point that can fairly be taken for his client. Still, there is a higher and a lower kind of advocacy, including work out of court, without any prejudice to the client's interest.

Not long ago a learned friend of Lincoln's Inn was talking with me of a late eminent English conveyancing counsel whose pupil he had been. Other men might be as learned, said my friend, but I worked much with him, and whoever worked with him might be sure that he wanted to put the business through. That is, in plain words, which no rhetorical expansion could better, the spirit of the law and the true lawyer. Ask yourself at every doubtful turn what will best help the business through, and you will have a good professional conscience and grateful clients.

We shall not think the less of the common law for not being infallible and invincible. Some say she is a hard mistress. It is true that she will not be content with any offering short of man's best work; she would not be faithful to herself if she were. Some call her capricious. It is true that she does not undertake to command world success for her followers; earthly fortune may be

added to them, but is not the reward she promises. There are some who call her arbitrary. True it is that we have to learn her speech, but when we have learned enough of it to speak it freely, we know that open discussion and unfettered criticism are the very light of the law.

Some complain of her tongue as barbarous. Well, the Latin of Roman law falls short at best of classical perfection, and when one gets below the surface of our mediæval books, French and Latin, one finds them at least as human as The Digest and far more living and human than Justinian's Institutes and the glossators. Rather we may praise our Lady the Common Law in the words of a poet who was not a lawyer, words not written concerning her, and nevertheless appropriate: —

Our lady of love by you is un beholden;
For hands she hath none, nor eyes, nor lips, nor
golden
Treasure of hair, nor face, nor form; but we
That love, we know her more fair than anything,

This was written by Algernon Charles

Swinburne in praise of Liberty. If there is any virtue in the common law whereby she stands for more than intellectual excellence in a special kind of learning, it is that Freedom is her sister, and in the spirit of freedom her greatest work has ever been done.

By that spirit Our Lady has emboldened her servants to speak the truth before kings, to restrain the tyranny of usurping license, and to carry her ideal of equal public justice and ordered right into every quarter of the world. By the fire of that spirit our worship of her is touched and enlightened, and in its power, knowing that the service we render to her is freedom, we claim no inferior fellowship of our brethren of the other great Faculty, the healers of the body and the comforters of the soul, the lovers of all that is highest in this world and beyond. There is no more arduous enterprise for lawful men, and none more able, than the perpetual question of justice laid upon all of us who are pledged to serve Our Lady of the Common Law.

The Adoption of the Recall in California

THE results of the vote of California, October 12 on twenty-three different constitutional amendments were striking. Official returns from 2,877 precincts out of 3,121 in the state gave these results: for woman suffrage 119,830, against 117,779; for the initiative and referendum, 138,181, against 44,850; for the judicial recall, 148,572, against 46,290.

The closest fight was over the amendment placing under the jurisdiction of the railroad commission public utilities

of all sorts. The commission will have power to fix passenger and freight rates on railroads, and to veto rates fixed by the companies, while none of its decisions shall be subject to court review except on the plea of confiscation.

Another amendment adopted was that providing that hereafter "no judgment shall be set aside or a new trial granted in a criminal case on account of improper direction of the jury or the admission or rejection of evidence unless, upon review of the whole case, including the

evidence, the court shall be convinced that the error has resulted in a miscarriage of justice."

All the amendments had been approved by the legislature before being submitted to the people at the polls.

The adoption of the amendments relating to woman suffrage, the initiative and referendum, and the judicial recall, is no doubt due chiefly to a radical sentiment which differentiates the democracy of the newer from that of the older states, but it may also have been due, to a considerable extent, to the prominence of local political issues of the movement overshadowing all others. Many doubtless voted for these measures from a desire to purify political conditions in California, and the drastic action taken by no means necessarily foreshadows recourse to the initiative and recall except in extraordinary emergencies. United States Senator John G. Works declared: "These are extraordinary remedies to be used only in cases of extraordinary necessity. I believe the people of California are wise enough to use them fairly and justly."

These measures of direct popular government having been incorporated in the constitution of California, granted that the constitutionality of legislation later adopted be sustained, may not, in their practical operation, bring about anything like the political revolution which might too readily be looked for.

The judicial recall, applying to all judges save those elected in chartered cities, was adopted directly in the face of President Taft's earnest utterances, and the overwhelming majority by which it was carried is surprising.

California is not the first state to apply the recall to the courts, Oregon having the same provision. Other western states are of the same temper, and if they have not already made their

judges subject to dismissal, will soon do so.

In this connection the *New Orleans Times-Democrat* observes: "Whether the Californians have acted wisely remains to be seen. In the past they have had, perhaps, greater cause for discontent with the conduct of certain members of their judiciary than the people of any other state. It is by no means assured that they will actually use the weapon just adopted against their judges. Other western states have refrained, and to this day, we believe, no judge has ever been 'recalled' in this country."

Woman suffrage was adopted by a much smaller majority, San Francisco's adverse majority being 13,705, which was more than offset in the rest of the state. Even in San Francisco progress is measured by the fact that fifteen years ago this city recorded 24,000 majority against the amendment.

California is the sixth state to grant full suffrage to women. The first state in the Union to take this step was Wyoming, in 1869. There was no other addition to the states where women might vote until 1893, when Colorado granted them the franchise. In 1896 two states, Utah and Idaho, passed suffrage amendments to their constitutions. The state of Washington had a vote on the question at the election of 1910, and gave the vote to women, although the measure had been twice defeated in that state, in 1889 and again in 1898, once by 19,000 and later by 9,000.

The election undoubtedly afforded many illustrations of the danger of referring too many questions to the voters at once. So many questions could not possibly be treated with the deliberation necessary. The *San Francisco Call* says: "The vote was large, but it is doubtful if the great body of the voters gave to the propositions the time and study

necessary to understand them thoroughly and to estimate their consequences. There were too many amendments, and the official sheets of informa-

tion tended rather to confuse than to clarify the mind and judgment of the electorate."

Is Our Constitution too Rigid?

THAT the Constitution of the United States should be more easily amendable is the conviction of Monroe Smith, Professor of Roman Law and Comparative Jurisprudence in Columbia University.¹ Although the constitutional amendment, for example, empowering Congress to tax incomes, has been ratified by thirty-four states, containing seventy-three per cent of the population of the forty-six states, a small minority is still able to frustrate the will of the greater part of the nation. Professor Smith considers this an extraordinary situation, paralleled in no other constitutional country in the world.

There are several grounds for his belief that the Constitution should be more easily amendable. In the first place, in the absence of final amendment of the Constitution, a process of "change by the establishment with general consent of new governmental custom" has developed. Instances of such amendment of custom or by interpretations are so obvious that they do not need to be cited. This kind of amendment has been made necessary "by the practical impossibility of formal constitutional amendment." But there are limits beyond which this sort of development cannot go. Up to a certain point the Constitution will be bent by the economic and social process which it now checks;

beyond that point there is danger of its being broken, for even the boldest interpretation can hardly change the Constitution to meet many of the new demands, and the doctrine of private rights which has been read into the Constitution impedes "the satisfactory solution of many industrial problems by the state legislatures."

On this point, that it may be impossible to bend the Constitution without breaking it, there is likely to be a difference of opinion. It will be argued by some that the Supreme Court, though it may feel constrained for a time to resist bold innovations, must eventually succumb to the pressure of public opinion and allow them, and that this will be equally true, whether some new exercise of governmental activity is involved or a new phase of the doctrine of the inviolability of private property. It might further be argued that there is no reason why judges should be deemed to sympathize with the interests of one class in the community more than another, that they do not constitute a class which solidifies with any one social or economic group, and that it is nothing but the doctrine of judicial precedent which impedes their ready response to the popular will; we shall soon get away, it may be contended from this standpoint, from the notion of the binding authority of precedent. With such considerations Professor Smith does not deal.

A second ground for the need of a

¹ "Shall We Make our Constitution Flexible?" By Munroe Smith. *North American Review*, v. 194, p. 657 (Nov.).

more flexible Constitution is argued more forcibly and clearly. Professor Smith says:—

“The effort to bend the Constitution to meet new social needs, and the tendency to evade its restrictions when these appear harmful, may be justified on the ground of necessity; but progress along these lines has many undesirable results. Evasion of law does not increase respect for law, and the lack of respect for law is already one of our national vices. Further, the attempt to evade the law and to justify its evasion is unfavorable to intellectual integrity, to straight thinking and honest speech, on the part of our legislators, and also, in second instance, on the part of our judges.”

The feeling of most people will be that Professor Smith is right on this point. There is, of course, the consideration that whereas the written Constitution is now accepted as the test of the fundamental law, a policy of amendment by judicial interpretation, once firmly established, would lead to a change in the attitude toward the written Constitution. We would virtually be living under an unwritten Constitution, as in England, and the letter of the law would not occupy so prominent a place in man's minds as to lead them to accuse judges of a lack of candor, nor would judges themselves have to feel any shame in setting up new criteria of constitutional rights. The fallacy of such reasoning, however, lies in the fact that our American institutions have their roots in a living written Constitution which cannot become an obsolete instrument of merely historical interest, and that the written Constitution will long retain an undisputed supremacy which it does not exert in the fundamental law of other countries. Consequently judges must continue to give heed to the letter of the law, and to avoid every suspicion of

chicanery in attempting to override its provisions.

A third reason for making the Constitution more easily amendable is the need of injecting a more wholesome spirit into national party politics. Professor Smith writes:—

“Mr. Roosevelt's New Nationalism would be an excellent party program if the results that he desires could be attained without amending the Constitution; but in view of the practical impossibility of securing the necessary amendments in the constitutional way, his propaganda began, and has for the present ended, in criticism of the Supreme Court because that tribunal has not developed our constitutional law along new nationalistic lines. Whether Mr. Roosevelt's strictures are justified or not is here beside the question. His attitude is cited to show the difficulty of building up a party pledged to radical reform measures, when it is obviously impossible for a party to redeem such pledges. If a party that can carry a presidential election by a fair majority of electoral votes could also amend the Constitution, a strong national party might well be formed with a program more radical than Mr. Roosevelt's, a program which men of conservative temper would probably term socialistic. Under such conditions, conservatives would no longer be able to rely upon the rigid Constitution and the Supreme Court to protect property interests; they would be forced to organize a party representing their principles. Even a conservative, if a broad-minded man, might view such a result with satisfaction. National parties would then represent something besides the scramble for office, and their leaders would probably be men of a different type from the majority of our practical politicians.”

It may be added that such a change

would enlarge power and responsibility in the executive and legislative departments of the federal Government, and would unquestionably tend to introduce new dignity into public life.

A fourth reason for making the Constitution less difficult of amendment is the position in which the federal judiciary are placed, which is a position never contemplated by our political theory. It was not intended that the judges should have an absolute veto, but only a suspensive one. The suspensive veto, in Professor Smith's opinion, provides all the check on overhasty legislation which is desirable. Just as the suspensive veto is overridden in the states, by the easy adoption of amendments to state constitutions, there should be means of overriding it in the nation at large. To give the judiciary an absolute veto is to compel them to exercise political as well as judicial functions, and to stimulate the agitation for an elective judiciary and the judicial recall.

Coming now to the means by which the Constitution should be amended, Professor Smith discusses Professor Burgess' proposal, made twenty-one years ago, that the following plan be adopted: "Proposal of amendments by two successive Congresses, Senators and Representatives acting in joint assembly and resolving by simple majority vote; submission of proposals to the legislatures of the several states, these again acting in joint assembly and resolving by simple majority vote; assignment to each state of the same weight in the count of votes as in a Presidential election, and ratification of amendments by a simple majority of the state votes thus weighted."

Professor Smith finds this plan defective in so far as it fails to recognize the federal principle of equality of states. He therefore proposes the following

plan as superior: "Proposal of amendments by the majority vote of both Houses in two successive Congresses; submission of such proposals to the legislatures of the several states or to conventions in the several states or directly to the voters in each of the states, as one or another of these modes of ratification may be proposed by Congress; and ratification of proposals by a majority of the states, provided that the ratifying states contain, according to the last preceding enumeration, a majority of the total population of all the states.

"The plan here outlined accepts Professor Burgess' suggestion that an amendment proposed by one Congress must be accepted by a second Congress with a newly elected House of Representatives before the proposal may be submitted to the states. In addition to the arguments for such delay cited above, which seem conclusive, it may be noted that this longer period of consideration and discussion will probably produce proposals of superior precision. . . .

"The most important feature, however, of the plan here suggested is the proposal to lodge the final power of amendment, the truly sovereign power in our system, in a majority of states containing a majority of the total population of all the states."

