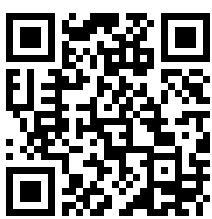

THE GREEN BAG

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HON. HORACE H. LURTON, OF NASHVILLE, TENN.

NOW ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES, SUCCEEDING JUSTICE PECKHAM

FORMERLY JUDGE OF THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

(From a photograph by Brown Bros., New York)

The Green Bag

Volume XXII January, 1910 Number 1

Mr. Justice Lurton

MR. JUSTICE LURTON, whose presence now adds to the dignity of the United States Supreme Court, is the fourth Confederate soldier to be raised to the bench of our highest tribunal, the other three having been Justices Howell E. Jackson, Edward D. White, and L. Q. C. Lamar. It would never be suspected from his springy step and infectious laugh that he is the oldest man who ever took a seat there. While he has white hair and moustache, he shows no other signs of age. In purity of character, in legal ability, in social charm, he has qualifications for the office which could not possibly be surpassed in a younger man.

Objections have of course been made to Mr. Justice Lurton's age by those who call attention to the fact that Justice Story was made a Supreme Court Justice at the age of thirty-two, and the majority of those appointed to the Court have been between forty and fifty years old. But unlike some former appointees, he is fitted to enter at once upon his new duties. He is also in possession of full vigor, and it has been well observed that if he lives to perform active duty for twenty years more he will not be so old as Chief Justice Taney was when he died. Any departure from those traditions which have made our highest tribunal the more impressive because its wisdom is suffused with the glow of life's sunset, would be most regrettable. The following verses were not inaptly quoted by the *New York Commercial*:—

Cato learned Greek at eighty; Sophocles
Wrote his grand Œdipus; and Simonides
Bore off the prize of verse from his compeers
When each had numbered more than four-
score years; . . .
Goethe at Weimar, toiling to the last,
Completed "Faust" when eighty years were
past.
These are indeed exceptions; but they show
How far the gulf-stream of our youth may
flow
Into the Arctic regions of our lives
Where little else than life itself survives.

Judge Lurton possesses a quick perceptive faculty and keen reasoning powers, which render his opinions close, broad, exact, and logical. His decisions are marked by sagacity, diligent research and learning. President Taft's statement that he is entirely satisfied of his impartiality in dealing with every subject connected with capital, labor, and the "trusts," may be accepted as conclusive.

Chief Justice W. D. Beard of the Supreme Court of Tennessee, at the farewell banquet in Nashville, December 23, remarked that Judge Lurton's "appointment was a recognition of his ability as a jurist. He will be the peer of the most learned man, the most profound jurist, upon the greatest tribunal in the world."

Reform of the Appeal System in Lower Courts

By Henry T. Lummus

WHERE the higher courts do not sit continuously, the community has always felt a need of magistrates before whom persons charged with crime may receive a preliminary examination, and by whom bail may be fixed for the appearance of defendants in some court of competent jurisdiction. In most states justices of the peace have long been entrusted with these judicial or quasi-judicial functions.

The next step was to give these justices of the peace jurisdiction over the smaller criminal and civil cases, in the hope that such cases might be disposed of without taking up the time of a real court. In the rural districts, at least, it was difficult, if not impossible, to find any sufficient number of persons possessed of the necessary learning and discretion, who would trouble themselves with hearing small cases for the petty fees allowed. The justices of the peace in general were not fit for the exercise of judicial functions, and therefore a complete right of appeal was given which wiped out the finding and the sentence or judgment as well.

This plan worked satisfactorily in the days of our grandfathers, before our cities became filled up by an influx of people from the four quarters of the world. The number of criminal cases arising in a homogeneous rural population is usually small, and the higher courts in the early days had ample time to attend to them all on appeal. In civil cases the time of magistrates, lawyers, parties, and witnesses was not very valuable; and even if the trial before the justice of the peace was wasted, a trial before the court and jury speedily settled the matter. At any rate, a final trial before any judge without a jury in a common law action was unknown, in Massachusetts at least, until 1857, and the system of appeals from justices of the peace was considered a necessity.