It will be observed that the adoption of Professor Smith's scheme, while it would increase the flexibility of the Constitution, would by no means result in a highly flexible Constitution. A considerable period must elapse before an amendment can become effective, and the assent of two successive Congresses would be required before amendments could be submitted to a popular vote. We would, therefore, still be living under a comparatively rigid Constitution. The difference would be that it would not be of the abnormal rigidity now existing.

Reviews of Books

LABOR PROBLEMS AND WORKMEN'S COMPENSATION

The Trade Union Label. By Ernest R. Spedden, Ph.D., Sometime Instructor in Political Economy in Purdue University. Johns Hopkins University Studies, series 28, no. 2. Johns Hopkins Press, Baltimore. Pp. 100 (index). (\$1.)

Latter-Day Problems. By J. Lawrence Laughlin, Ph.D., Professor of Political Economy in the University of Chicago. Charles Scribner's Sons, N. Y. Pp. 302 (index). (1.50 net.)

Beneficiary Features of American Trade Unions. By James B. Kennedy, Ph.D., Professor of Political Economy in Wells College. Johns Hopkins University Studies, series 26, nos. 11-12. Johns Hopkins Press, Baltimore. Pp. 128 (index). (50 cts. paper.)

Work-Accidents and the Law. By Crystal Eastman, member and secretary of the New York State Employers' Liability Commission. Being the fifth volume of the Pittsburgh Survey in six volumes, edited by Paul Underwood Kellogg for the Russell Sage Foundation. Charities Publication Committee, New York. Pp. xvi, 220 + twelve appendices 109 + index 11. (\$1.50 net; the set \$10.)

Risks in Modern Industry. Special number of Annals of American Academy of Political and Social Science, v. 38, no. 1, July, 1911, Philadelphia. Pp. 278. (\$1.)

WRITING of "The Trade Union Label," Ernest R. Spedden says: "The unions have not as a rule attempted to encourage the demand for label goods by making the label a mark of superior material or workmanship. The difficulty in the way of such a plan is obvious; the union is not organized to further the interest of any particular part of the workingmen in the trade, but to establish conditions for the trade as a whole."

John Graham Brooks, discussing the union label in 1898, said that in certain trades "a label that should be confidently known to stand for definite improvement in the life of the worker would attract a powerful public sympathy," and he complained that the rules under which the union labels were issued gave ordinarily no guarantee of good quality of work or of sanitary conditions.

The method governing the use of the union label is typical of the methods of trade unions. The label, originally designed to appeal to trade-unionists to support other unions and to combat cheap immigrant labor, eventually came to be used to appeal to the sympathy of the general public with the union cause. There have fortunately been some indications to make the label a badge of superior workmanship in certain trades, but ordinarily it has been simply a means of telling the public that workmen were receiving the union scale of wages. Even though the label may not have been a means of boycotting competing non-union goods, it has been a means of combating non-union labor by the characteristic method of soliciting support without showing any economic superiority of the trade-union product.

As a substitute for the trade-union policy of seeking to dominate the market by other means than those of normal competition, Professor Laughlin proposes the competitive principle of productivity or efficiency. To illustrate the advantages of free competition over "bucking" against a threatened oversupply of labor, he instances the great increase of wages for both skilled and unskilled labor during the past fifty or sixty years, which increase has been accompanied by a fall in the price of many commodities consumed by the laboring class. Were the unions to adopt this principle of efficiency, "the contest between union and non-union men would no longer be settled by force," because "the sympathy of the public would be transferred from the non-union, or the unfit, to the union, or fit men. . . . This policy unmistakably opens the

path of hope and progress for the future."

Dr. Spedden has written a monograph on the trade-union label that is a valuable contribution to economic history, but a few reflections on the questions of economic progress and public policy presented by this subject would have rounded out his discussion into a more symmetrical form.

Professor Laughlin's treatment of social and labor questions, in his essays on "Socialism a Philosophy of Failure," "The Abolition of Poverty," "Social Settlements," "Political Economy and Christianity" and "Large Fortunes," is sound. He lays himself open to the imputation of being neither an individualist nor a collectivist. His moderation is apparent in such statements as this: "Just as soon as the acts of any person infringe upon the rights of others the state should interfere in the interest of equality and justice. Beyond this limit individual activity should be left untrammelled and encouraged to believe that it will receive all the rewards due 'to its own initiative.'"

The function of trade-unions as factors in collective bargaining is so familiar that one readily overlooks the fact brought out by Professor Kennedy, that "American trade-unionism owed its origin as much to the desire to associate for mutual insurance as to the desire to establish trade rules." The activities of the trade-unions in insuring their members against death, disability, sickness, and superannuation have been extensive. Though such insurance activities, originally of primary importance, have become secondary, they still are a leading factor in building up the membership of trade organizations. If the adoption of workmen's compensation laws result in a transfer of these activities to the state, the trade-unions will

have lost one means of securing members, and the consequences are likely to be beneficial, if the trade-unions thus cease to exercise, in the interest of their own members, functions which should be performed by the state in the interest of all workingmen, and come to concentrate their entire attention on the fundamental conditions necessary to the highest welfare of the laboring classes.

As a basis for study of the appalling economic waste of industrial accidents, the findings of the Pittsburgh Survey already occupy the position of a classic. Pittsburgh's yearly loss is shown by its annually sending out from its mills, railroad yards, factories and mines, 45 one-legged men; 100 hopeless cripples, walking with crutch or cane for the rest of their lives; 45 men with a twisted, useless arm; 30 men with an empty sleeve; 20 men with one hand; 60 with half a hand gone; 70 one-eyed men — 500 such wrecks in all. "Such is the trail of lasting misery," says Miss Eastman, "work-accidents leave behind."

The facts impartially presented in this volume as the result of dispassionate study of "the short and simple annals of the poor" show the necessity of some new system of compensation to take the place of the law of employers' liability. The following requirements of legislation are postulated: (1) every serious accident must be made a certain and considerable expense to the employer; (2) a considerable share of the economic loss must be shifted to the whole body of consumers; (3) the possibility of disputes must be reduced to a minimum. So much should be admitted, with only slight qualification.

The legal aspect of the workmen's compensation program, which is important, is ably discussed by Lancelot Packer, secretary of the Employers' Liability and Workmen's Compensation

Commission, Washington, D.C. Mr. Packer has prepared a brief on the power of Congress to impose an absolute liability irrespective of negligence. He considers numerous decisions of the Supreme Court of the United States and other authorities and concludes:—

English Common Law started with absolute liability, irrespective of negligence, for harmful acts.

That such liability was modified from time to time by judicial decision and statute to suit the prevailing ideas of social policy. That in accordance with such social policy such absolute liability remained for certain classes of acts. That it exists today for the custody and ownership of dangerous things, such as fire. That a man acts at his peril in certain situations, such as in creating a dangerous reservoir on his land (*Rylands v. Fletcher*) and that a rule of absolute liability is moreover attached to certain contractual relations and callings, such as carriers of goods and apparently innkeepers. In the United States, too, it is seen that the Supreme Courts of certain of the states have adopted the doctrine of *Rylands v. Fletcher*, and admitted the existence in their common law of instances of absolute liability, irrespective of negligence. That the Supreme Court of the United States in decisions later than the *Nitroglycerin* case, has given recognition to the fact that such instances of liability irrespective of negligence exist under the English Common Law (*Zernicke* case), and exist in the texture of our law (as in the rule of master's responsibility for competent agent's negligence). It will be seen also that state statutes imposing an absolute liability have been upheld by the Supreme Court of the United States, citing as justification, reasons of policy, such as protection of employees and safety of the public (*Mackey* case), and the difficulty of proving negligence, and justice (*Mathews* case — just when both parties equally faultless duty of insuring against loss should rest on railroad, which creates the peril for its own profit), under the police power, as well as under the power of a state over corporations.

From statements made by the Supreme Court, it would appear, too, that development of the law in accordance with the needs of the times is not to be discouraged.

It has recently been decided in the *Employers' Liability* cases (207 U. S. 463), that Congress has the power under the Commerce Clause to

regulate the relations of master and servant in interstate and foreign commerce as regards accidents in that commerce. Can it then be doubted that the Supreme Court would uphold the power of Congress, if in so doing it should see fit to adopt a rule of absolute liability irrespective of negligence for accidents to employees incident to such commerce, a rule that the whole experience of the civilized world has adopted as both expedient and just — thereby discarding the rule which requires proof of negligence, which that experience has proved to be inexpedient and unjust.

HOCHHEIMER'S MANUAL OF CRIMINAL LAW

A Manual of Criminal Law, including Forms and Precedents. By Lewis Hochheimer, of the Baltimore Bar. King Brothers, Baltimore. Pp. 270 and table of cases and index 65.

ONE takes up so thin a book as this on so large a subject with a feeling that it must be superficial. However, the present volume is an exception. It does not aim at any historical exposition of criminal law, nor does it attempt to expound any of the disputed or doubtful propositions that prove so puzzling and close in criminal law. The author has set himself the task of presenting the existing law "in terse phrase and comprehensive form, incorporating no irrelevant statement and omitting no essential detail."

The definitions are not in the time-honored phrases established by the old masters and reiterated by generations of lawyers, but the author has boldly struck out, regardless of past authorities, and uses everyday language of his own that gives point and character to his accurate statement of the essentials of each crime. Thus, for example, his definition of embezzlement: "Embezzlement means the fraudulent misappropriation of a thing by a person to whom it has been entrusted. The term is applied to offenses created by statutes, variant in their terms, but having the common design to make punishable,

within the operation of the principles governing as to larceny, acts of virtual theft differing from larceny only in the respect that the original taking of the thing in question was lawful or with the consent of the owner." This covers the ground fully and adequately and is refreshingly pointed.

The book is divided into two divisions. The first part deals with the rules and principles of the substantive criminal law. The second covers arrest, pleading, procedure, and kindred subjects. There is also a collection of forms. The work shows accurate and intelligent handling and will prove a valuable book for table reference and prosecuting attorneys, judges and lawyers practising in the criminal courts. Where forms in criminal proceedings are so largely a matter of statute or local practice the value of the collection of forms may be questioned, but we have no hesitation in commending this book to the careful consideration of the profession.

A LAWYER'S NOVEL OF THE "MEN HIGHER UP"

The Shadow Men. By Donald R. Richberg. Forbes & Co., Chicago. (\$1.25.)

"**T**HE *Shadow Men*," by Donald R. Richberg of the Chicago bar, a novel which exhibits seriousness of purpose and literary instinct, is the weaving in of a little love affair into the legal and executive end of the big modern business corporation. There is the big wealthy Mr. Moulton, who controls and directs the actions of the officers of the corporation, and there is the scapegoat who assumes all the blame for the illegal acts. Then there is the government investigation, the self-sacrifice of the scapegoat to save the big promoter, and his subsequent conviction. Upon his release from prison he

returns and is taken into Moulton's home as a great hero.

Moulton then secures for him the position of secretary of a big car repair concern. The books of the concern do not show that Mr. Moulton owns any of the stock, but there are constant transfers of stock, which make the scapegoat suspicious of Moulton's transactions. Then charges of graft and fraud are made against the officers by some of the stockholders, and the scapegoat again gets into trouble. He threatens to give away Moulton and his clique rather than be sent to jail again, but after a conversation with Moulton in which Moulton's daughter plays a prominent part, the scapegoat disappears. His attorney friend who has been handling his defense suspects that a trip abroad is contemplated, and hurries to New York and finally locates him on a departing steamer. He coaxes him to come back, and they return and stand for trial. The defense interposed urges that the crime charged has been committed, and that the scapegoat is not the guilty man but that there are men higher up. These men higher up are designated as "The Shadow Men."

• Mr. Richberg has one of his old experienced lawyers, who should know the true facts, criticize the bar in the following harsh terms:—

"But what do we find:— a mass of lawyers, well trained in fact, ill trained in thinking, stupidity at the bottom, unscrupulousness at the top, uninspired and bewildered mediocrity between, practising before judges selected through a political machinery that eliminates the high-minded, the studious and the impartial, with unerring and partially intentional regularity. We find legislatures, dominated solely by self-interest, tinkering with the fundamental principles of good government, aided, to

our shame be it said, by high courts ruled by motives alike pitiful and sinister. Add to these conditions the fact that the courts are sought by clients — especially by the important clients for whom great cases are fought — not for the establishment of justice, but purely and simply for the accomplishment of private profit.”

Again:—

“Nothing is so sure to interest people as to point out that the man who is more successful than you is not brainier, but simply more dishonest.”

And again:—

“All of us are born to give something to life, and every law of God or Man says that he who takes more than he gives is a Thief.”

THE AUTOBIOGRAPHY OF A SHYSTER

The Confessions of Artemus Quibble. By Arthur Train. Charles Scribner's Sons, New York. Pp. 227. (\$1.30 net.)

IT IS always entertaining to read of the exploits of upstarts whose assurance and audacity balks at no obstacle in the path of success, and whose callow resourcefulness triumphs over every untoward circumstance. “The Confessions of Artemus Quibble” deal with the career of a clever, unscrupulous young man who succeeded, without the help of character, education, or real ability, in raising himself to the unenviable position of the most prosperous and disreputable shyster imaginable, eventually to land in Sing Sing prison, where poetic justice required that he be sent at a much earlier stage of the story. The ingenuity of Quibble is marvelous, and Mr. Train is to be complimented on his fertility of invention. New York lawyers will recognize much that is familiar in the escapades of this ambulance-chaser, swindler, and scoun-

drel, this promoter of sham suits, abettor of criminals, and grabber of his clients' savings, but a large part of his adventures exceed the bounds of probability, and simply furnish material for a ridiculous tale which grotesquely exaggerates the evils of professional practice that it portrays.

From a literary standpoint the story is nothing but a pot-boiler, but it will furnish diversion to many a lawyer in weary hours. The action is animated, and the hero undeniably clever.

BOOKS RECEIVED

RECEIPT of the following new books is acknowledged:—

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.)

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.)

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.)

Capture in War on Land and Sea. By Hans Wehberg, Dr. Jur. (Düsseldorf). Translated from *Das Beuterecht 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.)

Studies in American Elementary Law. By John C. Townes, LL.D., Professor of Law, University of Texas, author of “Townes on Texas Pleading, “Townes on Torts,” etc. 2d ed. T. H. Flood & Co., Chicago. Pp. xxvii, 626 + 68 (index and appendix). (\$4 net.)

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 + 38 (appendices and index). (10s. 6d. net.)

The Individualization of Punishment. By Raymond Salelles, 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 Philo-ophy in 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. xlv., 313 + 6 (index). (\$4.50 net.)

Index to Periodicals

Articles on Topics of Legal Science and Related Subjects

Agency. "The Real Estate Broker and His Commissions." By Prof. Floyd R. Mechem, Chicago University. 6 *Illinois Law Review* 145 (Oct.).

First instalment of a succinct statement of the law in numbered sections with elaborate footnote annotations.

Commerce Court. "Equitable Jurisdiction of Commerce Court over Dismissal Orders of Interstate Commerce Commission." By Paca Oberlin. 73 *Central Law Journal* 259 (Oct. 13).

Discussing the jurisdiction of the new Commerce Court particularly with reference to its decision in *Proctor & Gamble Co. v. U. S.*, July 20, 1911.

"Considering then that the true meaning and effect of a dismissal order of the Commission is a finding that no cause has been made out for its interference under the acts to regulate interstate commerce and that the jurisdiction of the Commerce Court is limited to specific classes of cases for specific purposes the conclusion seems inevitable that the United States Commerce Court has no jurisdiction upon general equitable principles to review a dismissal order of the Interstate Commerce Commission."

Corporations. See Property and Contract.

Criminal Procedure. "Trial for murder in England." 45 *American Law Review* 641 (Sept.—Oct.).

On July 4, 1910, John Alexander Dickman was tried before Lord Coleridge for the murder of a paymaster in the employ of a collier and was convicted on circumstantial evidence. The case is fully reported the arguments and testimony being included. It is doubtful if a case more interestingly typical of English criminal procedure could have been selected.

"It is desirable," says the *New York Law Journal* (v. 46, p. 260, Oct. 18), "that members of the bar carefully read the report, noting particularly the attitude of the trial judge and the active part he took as well as the co-operative spirit of counsel is officers of the court. Undoubtedly the presiding judge displayed more initiative throughout the proceeding and went further in affirmatively guiding the jury in his summing up than is customary in America or indeed than probably would be tolerated outside of the federal and perhaps a few other American courts. We believe, however, that no unprejudiced lawyer could read this summing up without being impressed not only with the great ability with which the evidence was marshaled, but also with the fairness with which

the issues of fact were actually left to the jury for their determination. The unfortunate Maybrick trial did a great deal to prejudice the American bar against English methods in criminal trials. We believe that that case was exceptional; certainly the present trial was conducted in an entirely different spirit."

"The Indictment and Its Preparation in Illinois." By Thomas Marshall. 6 *Illinois Law Review* 162 (Oct.).

The inference to be drawn from this article is that in some respects the Illinois system may lay too much stress on formal technicalities. "Remember that the indictment has to do with all of the substantive law, much of the procedural law, and with the facts of each case. Study the facts and the law and be sure to aver every element of the crime in the statute. Look out for clerical errors, dates, signatures, and name of parties, and avoid misjoinder. Having done all this, lay down your pen and await calmly the inevitable motion to quash."

Defamation. "Publication of Libel by Communication to Stenographer." By John Caldwell Myers. 26 *Bench & Bar* 105 (Sept.).

Pullman v. Hill (1891), 1 Q. B. 524, and *Gambrill v. Schooley*, 93 Md. 48, together with some other cases following their authority, seem to be the source of this strange rule.

"Even if it be conceded that the harsh rule laid down in *Pullman v. Hill* and *Gambrill v. Schooley* is technically correct, it cannot be doubted that the strictness of the rule will eventually be relaxed by judicial interpretation, or modified by legislative enactment, to meet the new conditions arising from the necessities of modern business. *Pullman v. Hill* has already been greatly limited by subsequent English cases, and has been followed by the Canadian courts with great reluctance. *Gambrill v. Schooley* has been approved by the courts of Alabama and Virginia, it is true, but it by no means follows from this that the question has been definitely settled in this country. In *Owen v. J. S. Ogilvie Publishing Company* (32 App. Div. 465), the New York Supreme Court has taken a step in the right direction by holding that where the person dictating the letter and the stenographer are common servants there is no publication."

Evidence. "The Value and Admissibility of Photographs as Evidence." By W. C. Rodgers. 73 *Central Law Journal* 241 (Oct. 6.).

"It is very clear that it would be a reversible error to permit a photograph to be introduced in evidence without some evidence of its correctness. *Sellers v. State*, 91 Ark. 175, 180."

Federal Practice and Procedure. See Monopolies, Procedure, United States Courts.

Feminism. "*De l'Homme Considéré par la Femme Anglo-Saxonne comme une Nécessité Biologique, mis en même temps comme une Excroissance Sociale.*" By L. D. *Journal du Droit International Privé*, v. 38, nos. 7-10, p. 1169.

In a recent divorce case in San Francisco, the wife against whom the action was brought publicly declared, "In my opinion man is a biological necessity, but at the same time a social excrescence." In this article, for the opinions of which the *Journal* disclaims responsibility, it is maintained that there are scientific grounds for this view, as may be deduced, for example, from the social life of ants and bees.

A fantastic picture is drawn of the future *gynécocratie* or woman-ruled state, in which man will be effectually limited to the functions of difficult labor and of continuing the species.

Freedom of Speech. See Labor Legislation.

Game Laws. "Excusable Violations of the Game Laws." By Almond G. Shepard. 18 *Case and Comment* 237 (Oct.).

Treating of violations of the game laws which are legally justified, such as in defense of life or property; the power of the state to interfere with the enjoyment and disposal of reclaimed wild game by virtue of the police power is discussed.

"The Rights of Amateur Sportsmen." By John B. Green. 18 *Case and Comment* 243 (Oct.).

"A History of Game Legislation in the United States." By Walter A. Swan. 18 *Case and Comment* 248 (Oct.).

Government. "Shall we Make our Constitution Flexible?" By Prof. Munroe Smith, Columbian University. *North American Review*, v. 194, p. 657 (Nov.).

The most important article of the month. See p. 636 *supra*.

"American and Canadian Political Methods." By Henry Jones Ford. *North American Review*, v. 194, p. 685 (Nov.).

"With the comparatively few measures that a Canadian legislature has to consider, business can, of course, proceed in regular order. Public policy is determined not in committee-rooms, but by public discussion on the floor of the House. Inasmuch as the drafting of bills is done by experts, questions of form do not occupy the time of the House, so there is time for real debate. The ability of a member is shown not by the number of bills he is able to pass or by the amount of appropriations he is able to get, but by his eminence as a debater and his acuteness as a critic of public policy. This explains how it is that workmen may rise to such high positions in English commonwealths. . . .

"These differences in the organization of public authority have important consequences in every department of public life. The concrete results impress everyone that crosses the border. They

affect every court, every public utility, every institution of government."

See Feminism.

History. "General Lee and the Confederate Government." By Thomas Nelson Page. *Scribner's*, v. 50, p. 581 (Nov.).

"The Confederate Government had theories about cotton; theories about political economy in which cotton played a controlling part; theories about the necessity of the South's being recognized by the leading power of Europe. They held the opinion that not only the North, but Europe, was dependent on cotton — "King Cotton," as it was termed. To control the supply of cotton and withhold it from Europe was in their opinion, to compel the recognition of the Southern Confederacy by Great Britain and France. Thus, though the Southern armies starved and supplies could have been had for cotton, the Government forbade the transactions which might have relieved the situation, and while the ports of the South were being steadily sealed up, one after another, by blockade squadrons, and the cotton was being captured, abandoned, or burned, they still followed to the end the fatal *ignis fatuus* of foreign intervention, and failed to utilize to the utmost their own resources. The leaders were more high-minded than practical.

"The Confederate Government had theories of finance. . . . In fact, the Confederate Government, by which is signified its officials, had theories about nearly everything, on which, indeed, they were quite willing to stake their lives, if this would have done any good. Unfortunately, however, these views, whatever their soundness in the abstract, when put to the practical test in the crucible of war, did not result in success, and the sincerity with which they were held did not add to their value. Lee's army starved and dwindled while the Confederate Congress debated and debated."

"Cleveland's Administrations, II." By James Ford Rhodes. *Scribner's*, v. 50, p. 602 (Nov.).

"The interval between December 17 and January 2 was a gloomy period for patriotic and peace-loving Americans. The prospect of possible, even probable, war with England was dismal enough. I remember that on the evening of January 2, I asked General Francis A. Walker what way there was out of the situation when each nation had given the other an ultimatum. 'One or the other,' he said, 'must crawl, but the news in tonight's paper shows the resolution of the "difficulty." This was the report of Dr. Jameson's raid into the Transvaal. His capture and the congratulatory dispatch of the German Emperor to Kruger followed. Though the British government had remained silent since Cleveland's message of December 17, the English press had been bellicose, but now the irritation of the public at the German Emperor's dispatch was so acute that Cleveland's offense was forgotten. Thenceforward things moved steadily to a harmonious settlement."

Industrial Accidents. "The Relation of Fatigue to Industrial Accidents." By Emory S. Bogardus. *American Journal of Sociology*, v. 17, p. 206 (Sept.).

In this opening instalment the author deals with the problem of formulating "a law of the development of the fatigue processes which accompany continued work, in so far as they may be related to accidents."

The law finally deduced is as follows: "Uninterrupted muscular activity is accompanied by inaccurate muscular co-ordinations, which increase irregularly and at a rate largely determined by the speed and relative difficulty of the activity for the given individual."

International Arbitration. "The Legal Evolution of Peace." By Edwin M. Borchardt, Law Librarian of Congress. 45 *American Law Review* 708 (Sept.-Oct.).

In the first stage of private justice disputes were settled by limitless resort to private war and private vengeance. In the second stage, private vengeance was restricted to certain offenses and persons and pecuniary compensation was introduced. In the third stage private vengeance was partly but not wholly controlled, the king being powerless to compel all disputants to come into his court. In the fourth, a judicial method of settling private disputes was fully established.

Likewise, the method of settling international disputes passes through an evolution of four corresponding stages. First we have wars of utter license and unrestrained cruelty, like those of the Reformation; then the introduction of humanizing agencies through the influence of great writers, like Grotius and Vattel, resulting in such work as that of the Geneva, Brussels, St. Petersburg and Hague conferences; then, thirdly, the concurrent existence of regulated public war and a system of international arbitration. The writer hopes that the fourth stage will be realized, in the form of a victory for the judicial system in international as well as private relations, and sees indications that it will be.

"The Deficiencies of Law as an Instrument of International Adjustments." By Rear-Admiral A. T. Mahan, U. S. N. *North American Review*, v. 194, p. 674 (Nov.).

"The positiveness inherent in the very idea of law, its lack of elasticity, renders it too frequently inadequate to the settlement of certain classes of disputes, because in the cases an accepted law exists, decision in accordance with which would simply perpetuate injustice or sustain intolerable conditions."

"The Arbitration Treaties and the Constitutional Powers of the Senate." By Senator Henry Cabot Lodge. *Editorial Review*, v. 5, p. 901 (Oct.).

Senator Lodge opposes the ratification of the treaties, resting his argument mainly on the ground that the submission of questions to the Joint High Commission of Inquiry, to determine

whether any dispute is justiceable, would be an unconstitutional delegation of exclusive sovereign powers of the Senate.