Municipal or police courts have long been established in practically all cities, and in many suburban or rural districts. When they were first established in the place of justices of the peace, the legislators were unprepared to make any great step forward, and therefore made the findings, sentences, and judgments of these courts subject to the same complete right of appeal. As our cities became congested with people of every race, speaking every tongue, there came, as a natural result, a great increase in every crime, from violation of city ordinances to murder. The municipal courts came to deal with many thousands of cases every year. So far as the question of sentence is concerned (and that is the only question in the great majority of the smaller criminal cases) a competent local court, with experience in the community, ought to be and is a better judge than any higher court can be. Yet a sentence is obliterated by an appeal, even where the defendant has entered a plea of guilty. The decisions of a lower court in favor of defendants in criminal cases are final; its decisions against defendants are always subject to appeal. Unless the lower court errs constantly and outrageously in favor of criminals, a large number of cases will go up on appeal,

choking the higher court, and causing the prosecuting attorneys to take almost any measures to get rid of them. Many of the cases are continued, or disposed of by the entry of a *nolle prosequi* or the imposition of the minimum penalty. The success of one lot of appeals results in still more appeals at the next term, and causes an increasing congestion of the higher court, until at last the prosecuting attorneys do not pretend to deal seriously with appeal cases. The authority of the lower courts becomes the subject of scorn, and their influence for order in the community is ruined. The spectacle of a solemn trial, ending in a conviction and sentence, turned into a mockery not because of any error in the proceedings, but merely because a party arbitrarily chooses not to abide by the result, is what brings the lower courts and their authority into contempt, and breeds a contempt for law in general.

In civil cases the appeal system works similar evil. Both parties may be, and often are, as willing to submit their case to the lower court as to any other tribunal. If they were compelled to elect beforehand between a trial before the lower court and a trial before some higher court, they would often select the lower court. But the present law in Massachusetts and in other states permits the losing party, after judgment, to appeal the whole case, both law and fact, wiping out the judgment of the lower court. Naturally he avails himself of this right, in all cases where there is any real controversy, and in many cases where there is not. The higher court on the civil side is choked with appeals, and the time spent by every one in the lower court is wasted. The burden of the appeal system is felt especially by the poor, who need speedy and inexpensive justice, but find that a victory in the lower court means nothing but additional and often prohibitive expense in trying the whole case again on appeal.

The most obvious remedy for the defects in the appeal system would be to provide for jury trials in the lower courts, and to abolish appeals. But jury trials are always slow trials, and the result would probably be that the lower courts would become congested, in civil cases at least, as badly as the higher courts. In criminal cases the prospect of a speedy and conclusive trial by jury in the lower court, without the possibility of appeal, might lead to pleas of guilty in many cases that are now dragged out on appeal. In large cities, where many sessions of the lower court are held at one time, a provision for juries might hasten the disposition of business; in smaller courts juries would probably be impracticable. In any case, juries in lower courts would involve a great increase in expense, and, in Massachusetts at least, the time is not ripe for them.

It seems clear, however, that relief in civil cases could be had by abolishing appeals and requiring a party not willing to abide by the result of a trial without jury in the lower court to remove the case to a higher court before trial, giving a bond for costs as a guaranty of good faith. Plaintiffs, desiring speedy and final trials, would welcome the change. Some defendants, seeking delay at any price, might remove their cases. A very few parties might think a jury trial presented some advantages worth the trouble of removal; though in most cases brought in lower courts a jury trial is of no great value to either party. But the great majority of parties if they had to act before trial in order to get the case before a higher court, would be satisfied to let the case remain in the lower court for final disposition.

A right to carry law questions to a higher court could be preserved without any great inconvenience; the existing appeal system, which arbitrarily wipes out the entire result below, is what ought to be abolished.