"Report of the Senate Committee on Foreign Affairs." *Advocate of Peace*, v. 73, p. 222 (Oct.).

The majority report, presented by Senator Lodge, which is not so able as the minority report, pursues the line of argument above indicated. The minority report, presented by Senator Root, for himself and Senators Cullom and Burton, says in part:—

"The real objection to the clause which commits to the proposed joint commission questions whether particular controversies are arbitrable is not that the commission will determine whether the particular case comes within a known line, but that the commission, under the general language of the first article, may draw the line to suit themselves instead of observing a line drawn by the treaty-making power. If we thought this could not be avoided without amending the treaty, we would vote for the amendment to strike out the last clause of Article III, for it is clearly the duty of the treaty-making power, including the Senate as well as the President, to draw that line, and that duty cannot be delegated to a commission.

"We do not think, however, that any such result is necessary. It certainly is not intended by the treaty; and it seems that it can be effectively prevented without amending the treaty by following a practice for which there is abundant precedent, and making the construction of the treaty certain by a clause in the resolution of consent to ratification."

Senator Burton, discussing the subject more minutely, says in his supplemental views appended to the minority report:—

"The existing treaties of 1908 provide, in the very words which have been incorporated in the treaties under consideration that the special agreements submitting questions to arbitration shall be made by and with the advice and consent of the Senate. The power of the Senate to decide whether or not certain questions should be arbitrated was clearly just as much impaired or surrendered in those treaties as is the right to pass upon an enlarged list of questions in the pending treaties. Arbitration treaties may be special or general; if special, they include single controversies or agreements; if general, they are framed to include all controversies, or specific categories of controversies, as they may arise. The Senate has ratified treaties of both classes, and it is clear that in neither class has it abdicated its prerogatives."

Interpretation and Construction. See *Judicial Legislation*.

Interstate Commerce. See *Commerce Court, Monopolies*.

Judicial Legislation. "The Common Law and Judicial Legislation." By Andrew Alexander Bruce. *Chicago Legal News*, v. 44, p. 60 (Sept. 28). (Continued in following issue.)

This paper, read before the North Dakota

Bar Association as the president's address, is worthy of perusal for its vigorous and profound thought. Particularly able argument is adduced to refute the proposition that on a question of fact and of necessity the Supreme Court of the nation may oppose its judgment to those not merely of the state legislatures, but of the state courts, and that the state tribunals may on like questions of fact overrule the judgments of their own state legislatures. This "is a doctrine which although, until recently, generally acquiesced in, has no foundation in sound reason nor sanction in the history of our jurisprudence. It can only be asserted on the theory that our legislative bodies are undemocratic, unintelligent and unrepresentative. It is a doctrine which has been grafted upon but which has not been rooted in our English or in our American jurisprudence. It is the product of class pride and of class prejudice. It was not, indeed, until after the Civil War that the doctrine of the supremacy of the courts was ever asserted in relation to the acts of a popular parliament or a popular legislature, when that body was acting within its legislative domain. In England the doctrine was only announced as a check to an unlawful exercise of the royal prerogative and never as a check upon the popular parliament after that parliament had once assumed form and become in any manner representative. . . ."

"There can, indeed, be no question of the right and power of the courts to compel public officials to keep within their legal spheres and to prevent, for instance, the executive from judging or legislating and the legislature from judging or the states from encroaching upon the domain of the national Congress. There is a wide distinction, however, between this and the setting aside of an act of a legislature, such as the Eight Hour Labor Law, which is passed by a popular assembly within the undoubted sphere of its legislation and not for the purpose of oppression, but of protection. The province of the courts, in other words, is to keep the public and the public officials within the law and not to check the legislative bodies in the exercise of their law-making powers. This, indeed, with but rare exceptions, has been the policy of our courts and it should always have been adhered to and have been made clear and certain."

Judicial Powers. See Procedure.

Labor Legislation. "Criticizing the Courts." By George W. Alger. *Atlantic Monthly*, v. 108, p. 656 (Nov.).

"The position in which the American courts are placed today is a peculiarly delicate one. On the one side are those to whom modern American legislation is the new barbarism threatening the states and nation with a rank growth of meddlesome, inefficient, unenforceable laws injurious to industrial development, yet inevitable, unless restricted, as they ask to have it restricted, by new judicial limitations. On the other side are those who contend that legislation of the new type is necessary and unavoidable, that the collective principle so

clearly expressed in industry in the great aggregations of capital can only be governed, so as to preserve an actual rather than a nominal individual freedom, by the enactment of wise law; and they, too, are looking to the courts to sanction, and not to destroy, new legislative programs, and to the increase of governmental control over industry to prevent the exploitation of the people. Hence the issue of criticizing the courts; hence unreasoning defense, and at times intemperate censure, of judicial decisions involving the Bakeshop Law, the Workmen's Compensation Law, the Sherman Anti-Trust Law, the Oklahoma Bank-Guaranty Law, the Interstate Commerce Law, and other legislative experiments with the collective principle."

"How to Put the People Behind the Law." By Rev. Percy Stickney Grant. *North American Review*, v. 194, p. 697 (Nov.).

"The working-class outlook, on the whole, it has unfortunately to be noted, is not broad, and some of the decisions adverse to labor we are obliged to account for (and this is admitted by labor men themselves) as the result of immature legislation undertaken at the hasty and querulous call of labor. . . . Much of the legislation in the interest of labor has, as can be seen, discriminated against corporations and also in favor of local labor as against race and nationality. Not only was it easier for the courts, but incumbent upon them, to declare such legislation unconstitutional. The fault may lie in the wrong instincts of the working class, or in the attempt on the part of legislators to satisfy labor by passing some sort of legislation in its favor, but of such a nature as to make the declaration of its illegality certain.

"If capitalistic control of legislation is intolerable, and if working-class control would be no better, must we not look for a mean between capitalistic control and working-class control; that is to say, for a relation between the two that will give to neither undue power? . . ."

"A weakening of self-confidence may be observed today in the capitalistic attitude in America, and, at the same time, an increasing sympathy for labor among the intellectuals. Here, then, we have a mental and moral medium in which alone class concession may be secured and fixed. This is the field, too, in which wider education, mutual confidence and sympathy ought to be most helpful in adjusting popular grievances."

Legal History. "History of the French Notarial System." By William W. Smithers. *60 Univ. of Pa. Law Review* 19 (Oct.).

A history of the office of Notary, which "is older than any other now connected with administration or jurisprudence in France."

Literature. "The Hooligan." A Character Study in one act. By Sir William S. Gilbert. *Century*, v. 83, p. 97 (Nov.).

This is not the sort of thing we would have expected from Sir W. S. Gilbert; the grim tragedy of the prisoner under sentence of death is more in the style of Galsworthy. The Gilbert-

ian humor, however, will out, as when the prisoner is made to exclaim: —

"Hevidence? Call that hevidence? Why, it was bloomin' lies — bloomin' lies and hevidence."

"The Judgment of Pantagruel." By François Rabelais. (Extract in the Series, "Law from Lay Classics.") 6 *Illinois Law Review* 189 (Oct.).

Marriage and Divorce. "Agitation for Reform of Divorce Laws." Editorial, 26 *Bench & Bar* 87 (Sept.).

"These evils are, in our opinion, (1) the granting of divorces for trivial causes to persons who migrate or emigrate merely to obtain divorces, and (2) the marriage in other states of divorced persons forbidden to marry again by the laws of their own states. . . .

"In New York the statute forbidding a person divorced for his or her adultery to marry again during the life of the innocent spouse has been held not to apply to marriages outside New York, which are recognized as valid in this state, even where both parties are residents of New York, and are married in another state for the express purpose of evading the New York law (*Van Voorhis v. Bristnall*, 86 N. Y., 18; *Thorp v. Thorp*, 90 N. Y., 602; *Moore v. Hegeman*, 92 N. Y., 521). . . .

"What remedy, if any, is there for this condition? New York can, of course, make such marriages void in this state, wherever they take place; and it is possible that some concerted action among the states or some of them might be secured for the enactment of laws prohibiting the marriage in a state of a person forbidden to remarry by the law of another state in which he has been divorced for his own wrongdoing. . . . Conceding to every state the fullest right to determine for itself what shall constitute grounds for divorce, it is still reasonable to ask that the local policy be not applied to acts committed elsewhere in favor of a person seeking to obtain from those acts an effect not given to them by the state in which they were committed, and in which he was domiciled at the time. And this has been recognized. The uniform divorce law prepared by the National Congress on Uniform Divorce Laws in 1906, and already adopted in Delaware and New Jersey, contains a clause providing, in effect, that no divorce shall be granted to a person not a resident of the state when the cause occurred, unless such cause was ground for divorce in the state where the plaintiff then resided (see, for example, Laws of N. J., 1907, chap. 216, sec. 6, subd. b, sec. 7, subd. b.). Such legislation seems to us most commendable. . . .

"The second branch of the 'western divorce' evil is due to the divergence of view as to the extra-territorial effect to be given to a foreign divorce granted upon constructive service of process. . . . It is most unfortunate that there should be a diversity of view as to the extra-territorial effect to be given to divorce decrees.

"The difficulties of the situation are sufficiently obvious, and it is too much to hope for anything like a complete remedy for existing evils in the near future. The great diversities of opinion on the subject preclude the possibility of any

satisfying federal legislation at the present time, even if a constitutional amendment could be secured. The best method of approaching the problem appears to be through uniform state legislation of the kind above suggested. And it is believed that through such legislation much can be done to minimize the evils to which we have referred. While the conference of Governors is past, there is no reason why a conference of Governors' representatives should not be called to consider this question, as was done in 1887 at the instance of Governor Hill to consider the subject of interstate rendition."

Monopolies. "The Problem of Controlling Monopolies." By William C. McChord. *Editorial Review*, v. 5, p. 928 (Oct.).

Mr. McChord, who was counsel for the "Burley" tobacco growers of Kentucky, would substitute for the existing system one of administrative regulation of corporations by state and national commissions, having functions analogous to these of state railway commissions and the Interstate Commerce Commission.

"Is the United States Judiciary Powerless to Hurt the Business of a Trust?" By William L. Royall. 73 *Central Law Journal* 297 (Oct. 27).

"If the argument of this paper is sound, all the Government can do is to restrain the American Tobacco Company from violating the law in the future, and to provide penalties for its violation of the law in the future. But the past is a sealed book, and what the American Tobacco Company has acquired in the past belongs to it and it cannot be deprived of one dollar's worth of those acquisitions without overthrowing the fundamental principle upon which social order rests."

"A Review of the Opinions of the Chief Justice of the United States in the *Standard Oil and Tobacco Cases*." By Albert H. Walker. 45 *American Law Review* 718 (Sept.-Oct.).

Taking the view that all that the Chief Justice said about the "rule of reason" was mere *obiter dicta*, and accusing the Court of deliberately frustrating the will of Congress.

Municipal Trading. "Aspects of Public Ownership, IV." By Sydney Brooks. *North American Review*, v. 194, p. 737 (Nov.).

"The probability is that if all the necessary data could be collected and examined, municipal trading in Great Britain would show a certain small advantage over private corporations in the matter of the cost of the services supplied, but would not show any corresponding advantage in point of quality. Those, however, are assumptions which, whether reasonable or otherwise, can neither be proved nor disproved. Meanwhile what appears to be certain from a study of British experiences is that municipal enterprise always leads to an immediate increase

of taxation; that its other financial results, whether good or ill, are at present so indefinite as to be almost negligible; and that the many and varied abuses of a political and economic character which it entails cannot, therefore, be condoned on the plea of its commercial success."

Panama Canal. "Necessary Panama Canal Legislation." By Emory R. Johnson. *North American Review*, v. 194, p. 714 (Nov.).

Treating questions connected with the administration of the canal and of the Canal Zone.

Procedure. "Right of Trial Judge to Comment on the Evidence." Editorial. *26 Bench & Bar* 94 (Sept.).

Here are collected a large number of quotations from New York decisions defining the powers of the trial judge. By way of summary: "Under the authorities it is clear that while the trial judge in both civil and criminal cases may comment upon the testimony, his comments, especially in criminal cases, must be very guarded. He must make it absolutely plain to the jury that the decision of every question of fact rests with them, and that whatever opinion he may have expressed is not binding upon them, but that they are to examine the evidence and decide the questions for themselves. At the same time, it seems desirable that judges should exercise to the full the powers which they have of commenting upon the evidence. Their training and experience peculiarly qualify them to weigh the evidence, to determine its sufficiency and to pass upon the credibility of witnesses."

"Progress Toward Reform in the Administration of Law." By Ralph W. Breckenridge. *Editorial Review*, v. 5, p. 943 (Oct.).

Mr. Breckenridge, who is chairman of the Committee of the National Civic Federation on Reform in Legal Procedure, describes the general movement for the reform of procedure, without dealing with special problems.

Property and Contract. "Privilege Becomes Property under the Fourteenth Amendment: The Consolidated Gas Decision." By Jesse F. Orton, A.M. *Independent*, v. 71, p. 797 (Oct. 12).

In *Consolidated Gas Co. v. City of New York*, 212 U. S. 19, 157 Fed. Rep. 849, the Supreme Court "reviews the report of a legislative committee appointed in 1885 'to investigate the facts surrounding the consolidation' of the gas companies. The committee concluded that under conditions existing in 1884, 'the valuation of \$7,781,000 for the franchises was not more than their fair aggregate value.' What were those 'conditions?' (1) The enormous dividends paid by the gas companies; (2) a law which 'virtually prohibited the laying of any more gas pipes in the streets'; (3) an agreement between the gas companies 'fixing the price of gas at a figure that paid these dividends'; (4) a contended public paying this price 'without objection or protest'; and (5) the existence of no law that made these high rates or excessive dividends 'illegal.'

"Yet the court complacently comments thus on the committee's report: 'Assuming as the committee did, that the company would be permitted to charge the same prices in the future which in the past had resulted in these "enormous" or "excessive" dividends, it need not be matter of surprise that a franchise by means of which such dividends had been possible was not regarded as over-valued at the sum stated in 1884.' . . ."

"The opinion of the Supreme Court, nominally against the company, but really in its favor on the most important issue in the case, was given by Justice Peckham, and received the concurrence of all the other members of the court — Chief Justice Fuller and Justices Harlan, Brewer, White, McKenna, Holmes, Day and Moody. Thus was the legislative sword, drawn against monopoly, turned back into the vitals of the people, in whose protection it had been raised. A prohibition designed to check over-capitalization had been transformed, in the judicial crucible, into a license for extortion. Thus, as often happens, the people got *the decision*, but the corporations got *the law* — for future use."

Public Ownership. See Municipal Trading.

Public Service Corporations. See Property and Contract.

Rate Regulation. "Jurisdiction of Certain Cases Arising Under the Interstate Commerce Act." By Henry Wolf Bikle. *60 Univ. of Pa. Law Review* 1 (Oct.).

"In short, strict obedience to the provisions of duly filed tariffs is the imperative mandate of the Interstate Commerce Law, and no court can relieve the carrier, or by the same token the shipper, from their necessary and proper operation. Relief is obtainable only from the Interstate Commerce Commission, and then only in those cases where the rate or regulation in question is, in the judgment of that tribunal, unreasonable. The decisions are well summarized by the United States Circuit Court of Appeals for the Third Circuit in *Morrisdale Coal Co. v. The Pennsylvania Railroad Company*, in which case the Court says (183 Fed. 929, at p. 936 (1910)) :—

"These cases [the cases referred to in the opinion] conclusively establish the doctrine that the Interstate Commerce Commission alone has original jurisdiction to determine whether an existing rate schedule, or an existing regulation or practice affecting rates, or an existing regulation or practice of any other kind affecting matters sought to be regulated by the act, is unjust or unreasonable, or unjustly discriminatory, or unduly preferential, or prejudicial, and that the courts cannot, by mandamus, injunction, or otherwise, control or modify any order of the Commission made by it in the due performance of its merely administrative functions."

Socialism. "The Rising Tide of Socialism: A Study." By Robert F. Hoxie. *Journal of Political Economy*, v. 19, p. 609 (Oct.).

"Socialism has quite suddenly made its appearance in American politics as something more than a mere doctrinaire sect or party of

protest. Its seat of power is in the Middle West; but it is not confined to any one section of the country. On the contrary, it is most markedly pervasive, its widespread successes indicating that beneath the surface it is a force developing throughout the country. Nor is this force confined to any one class of communities. While manufacturing, mining and railroad centres stand conspicuous in Socialist successes, small country towns and purely agricultural communities contribute largely to the total; and even residential and suburban communities figure in the count. On the other hand, to speak of Socialism as already a power in American politics is to deal altogether in hyperbole. . . .

"The average Socialist recruit begins as a theoretical impossibilist and develops gradually into a constructive opportunist. Add a taste of real responsibility and he is hard to distinguish from a liberal reformer. It is the same with the movement. These Socialist successes in general, therefore, are a training school of constructive democracy. This fact should calm the fears and allay the prejudices of all those who have a real faith in the people."

Stare Decisis. "Effect of Overruling Opinion of Court of Last Resort on Rights Acquired on Opinion Overruled." By James E. Babb. 45 *American Law Review* 750 (Sept.-Oct.).

Some of the authorities are reviewed, including the well-known cases of *Gelpcke v. Dubuque* and *Muhlker v. N. Y. & C. R. Co.*, but little new light is thrown on the subject.

Taxation. "The Measure of Income for Taxation." By Truxtun Beale. *Journal of Political Economy*, v. 19, p. 655 (Oct.).

The writer, who takes for granted the general adoption of income taxation in the near future, discusses from an economic standpoint the adjustment of income taxes in such a way as to secure the maximum benefit to the wealth and well-being of the community. He argues at length in favor of exempting saved income from taxation, and he would tax income spent on luxuries.

Uniformity of Laws. See Marriage and Divorce.

United States Courts. "The New Federal Judicial Code." By Hon. Henry B. Brown. 73 *Central Law Journal* 275 (Oct. 20).

Part of the address of Justice Brown before the American Bar Association at Boston last August, treating of the changes made by the new federal judicial code.

See Commerce Court.

Workmen's Compensation. "The New York Workmen's Compensation Act Decision." By James Parker Hall. *Journal of Political Economy*, v. 19, p. 694 (Oct.).

"In the face of so large a number of instances of liability without fault under our system of law, it cannot be successfully argued that a statute takes property without due process of law

merely because it imposes a new liability of this character. The question instead must be the more fundamental one. Does the statute seek an end so unreasonable or arbitrary as not to be within the legislative discretion? or, Has it sought a legitimate end by similarly unreasonable or arbitrary means?"

"Workmen's Compensation in Illinois." By Samuel A. Harper. 6 *Illinois Law Review* 170 (Oct.).

"In all cases where the injury results from the direct negligence or intentional act of the master the servant would seem to have a clear right to his common law remedies against him, including the trial by jury. The extension of the liability of the master, however, to cover the negligent acts of a servant or agent, is a comparatively recent, judge-made privilege given to the employee, and what has thus been given him might in reason be taken away in the exercise of the reasonable police power of the state."

"German Workingmen's Insurance and Foreign Countries." By Dr. Zacher. *American Journal of Sociology*, v. 17, p. 177 (Sept.).

A short *résumé* of the past twenty-five years' experience of Germany.

"The German principle . . . is superior to the *liberté subsidie* in this, that it involves both parties, workmen and employers in the cost of premiums, and so places the entire insurance on a firmer, clearer and juster basis, and makes it evident to the workmen that the contribution of the employer is not a 'subvention,' but something which they have themselves earned."

See Industrial Accidents.

Miscellaneous Articles of Interest to the Legal Profession

Biography. "Lafollette's Autobiography." By Robert M. LaFollette. *American Magazine*, v. 73, p. 3 (Nov.).

This second installment, dealing with LaFollette's experience in the House of Representatives, gives interesting impressions of the period from 1885 to 1891. "In those days the consideration of private interests of all sorts overwhelmed Congress. I have showed how, in several instances and in a limited way. I tried to fight against them, singly. But . . . such men as Sherman in the Senate and Reagan in the House were real constructive statesmen."

Camorra Trial. "An American Lawyer at the Camorra Trial." By Arthur Train. *McClure's*, v. 38, p. 71 (Nov.).

"As for the lawyers—the *avvocati*—they seem very much like any group of American civil lawyers and distinctly superior to the practitioners in our criminal courts. Many are young and hoping to win their spurs in this celebrated case. Others are old war-horses whose fortunes are tied up with those of the

Camorra. At least one such, *Avvocato Lioy*, is of necessity giving his services for nothing. But it is when the *avvocato* rises to address the court that the distinction between him and his American brother becomes obvious, for he is an expert speaker, trained in diction, enunciation and delivery, and rarely in our own country (save on the stage or in the pulpit) will one hear such uniform fluency and eloquence. Nor is the speech of the advocate less convincing for its excellence, for these young men put a fire and zeal into what they say that compel attention.

Cuba. "An English View of Cuba." By Sydney Brooks. *Forum*, v. 46, p. 461 (Oct.).

"The final impression I brought away was that, with all its pretty obvious shortcomings, the Cuban Republic was faring as well as any rational man could expect, that it is the form of government which the vast majority of the people prefer, and that it has done little to forfeit, and

much to deserve, the sympathetic support of the American people."

Detection of Crime. "The Amateur Detective." By Harvey J. O'Higgins. *McClure's*, v. 38, p. 52 (Nov.).

Another Burns detective story. In the attempt to run down some counterfeiters, Detective Burns found that his amateur detective had succeeded only in falling a victim to some confidence men who tried unsuccessfully to get his money.

Election Frauds. "Seventeen Hundred Rural Vote-Sellers." By A. Z. Blair. *McClure's*, v. 38, p. 29 (Nov.).

Written by the district judge who conducted the trial resulting in a remarkable revelation of corruption in the rural electorate of Adams county.

Latest Important Cases

Corporations. *Corporation Sole of Roman Catholic Church Illegal in Pennsylvania — Church Property Controlled by Congregations.* Pa.

The decision of the Pennsylvania Supreme Court, which on October 21 set aside the decree of the Lackawanna County court in the suit between Bishop Hoban of the Roman Catholic Church diocese of Scranton, Pa., and the congregation of St. Joseph's Lithuanian Church, is far-reaching. The lay members of the congregation who insisted in keeping control of the church property have won their cause.

The Court (Stewart J.) said: —

"The office of trustee simply of legal title is not created by ecclesiastic authority, but created by the law; such trustee can exercise no control whatever over the property held in trust; being an officer created by law and answerable only to the law, he can derive neither authority nor power from any other source.

"If St. Joseph's Lithuanian congregation desires Michael J. Hoban,

whether described by his episcopal office or not, to be the custodian of the legal title to their church property, let them so declare by a majority vote of the adult male membership, and their choice will not only be respected by the courts, but will by them be enforced if necessary."

Monopolies. *Sherman Act Does Not Permit Confiscation — Forcible Seizure and Sale of Property of Corporation Violating the Law.* U. S.

The proposed plan of the American Tobacco Company for reorganization was approved by the United States Circuit Court for the southern district of New York in a decision rendered early in November, a comprehensive decree being issued by the Court enjoining "common stockholding" and any other forms of combinations and agreements in restraint of competition.

The Court (Lacombe J.) said: —

The Attorney-General has formulated the request "that the stock of the United

Cigar Stores Company be sold and distributed to parties other than the twenty-nine individual defendants or others of the common stockholders of the American Tobacco Company, to the end that the corporation be entirely separated from any connection with the corporations to which the properties and businesses now in the combination are to be distributed.

"We have no power to grant any such request. The Anti-Trust act carefully enumerates the penalties for a violation of its provisions — fines, imprisonment, injunction against continuing to transact interstate business, treble damages to all persons injured by an unlawful combination, seizure and forfeiture of property in course of interstate transportation. These are certainly ample to enforce obedience. By confiscation of property in transit and injunction against continuance in interstate business an offender may be put out of active existence into a state of paralysis as helpless as dissolution. It might be said that to these penalties the Supreme Court has added another, a qualified confiscation of property not in transit by receivership and forced sale.

"Nowhere, however, is there any authority for the proposition that this court may seize the property of private persons who may have offended against the statute and sell it under conditions which would preclude the holder of the title or the owner of the equity from bidding at the sale so as to compel the purchaser to pay a reasonable price for it, or from buying it himself if no one else will pay full value for it. That is confiscation; none the less so because the proceeds of such a sale, after paying outstanding debts and expenses, are to be turned over to the owner. Until Congress shall expressly give such power

to this court, or until some obscure language in its grant of power shall be construed by the Supreme Court as in effect conveying such power, this court is not prepared to assume that it possesses any such authority. The request is denied." N. Y. L. Jour., Nov. 16.

Workmen's Compensation. *Liability without Fault — Limits of Police Power.* Wash.

The constitutionality of the Washington Workmen's Compensation act was sustained in a decision rendered in September by the Supreme Court of Washington, in *Davis-Smith v. Clausen*, 117 Pac. 1101. The statute undertakes, by requiring contributions from employers to an accident or insurance fund, to provide fixed and certain relief for workmen injured in extra hazardous work and their families and dependents, regardless of questions of fault or negligence, and to the exclusion of every other remedy or compensation.