In criminal cases two methods are suggested. There are three stages at which a case may conceivably be removed to a higher court having a jury, in order to preserve the constitutional right to a jury trial; (1) before trial, (2) after finding of guilty, (3) after sentence. The existing appeal system permits the removal to be claimed at the third stage. It would seem much better to follow the analogy of the plan just suggested for civil cases, and to require the removal to be claimed at the first stage, or else to require it at the second stage. If a defendant does not remove the case at the required time, the sentence of the lower court ought to be final unless error of law is shown. It seems clear, at least, that a defendant who is satisfied with a finding of guilty ought not to be allowed to wipe out the sentence of the court having the best knowledge of the needs of the community, if he thinks he has a chance to get a more favorable result, and to appeal, merely on the question of sentence, to the district attorney and to a court having less knowledge of local conditions. In the great majority of appeal cases there is no question as to the guilt, and the defendant ought not to be allowed to put off the day of reckoning while he appeals to several courts in succession upon a question of discretion, in the hope of finding some court or prosecuting officer to his liking. The mere fact that the higher court is presumed to be superior in quality as well as in position is no argument for taking all finality out of the rulings of lower courts; otherwise the business of no court ought to find a resting place short of the United States Supreme Court.

A sound public policy seems to require that the action of lower courts should be made effective within their jurisdiction, however narrow that jurisdiction may be. The legislative tendency in recent years to extend their nominal jurisdiction, preserving, however, the power of parties arbitrarily to annul all their judicial acts by appeal, encourages disrespect for legal proceedings and for the law itself.[1]

The Bar and the Young Man

By Shearon Bonner, Member of the Faculty of the Dallas (Texas) Law School, and of the Texas Bar

A GREAT deal has been written for the benefit of the young lawyer; but very little, I think, for the benefit of the young man who is aspiring to the bar. Therefore, I shall devote the larger part of this article to what the young man who expects to apply for admission to the bar ought to do towards preparing himself for that ordeal. The second part I shall devote to the attitude I think the bar ought to take toward the young man who is seeking entrance.

[1] The views of the writer are more fully stated in a pamphlet entitled, "The Failure of the Appeal System," published by the Massachusetts Prison Association, Pemberton Square, Boston.

I. THE YOUNG MAN AND THE BAR

In the first place, every young man who can, should, before taking up the study of law, have at least one year in college. I do not believe that this is essential to the making of a good lawyer; but, other things being equal, it will assuredly enable the one who takes it to pass in the race others who have not had such an advantage. In the next place, when he takes up the study of law, he should do so in a law school, and in a law school of reputable standing. The law school comes ahead of all methods I know of. But this article is written as much for the young man who cannot go to law school as for him who can. So I say again that the law school is not essential. It is in the college that men give their entire time and study to making lawyers of you, men who are thoroughly trained and deeply interested in their work. But you will find just as good teachers in law offices as you will find in law schools: the fact which offsets this status is that it is very difficult to find a practising lawyer who will give his time to you.

But if you cannot go to a law school, take up your study in a lawyer's office, if possible in the office of one who will help you by explaining difficulties that you meet in your reading, and quizzing you regularly on the matter you have read. You should not make the mistake of believing that you can learn more by looking after small matters for the lawyer than by reading your text-books. The former will prepare you for practice in a certain line of work; but what you want is to prepare for entrance to the bar, and such preparation is very different from preparing for any one phase of actual practice. Some of our most successful practitioners would make a failure of a trial at one of the bar examinations of their state. I remember that when I took my examination there was a man taking it with me who had practised law in another state, so he told me, for seventeen years. But that man had to take three examinations before he succeeded in passing one of them. There seems to be a difference between a successful practitioner and a good lawyer. The consummation devoutly to be wished is that you may become both a good lawyer and a successful practitioner. It is very true that "the best way to learn to practise law is to practise law"; but if you know enough law to pass the right kind of bar examination, the practice will come easily enough. Some matters of practice you ought to know, of course, and some day the bar is going to require that you know them before it will allow you the privilege of displaying to the admiring public your framed license, or an unframed one, for that matter. But that must come in addition to the text-book reading, and not as a substitute for it.