We quote from the syllabus: —

"The test of the validity of a law which creates liability without fault and under which the property of one is taken, without compensation, to pay the obligations of another, is not whether it does objectionable things, but whether there is any reasonable ground to believe that the public safety, health or general welfare is promoted thereby, the 'police power' under which such reasonable regulations may be made being a power inherent in every sovereignty, the power to govern men and things, the power to which the possession and enjoyment of all rights are subject, and under which the legislature exercises a supervision over matters affecting the common weal and enforces the observance by each member of society of his duties to others and the community at large."



The Editor's Bag

THE UNIFORMITY OF STATE LAWS

THE movement for uniformity of state laws has gathered such headway that the desire of the readers of the *Green Bag* to help it in every possible way may be taken for granted, and it is hardly necessary to present any arguments to show why it should receive the support of the bar.

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 coöperation of existing active agencies in the labors which this body has under way.

Some defects have been discovered in the Uniform Negotiable Instruments Act,

and it has been pointed out that this statute has led to some of the very conflicts of judicial interpretation which it was designed to obviate. This fact, however, should not weaken confidence in the methods which are being pursued to unify the laws of commerce. From a statement made elsewhere in this issue by the Chairman of the Conference, it is evident that the Conference has amendments to this Act under consideration, and the organization of the Conference certainly renders it the ideal agency not only for the drafting of laws, but for the mending of their defects after enactment. A point which cannot be too strongly emphasized, for the benefit of critics of the Uniform Acts, is that they can always be amended by a process similar to that which resulted in the original drafts. The Conference is thus to be regarded not as a mere transient body, existing only to propose certain measures, but as a permanent institution, whose work can never possibly be completed, existing not only to formulate but to perfect the laws, and always striving to adapt them to the shifting needs of the times.

In view of these considerations, we anticipate the eventual enactment, in practically all the states, of the entire commercial program of the Uniform State Laws Conference. That some of the laws will be adopted more slowly than others should afford no ground for discouragement, but should rather be interpreted as a sign that some sub-

jects are receiving the mature deliberation which may well precede all forms of legislation.

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 recognizes that a very large group of matters are primarily subjects for local regulation, and 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 enforceable 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. Of necessity there are strong forces at work to bring about uniformity in the laws governing this class of subjects.

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 as that afforded by the Conference, are sufficiently plain, and the efforts of the Conference in these directions cannot fail to be remarkably successful.

The Conference has not been reluctant to assume new tasks, and every topic of state legislation which discloses

the need of uniformity will surely receive its thoughtful attention. The Conference has thus come to exercise a function of great importance in molding the legislation of the several states, and should be consulted by the state legislatures for advice on important projects of state legislation, and aided with suggestions from every source in its work of shaping new uniform acts. Were the examples of Massachusetts, which has enacted seven of the eight uniform acts, and of Wisconsin, which has adopted six of them, to be imitated by their sister states, the movement would be given a great impetus which would surely produce momentous results, and would strengthen the hands of the most efficient bill-drafting body in the land to lay hold of many new undertakings of tremendous importance.

MR. JUSTICE HARLAN

AFTER nearly thirty-four years of distinguished service as an Associate Justice of the Supreme Court of the United States, John Marshall Harlan died at his home in Washington, Oct. 14, at the age of seventy-eight. His illness had been brief, and Judge Harlan continued in the possession of vigorous mental powers up to the last, dying practically in the harness.

Justice Harlan's powerful personality has left its impress on the many decisions rendered by the Supreme Court during a long period, and so deep is that impress that his name will loom large in the history of the Court. So distinguished are his opinions for intellectual force and firmness of conviction that they are certain for a long time to attract attention to his unusual personality, and always to be remembered as those of one of the strongest individualities that ever occupied the Supreme Court bench.

The mind of Justice Harlan, like that of the late Justices Brewer and Peckham, was more rugged than keen, and better fitted to cope with practical realities than with subtleties of legal reasoning and extinct lore of the books. This fact accounts for the simple, direct, persuasive quality of his judicial opinions, which were easily understood by the layman, and had a downrightness that commanded the admiration of the bar for their vigor and independence.

The frequency and energy of the late Judge's dissents has given rise to the impression that he was more independent than most of his colleagues, but candor is pre-eminently a judicial characteristic, and able judges who have the courage of their convictions are rather the rule than the exception. It was not the fact that Justice Harlan had the courage of his convictions that distinguished him from his colleagues, but rather the tenacity with which he clung to his convictions, and the ruggedness of temperament which led him to express them with aggressive insistence. His was a mind less impressionable, less flexible than that of most of the other members of the Court, less easily tempted to modify its conclusions in response to the complicated considerations entering into the determination of every great legal controversy. He had no interest in the theories of a changing Constitution, of an overlapping of governmental powers, or of a public policy determined by the dictates of public opinion. He leaned to the doctrine of strict literal construction of the Constitution, and adhered pretty closely to views on constitutional questions formed early in his public career.

Personally Justice Harlan was a bluff yet kindly Kentucky gentleman, considerate of all those with whom he had contact, yet winning admiration by the

manlier as well as by the gentler virtues. His impressive personal presence well befitted the dignity of the Court, and his past accomplishments as soldier and orator increased the respect in which he was held.

John Marshall Harlan was born June 1, 1833, of Quaker ancestry on his father's side, his father being one of the foremost members of the bar of Kentucky. Justice Harlan received his early education in Kentucky, the state of his birth, and in 1861 removed to Louisville. He had hardly become settled before the war broke out. He raised a regiment and became colonel, but after fifteen months' service in the Union Army the death of his father forced him to return home. He ran in 1871 and 1875 as Republican candidate for Governor of Kentucky, although he knew beforehand in each case that he could not be elected.

In the Republican convention of 1876 he was the leader of the Kentucky delegation, and it was by his efforts that Hayes was nominated for President. A few months after Hayes's inauguration he was appointed to the Supreme bench.

It was Justice Harlan's ambition to serve until next June, when he would have exceeded the service of any other man who ever sat on the Supreme bench. As it was his service was longer than that of any other Justice except Chief Justice Marshall and Associate Justice Stephen J. Field.

A GHASTLY MISTAKE

(From the *Westminster Review*)

ERRATUM.—On page 200, in the August issue of the *Westminster Review*, instead of 'Not in a single instance during a quarter of a century, has a barrister-judge been concerned in failures of justice,' read 'civilian-judge,' etc."

ADMINISTRATIVE DISCRETION
IN ENFORCING THE
SHERMAN ACT

LAWS are made by the legislature, declared by the judges, and administered by the executive. The spirit of our institutions demands that the popular will be given effect through the organs of legislation, and forbids the judiciary and executive from exercising law-making functions. So much, at least, is the theory of our government. But in practice, it is found that leaving the legislative function exclusively to the legislature would frequently result in defeating the popular will. Legislatures are in the habit of enacting laws in a vague or incomplete state, which cannot possibly be administered in the shape in which they issue from the legislature. Consequently judges and administrators must in some cases make the law.

The Sherman anti-trust act was a law of this kind, adopted in a vague and inchoate form. The original purpose leading to its adoption is in dispute. By some the law is thought to have been a device to enable the government to check only the more pernicious and flagrant forms of corporate activity tending to injure freedom of trade; by others it is supposed to have been an instrument for the maintenance of absolute freedom of competition in every branch of industry. The general terms of the statute, and its brevity, shroud its actual purport in obscurity. Congress had only half done its work; the statute must either be declared void for uncertainty, with the risk of defeating the will of the people, or it must, to be given effect, be interpretatively enlarged or completed, whether by the judges, by the executive, or by both.

It is incorrect to say that the execu-

tive never has any discretion in enforcing the laws. Before it can enforce any law it must first know what it means. If the meaning is obscure, the executive must seek light from the statutes or the courts; failing in this, it must either exercise its own judgment to determine the meaning of the law, or leave it alone and fail in the performance of its duty to enforce it.

From the adoption of the Sherman act until the close of Cleveland's second administration, there was what we may call an administrative interpretation of the law. The administration had no leanings to the unlimited competition school, and it construed the act as applying only to business abuses whose injurious character was undeniable. As a result suits were brought only against the clearest forms of unlawful monopoly prohibited by the act.

The effect of this administrative policy was significant. The United States Supreme Court, if it had been called upon to rule on the constitutionality of the act before the administration had singled out the grosser phases of monopoly for prosecution, would have had either to pronounce it void for uncertainty, or to legislate into it a clearer meaning. Either course would have subjected it to attack. The moderate policy of the Executive made it possible for the Supreme Court to avoid this dilemma, by simply giving the act a literal interpretation, and by recognizing it to apply to certain clear states of fact without inquiring into its application to more obscure and controversial matters. Under the circumstances the Court could pursue this non-committal, strict-constructionist line of action without subjecting itself to any charge of partisanship.

Then, with the inauguration of Mr. Roosevelt's monopoly-baiting policy,

there was a change. Litigation was begun against combinations falling into a different class from those previously prosecuted; the Government could succeed in these suits only on the theory that the act had a very broad application, and that was the theory of Roosevelt's administration. The Taft administration went still further than the preceding, launching suits against every conceivable form of monopoly. The result of this was that the burden of construing the act was placed squarely on the shoulders of the Supreme Court, where it will continue to rest until either the act is amended or the attitude of the administration changes.

The Supreme Court, having long applied the act to the cases arising under it, was not now at liberty to declare it void for uncertainty, nor in view of the altered situation was it free to construe it literally without subjecting itself to the charge of a partisan bias. It rose to the occasion by adhering steadily to its own precedents and recognizing the will of Congress as controlling, while at the same time it asserted the prerogative of judicial discretion in the shape of the famous "rule of reason" doctrine. This doctrine was that the statute was to be construed in the light of reason, always with regard to the state of the law at the time when it was adopted, and to the clearly expressed will of Congress in enacting it. So subtly were conservative and progressive elements combined in this doctrine that the Court was able to decide the *Standard Oil* and *Tobacco* cases with that close approach to unanimity which always affords the best possible evidence of the non-partisanship of a great Court.

Meanwhile the President and his Attorney-General, reading these judicial opinions with attention centred upon the strict-constructionist element alone,

and blind to the finer implications of the "rule of reason" doctrine, have found the Sherman anti-trust law, as judicially construed, in harmony with their own anti-monopoly prejudices, and are bending every effort to securing the maximum of convictions under an interpretation of the act which is really their own and not that of the Court. If they had penetrated more deeply into the inner meaning of the decisions, they would see that the process of judicial interpretation has but just begun, that they are assuming the illegality of states of fact not yet indisputably under the ban of the statute, that many of their prosecutions cannot succeed, and that they are subjecting the business of the country to needless anxiety and disturbance.

It is obviously a mistake for the administration to maintain that it is permitted no discretion in enforcing the law. Where the meaning of the law is in dispute, and the precise purport, even, of the "rule of reason" doctrine may be uncertain, the administration must act with great circumspection, lest it appear to adopt a purely partisan interpretation of the statute. Failure to exercise such circumspection can result only in burdening the courts with unnecessary lawsuits, and in usurping functions which lie outside the sphere of executive action.

The pending suits will eventually find their way to the Supreme Court, and it may be supposed that they will there furnish material for a much needed judicial formulation of the law of free and fair competition. If we were sure that Congress were satisfied to leave this work to the Supreme Court there might be something to rejoice over in such a prospect, even though, as President Taft has himself said, that would be placing too great a burden on the Court. But there are indications that the act may be amended long before

this can ever come to pass, and that the present war against industrial combinations can have no such useful result.

CROW vs. CROW .

THESE may be nothing in a name when it stands alone, but there is often much amusement in the association of several names. For instance, there was tried some years ago at Newark, N. J., a case that stood on the docket as *Crow v. Crow*.

A man by the name of Crow, a resident of Newark, left his wife and struck out for the wilds of Montana. After living there a few months, he applied to the territorial court for a divorce from Mrs. Crow on the ground of cruelty. The court would not listen to his appeal, but bade him go to New Jersey and there seek redress for his grievances.

When the trial came on in Newark, Mr. Crow preferred to act as his own counsel. The principal witnesses brought on by the plaintiff were named, respectively, Daw, Linnet and Thrush! The defendant's counsel was a lawyer by the name of Howell. But the stenographer, who took down the testimony, was an Englishman, who persisted in addressing him as Mr. 'Owl.

The case created no little merriment in the court at the time, and it was remarked that the only thing needed to complete this strange combination of names was to have had Vice-Chancellor Bird preside.

ALL ON ACCOUNT OF MILDRED

A SINGULAR reminiscence is given by George Gordon Battle, Esq., of 37 Wall street, New York, in an interview in the *New York Herald*:

"Some years ago, after I ceased to be

an Assistant District Attorney," said Mr. Battle, "I was frequently retained as counsel in criminal cases. One winter night, just as I was about to leave my office, I was called to the telephone. The man at the other end of the wire was a stranger to me, and, without revealing his identity, he asked me to defend a young man named Walcott, then in the Tombs on a charge of highway robbery. The speaker, whom I judged to be about sixty years old, agreed to send me a retaining fee of \$500, but insisted that I should not tell Walcott in what circumstances I had been retained for his defense.

"The next morning I received at the hands of a messenger boy an envelope containing \$500 in crisp \$100 bills. The envelope was addressed in typewriting and there was absolutely nothing to show from whom it had come. I went to the Tombs and had a talk with Walcott. He was a sullen chap, and when I told him that I had been retained by a man over the telephone, and that he had sent me the retaining fee, Walcott's face clouded.

" 'I know the man,' he said, after a pause. 'Rather than accept any help from him I would rot in prison or die in the electric chair.'

"I argued with him in vain. I said that as long as he was properly defended it made little difference to him who provided the money for his defense. The man swore bitterly and displayed a deep seated hatred for the man who had talked with me over the telephone, but whose name he refused to disclose. I finally gave up the task and asked him to at least give me the address of the man who had sent me the money and to tell me what I was to say when I returned the fee.

" 'Tell him,' answered Walcott, with an oath, 'that the reason why I decline

his aid is that I cannot forget Mildred. He will understand.'

"I left the prisoner and that afternoon the same voice came to me over the telephone and asked if I had seen Walcott. I told him of Walcott's obstinacy and the reason for his refusal to accept aid. There was a sob in the man's voice as he talked with me. I then asked him to whom I was to return the retainer fee, and he replied that I should donate it to some institution or association, having for its object the assistance of prisoners and improvement of prison conditions. I carried out his wish and donated the money anonymously to a prison reform association. I inquired about Walcott later and learned that he had pleaded guilty and had been sent to prison for a long term.

"I never saw Walcott after that time, nor have I ever heard from the man who tried to help him. There are many explanations which one might suggest, but they would be, at best, mere conjectures. Take it all in all, however, it was an odd experience, and the strangest case, perhaps, that I recall in my practice."

THE SQUIRE'S LECTURE

FIVE honest old farmers of Virginia were once convened as an examining court. The subject of their examination was a boy who had been arrested upon a grave charge, and the question was, should he be held for trial at the circuit court.

The honest old fellows knew little law, but they were kind-hearted and not without that mental quality known as "horse sense." They listened to the evidence; it was conclusive against the prisoner. But he was very young, and might reform if given another chance. Should he be sent up for trial he might go to prison and be ruined.

So the justices agreed that the eldest among them, an old "squire," should give the youth a severe lecture, and then discharge him. The squire, impressed with the serious duty, arose, ordered the prisoner to stand up, looked fiercely at him, and exclaimed:—

"Young man, it's awful—*awful*, I say! Clear out of my sight, you ornery scamp!"

And he did, amid the roars of laughter from the spectators.

LEGAL-RELIGIOUS CUSTOMS

WHEN one lawyer refers to another as "brother attorney" he employs an ancient phrase peculiar to religious and legal fraternities and suggests the close historical relation between the callings. In England for two and a half centuries after the Norman Conquest, all high legal offices were filled by churchmen. Laymen could not hope for advancement or for clients and indeed the only path to the acquirement of a professional education lay through holy orders. The fraternal form of address, common to the Church, passed naturally into legal phraseology. Brother so-and-so of the monastic order was "brother" also at the bar. So strong was popular prejudice against admitting the competency of mere laymen at law when this class began to practice about 1300, that lay barristers adopted a black velvet skull cap, or coif, to conceal their lack of tonsure, the distinguishing mark of the priestly clerk. Down to our day both the form of address and the peculiar head gear have remained, although we have ceased to associate the two professions whose early intimacy was the original reason for their existence.

A. P. C.

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, facetia, and anecdotes.

The Legal World

Monthly Analysis of Leading Events

The Sherman anti-trust law continues to occupy a prominent place in the public attention. There have been some wholesome indications of a moderate attitude toward monopoly, but this attitude cannot yet be said to be predominant. Governor Woodrow Wilson, speaking at Red Bank, N. J., Oct. 11, expressed his opposition to indiscriminate prosecutions under the trust act, and regretted that sound business should be forced to continue in a panicky state. Governor Simeon E. Baldwin, in an address at Bridgeport, Conn., Oct. 19, declared that the Government was collecting evidence of more supposed violations of the Sherman act than it could possibly prove. The great discretion entrusted to the President, to prosecute or not to prosecute corporations, placed upon him, he said, a great responsibility. On the other hand, the radical tendency is still in apparent control of the situation. President Taft, in his speeches in the West, has proclaimed the old-fashioned doctrine of free competition as a panacea for all ills, by saying that we have got along without monopoly in the past, and can therefore always get along without it, notwithstanding that this does not follow, in view of changed conditions in every great country of the world. Attorney-General Wickersham has claimed that the Supreme Court decisions in the *Standard Oil* and *Tobacco* cases ring the death knell of monopolies. The activity of the Government reached a climax Oct. 26, when a suit to dissolve the United States Steel Corporation was brought in the United

States Circuit Court at Trenton, N. J. Another development of the month was significant. The plan of the American Tobacco Company for reorganization was to be fought by the Attorney-Generals of Virginia and North and South Carolina, and also by a group of independent tobacco men. The dissatisfaction with the plan for reorganization seemed to be due to a conviction that a legal freedom of competition is not sufficient, that economic freedom of competition also must be created by law.

To turn from economic to governmental issues, there seem to be increasing symptoms of popular impatience with constitutional restraints. Emphatic protest against a delegated system of government has been offered by the people of California, who adopted constitutional amendments Oct. 12 providing for the initiative and referendum, judicial recall, and woman suffrage. Theodore Roosevelt, taking care that no one should accuse him of advocating the recall, vaguely asserted at Carnegie Hall, New York, Oct. 20, that judges should be controlled by the people, because certain courts "are steeped in some outworn political or social philosophy and totally misapprehend their relations to the people, and to the public needs."

Despite the agitation of the judicial recall, there are signs of a tendency toward improvement of the administration of the courts. Justice Morschauer told lawyers in the New York Supreme Court at White Plains, Oct. 4, that if they were not ready to go to trial with their cases at once he would

adjourn court for the term. Judge Humphrey of the Queens County Court, in New York City, served notice on the same date that lawyers must proceed with their cases or the cases would be dismissed. Judge Grimm, in St. Louis, fined an attorney for blocking a damage suit by filing a trivial motion and leaving it unargued for months. The commission on the inferior courts of Boston, which gave a hearing Oct. 14, has a centralized system of city courts under consideration. The Boston District Attorney pursued a prompt and vigorous course by immediately bringing the case of Richeson, charged with murder, before the grand jury on Oct. 26. Unfortunately the delays in impaneling a jury in the tedious McNamara trial in Los Angeles still show the urgent need of reforming our criminal procedure. But the outlook for an improved administration of justice cannot be said to be depressing. Reports show the newly established Court of Domestic Relations in Chicago to be doing highly effective work in bringing together hundreds of severed couples. The New York Federal Judges Salaries Committee is working to get the much needed increase of salaries before the favorable attention of Congress. The constitutional amendment adopted in California, preventing reversals in criminal cases on purely technical grounds, is a progressive step. The Law Reform Committee of the New York City Bar Association reports that of twenty-four of its recommendations designed to reform the procedure in New York, nineteen became laws, and five were substantially or partly adopted. Disbarments of attorneys for professional misconduct in their relations with their clients continue, several having been disbarred by the Appellate Division in

New York City in October, on charges brought by the Bar Association against fifteen attorneys.

The United States Supreme Court

The Supreme Court of the United States convened Oct. 9 at noon after a four months recess. It will remain in session until the last of next May, and will consider as many of the eight hundred cases now piled up on the docket as time will permit. An estimate has it that the court will dispose of about four hundred cases during the term, but that about two hundred additional cases will be docketed before next June.

A long list of important cases, second only to the great *Standard Oil* and *Tobacco* cases, were to take up the attention of the Court at an early date. Three cases involve alleged violation of the Sherman anti-trust laws. These are the suits against the principal anthracite coal-carrying railroads and coal-owning companies, against the railroads operating the bridges over the Mississippi at St. Louis, and against James A. Patten and others, charged with cornering the cotton market. Other cases are those involving railway rates in Kentucky, West Virginia, Minnesota and Oregon, which have been set for argument Jan. 8, the so-called "elevator cases" testing the power of the Inter-state Commerce Commission, and cases involving the rights of Indians to alienate their land and the entry of the so-called "Stracy coal land claims" in Alaska.

The Court has promulgated new rules for its procedure, designed to avoid future clogging of the docket. Under the new rule one hour and a half instead of two hours is allowed for the argument of cases, and in cases certified

from the Circuit Court of Appeals involving only the jurisdiction of the court below and cases arising under the Criminal Appeals act only forty-five minutes are allowed.

The time for arguing motions is cut down from one hour to forty-five minutes, and special provision is made for the prompt disposition of cases appealed apparently for the purpose of delay or depending on questions so frivolous as not to need further argument. To this end the Court will receive a motion to affirm on either of these grounds.

The American Prison Congress

Interesting addresses were made before the American Prison Association at its meeting in Omaha, Oct. 17. Attorney-General Wickersham favored extension of the federal parole law to include life prisoners. He regarded it as an incongruity that prisoners sentenced to long terms for vicious crimes should be eligible for parole when the man convicted of second degree murder must remain in prison for life.

Since the parole law was placed in operation last autumn, the Attorney-General said, only one prisoner had violated his parole. The two hundred prisoners who were paroled from the time the law was put into effect in the autumn of 1910 to June 30 earned nearly \$22,000, whereas, if they had remained in prison, the Attorney-General pointed out they would have been a charge on the Government. Mr. Wickersham expressed the belief that the parole boards should be enlarged by adding two unofficial persons selected from among prominent citizens of the locality in which the prison is situated.

Quoting President Taft as saying that "The

this country is a disgrace to civilization," Judge C. A. De Courcy, Justice of the Supreme Court of Massachusetts, pointed out that the United States was conspicuous for the great number of unpunished murderers. The defense of insanity, the limitation of the power of judges and the character of testimony allowed to be introduced in behalf of the defendant were some of the evils which, he said, ought to be rectified. "The number of homicides in this country for 1910 was 8,975 — an increase of nearly 900 over the number in 1909; yet but one in eighty-six was capitally punished in 1910 as against one in seventy-four during the year preceding," said Judge De Courcy. "It is said that in 1896 for each million of the population there were 118 homicides in the United States; in Italy less than fifteen; in Canada less than thirteen; in Great Britain less than nine; in Germany less than five.

"In New York City, 119 cases of homicide were investigated by the grand jury during the last year, but only forty-five convictions resulted. Chicago reports 202 homicides were committed in that city during the last year. Only one of the offenders was hanged; fifteen were sent to the penitentiary and the others were set free. In Louisville, with a population of 224,000, during the last year, there were forty-seven cases of homicide and not a single murderer was hanged. In Alabama a conviction for stealing hides was recently set aside because the indictment failed to state whether they were mule, cow, goat or sheep hides. And indictments were dismissed because 'father' was spelled 'farther' (in South Carolina); because the letter 'i' was omitted in spelling 'malice' (in Alabama)." Judge De Courcy then suggested some criminal law reforms which included simplified

forms of indictments, changes in the selection of juries and in the rules governing pleadings.

Other speakers were Dr. Daniel Phelan, surgeon of the Dominion Penitentiary at Kingston, Ont., L. A. Halbert, general superintendent of the Board of Public Welfare of Kansas City and James A. Kayll, advisory visitor of the New Zealand prisons.

Personal

Members of the Suffolk Bar met in the court room of the Massachusetts Supreme Judicial Court Oct. 21 for the presentation of resolutions eulogizing the late Justice John Lathrop of the Supreme Court. Moorfield Storey was chosen chairman of the meeting and John C. Gray, as chairman of the committee on resolutions, read the report of his committee. Winslow Warren and Augustus Loring were called upon to speak of their personal acquaintance with the late Justice, and Attorney-General Swift presented the resolutions to the full bench.

With the record of twenty-five years of service well done in the administration of the federal law, Judge Henry F. Severens of Kalamazoo, Mich., closed his career as Judge of the United States Court of Appeals at Cincinnati Oct. 3. Judge John W. Warrington, his successor, paid eloquent tribute to the career and service of Judge Severens. Following the session of the court Judge Severens received expressions of personal good will from many of the attorneys and other friends.

Judge Peter S. Grosscup of the United States Circuit Court, seventh circuit,

resigned from the bench Oct. 21, his resignation to take effect immediately. Judge Grosscup had first announced that he would resign in September, but following published statements alleging misconduct in office on his part and rumored reasons for the resignation at that time, he declared he would not resign until he had given his enemies a chance to face him squarely in order that he might prove the charges false. Then came the report that he would resign some time during the first week of October, but his duties in connection with the settlement of the Chicago & Milwaukee Electric case detained him. On leaving the bench Judge Grosscup announced he had no further plans for the future than to take up the private practice of law.

A very remarkable and impressive incident occurred in Omaha early in October, in connection with a meeting of the Douglas county bar called for the purpose of adopting resolutions on the death of Richard S. Hall and two other deceased members of the bar. The meeting was addressed by the venerable Judge E. Wakeley of Omaha, who fifty years before had made a similar address in memory of Mr. Hall's father, Augustus Hall, the distinguished pioneer jurist. "When fifty years ago I took in that gathering of friends of Augustus Hall, territorial judge of Nebraska, and said a few appropriate words out of my heartfelt admiration for his good life and good deeds, what could have been more improbable than that I, a half century later, should be here to pay a like tribute to his son, Richard S. Hall?" asked Judge Wakeley, in a voice trembling with emotion as he addressed district and federal judges and members of the bar.

Bar Associations

Boston. — At the annual meeting of the Bar Association of Boston, held Oct. 7, Moorfield Storey was re-elected president, other officers being Samuel J. Elder, vice-president; William S. Hall, treasurer; Robert S. Gorham, secretary. These members were elected to the council for three years; Everett W. Burdett, Franklin T. Hammond, James F. Jackson, John Lowell, B. W. Warren, Henry A. Wyman and Henry James, Jr.

Brooklyn. — The Kings County Lawyers' Association was organized at a meeting held in Brooklyn, N. Y., Oct. 14, and papers of incorporation were filed with the Secretary of State two days later, with a membership of more than one hundred lawyers. The first annual meeting will be held next June, and until that time the officers will be: president, Edward T. Curran; vice-president, Max E. Lehman; corresponding secretary, Samuel W. Pease; recording secretary, Thomas Hickey; treasurer, Felix J. Bannert.

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

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.

New Jersey. — The New Jersey State Bar Association has again taken the initiative, in an effort to provide some method by which the administration of justice in New Jersey may be expedited. A committee which is investigating this subject consists of former Justice Van

Syckel, former Governor Fort, Supreme Court Justices Swayze and Bergen, Vice-Chancellors Walker and Howell, Judges Skinner and Gaskill, Senator Silzer, former Justice Gilbert Collins, William N. Clevenger and Frank H. Sommer. At a meeting held Oct. 16, it was voted to leave matters to a sub-committee of Charles H. Hartshorne and Judges Clevenger and Skinner.

Miscellaneous

In spite of the prophecy expressed in the judicial statistics of 1909 and the assertion that crime was on the increase in England, the annual return of the Prison Commissioner for the year ending March 31, 1911, which the British Government has issued, shows a satisfactory state of affairs. There is decline in the actual number of convictions and in the proportion of prisoners under sentence to the whole population. The recorded actual number of those "doing time" is 167,695, a decline of 12,000 since the previous year, and of 30,000 since 1904-6.

Government control of monopolies and a commission somewhat similar to the Interstate Commerce Commission, to regulate all trusts, was advocated by Charles A. Prouty, Interstate Commerce Commissioner, before the Brooklyn Congregational Club, Oct. 24. Mr Prouty said: "I believe the only practical relief from trust oppression is to be found in more direct and drastic Government regulation. First a commission should be appointed, in most respects similar to the Interstate Commerce Commission. It should devote considerable time to investigation before taking action."

The long-expected Government suit for the dissolution of the United States Steel Corporation was filed in the Cir-

cuit Court at Trenton, N. J., Oct. 26, by Assistant Attorney-General John B. Vreeland of the New Jersey district, acting under the immediate direction of Attorney-General Wickersham. Ex-Secretary of War Jacob McGavock Dickinson is associated with the Attorney-General as special counsel to the Government. The defendants named in the Government's bill include thirty-seven corporations, five individuals sued as trustees and eighteen in their capacity as officers and directors of the Steel Corporation or its subsidiaries.

According to a dispatch from Madrid, Prof. Walter Lichtenstein, librarian of Northwestern University at Evanston, Ill., purchased in Spain for Harvard University, on Oct. 27, the extensive library of the Marquis d'Olivart. This library has long been regarded the most complete collection of works relating to international law and diplomacy. It is also rich in material upon the subject of jurisprudence. The gathering of this collection has been the work of a lifetime. The printed catalogue shows more than 6,000 titles and the number of volumes is much larger. Many of the books are of very early date and no longer obtainable. The collection of early books upon the theory of natural law is very extensive, but the material upon the Spanish-American war of 1898 and the recent Moroccan controversy is no less complete.

After a two days executive session, the federal Employers' Liability and Workmen's Compensation Committee reached an agreement at Washington, D. C., on Oct. 24, on the basis of legislation to be recommended to Congress, and adjourned until Monday, Nov. 6, when the commission will meet in Washington for the purpose of hearing sug-

gestions. Senator Sutherland, chairman of the commission, supplied an outline of the proposed plan, as follows:—"The compensation is to be paid by the employer directly, and not out of a general fund created by any form of taxation. The law shall be in form compulsory, and not subject to election by either employer or employee. The remedy shall be exclusive of any common law or other statutory remedy. The law will apply to all accidents resulting to the employee while in the course of his employment, except those where the disability continues for a period of two weeks or less, the employer, however, to furnish medical and surgical assistance to an amount not exceeding \$200."

At the fifth annual meeting of the American Association of Title Men, held in Little Rock, Ark., in October, John T. Kenney of Madison, Wis., read a paper on "The Passing of the Torrens Fallacy," in which he discussed at length the land title problems of Great Britain and her colonies. Referring to the United States, he said: "In respect to conditions in the United States generally, I shall not attempt to particularize, but I call your attention to the fact that since our last meeting at Detroit, two states, New York and Oregon, have enacted amendments to their laws permitting the withdrawal of registered lands from the operations of such statutes at the will of the owner as demanded in our resolutions of last year and not a single state has adopted the law during the past winter, although some forty-three legislatures were in session. In many of the most progressive states, among them Wisconsin, I am glad to say, notwithstanding the most strenuous efforts of its advocates, it was again defeated. In Chicago, the most aggressive and energetic administrative head

of any Torrens office in the country, Mr. Abel Davis, has announced his resignation as registrar and acceptance of the presidency of an abstract and title insurance company. In New York, Mr. Gilbert Ray Hawes, the promoter of the Torrens Title Insurance Company, interested in securing titles to register, is at loggerheads with a committee of the New York Bar Association appointed at his own suggestion to try to make the New York law workable and practicable. In Minnesota, it is admitted that notwithstanding the oppressive rulings and statutes secured by interested politicians seeking political patronage, against private abstracters and in favor of the registry of title offices, it is admitted that the registration of title offices are not paying expenses, although no detailed or satisfactory reports in this respect have ever been given out. The great impetus which it was thought the McEnergy Emergency Act would give to Torrens registrations in California does not seem to have materialized and the deed registries and courts in other states seem not to be in the slightest danger of elimination by the advance of the Torrens registrar.

Obituary

Adams, Judge George B. — At Lake George, Oct. 19, aged 66. Appointed Judge of United States District Court at New York City in 1901; a leading authority in admiralty law.

Bright, General John M. — At Fayetteville, Tenn., Oct. 2, aged 94. Inspector-General of Tennessee during Civil War; Member of Congress from Tennessee, 1870-80.

Eells, Alexander G. — At San Francisco, Oct. 12, aged 49. Chairman of Section on Uniform State Laws of California

Bar Association; acknowledged authority on mechanics' liens law.

Fenner, Judge Charles E. — At New Orleans, Oct. 24, aged 77. Served in Civil War with gallantry; Associate Justice of Supreme Court of Louisiana, 1880-1894; member of the Board of Administrators of Tulane University.

Manderson, General Charles. — On the *Cedric*, Sept. 28, aged 74. United States Senator from Nebraska, 1883-95; formerly general counsel of Burlington lines.

Mather, Robert. — At New York, Oct. 24, aged 48. Had been general counsel and later president of Chicago, Rock Island & Pacific Railway, chairman of the board of directors of the Westinghouse Electric and Manufacturing Company, and general counsel of the Chicago & Alton.

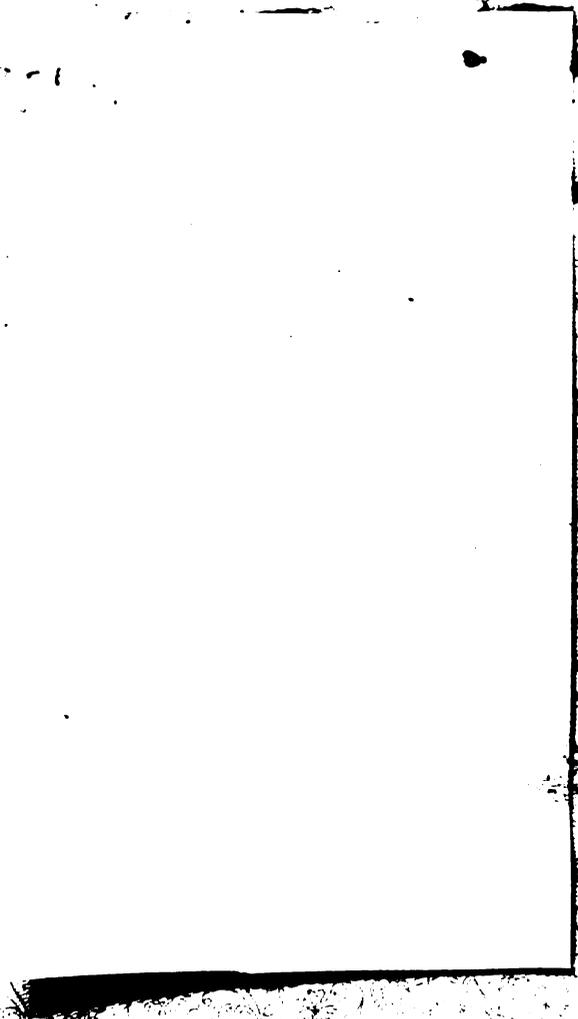
Quarles, Judge Joseph V. — At Milwaukee, Oct. 7, aged 68. District attorney, mayor of Kenosha, and state legislator; later United States Senator from Wisconsin, 1899-1905; afterward United States Circuit Judge.

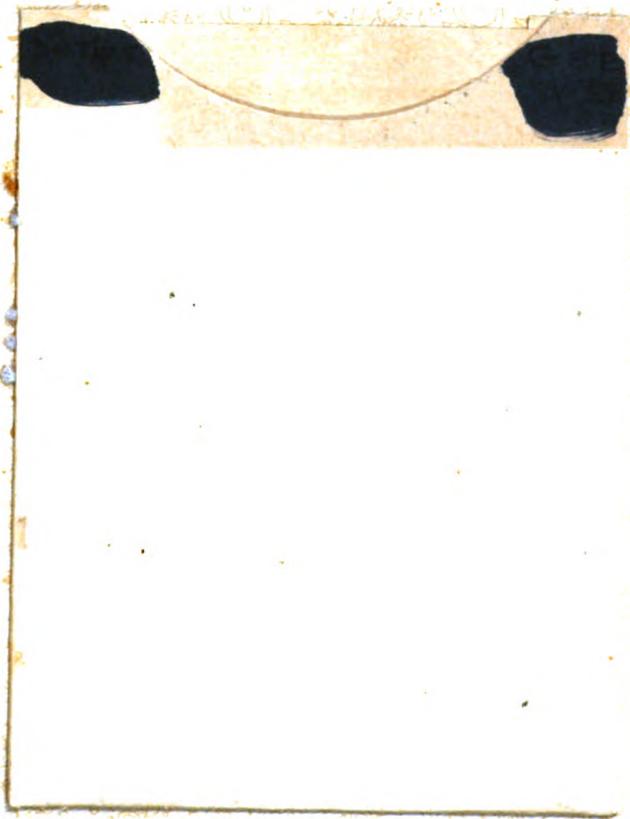
Sanderson, John F. — At Pittsburgh, Oct. 16, aged 58. One of the most prominent lawyers of Pennsylvania and formerly deputy Attorney-General; author of legal text-books.

Sheldon, Judge Joseph. — At New Haven, Conn., Oct. 25. Delegate from New York in 1894 to Red Cross convention at Geneva.

Wright, Justice Maurice L. — At Clifton Springs, N. Y., Oct. 13, aged 66. For twelve years county judge; for fourteen years Justice of the Supreme Court of New York, until 1905.

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