As a preliminary warning, let me advise you not to put very much faith in correspondence schools. I am inclined to believe that these schools depend for their success on a new crop of young men each year, rather than on any reputation they have made for efficiency and straightforwardness. I believe that the law can be successfully taught by correspondence; but whether or not it is now being done by any person or school is a different question.

Taking it for granted that you have found it impractical to attend a law school, I assume you will be interested in a few of the steps you should take in

order to make your preparation effective. I trust, however, that these suggestions will be helpful to those who are in the law schools as well.

Before you do anything else, find out what are the requirements of your state for admission to the bar. In this state, and I presume in all others, the Supreme Court has prescribed a list of subjects with which the applicant must make himself more or less familiar. Or, this matter may have been in your state controlled by the legislature. At any rate, you should find out what these requirements are, and then confine your preparations to these matters. Importance is usually laid on the subject rather than on the text; so you should choose your work in the light of that preference. But some text-writers are, for your purpose, better than others. Any practitioner of a few years will give you the information you want on this point.

Then go to work on your text-books. But at the outset, in order to avoid the confusion very apt to descend on the student, fix well in your mind the difference between the common law and the law in your own state, or in any other state. The common law may be the law in your state; it is so because it was adopted by your legislature; but your state has a great deal of law that is not common law. As a matter of legal history, I believe the common law has been adopted now in every one of the United States except Louisiana, which state is governed largely by the civil law, or an adaptation of the old Roman law. Sometime ago in discussing a matter of common law, one of my pupils took issue with me; and, to the delectation of all the class, he thought, he told us of a case that arose in New Orleans which was decided contrary to the rule of common law which had just been stated. I told him of course that the common law was not in force in Louisiana; and he did not afterwards make this mistake again. But it is the common law that most of the text-books treat of, and on which you must lay your foundation for the practice. You must supplement your knowledge of the common law with a study of the statute law of your state.

A great deal depends on how you read your text-books; that is, on how you study them. You cannot read a law book once through and be prepared to take an examination on it. Get a book that you can mark freely, preferably your own book. Read it through once; then read it through again, and mark the sentences and passages that state definite rules of law. If, according to the text, the authorities are agreed, or if the weight of authorities is on a given principle, mark it as an established rule. If the authorities are not agreed, do not confuse your mind with what each court holds, but mark it merely as a disputed matter. After you have marked your book in that way, read it a third time, this time reading only the passages you have marked. And if you want to be very well informed on the subject, you can impress on your mind the information thus acquired very effectively if you will outline the subject, just as though you were going to write a book and wanted a skeleton for your work. For instance, the subject of evidence may be divided as follows:—

I. GENERAL PRINCIPLES.

1. Meaning of Evidence.
2. The Different Kinds of Evidence.

II. THE SOURCES OF EVIDENCE.

1. Witnesses.
   a. By Oral Testimony.
   b. By Depositions.
2. Written Instruments.
   a. Public Documents.
   b. Private Writings.
3. Real Evidence.

III. RULES AS TO THE ADMISSIBILITY OF EVIDENCE.

1. The Relevancy Rule.
2. The Best Evidence Rule.
3. The Hearsay Rule.
4. The Parol Evidence Rule.
5. Exclusions Based on Public Policy.
6. Admissions and Confessions.

Each of these divisions must be divided into its respective subdivisions, and so on. This means hard work, but it will pay you many fold before the end.

If you have the time for it, you should spend a few days in the court rooms, watching and listening to cases actually being tried; you should familiarize yourself with the history of a lawsuit from its beginning to its final decision by the highest authority; and you should acquire a knowledge of the ethics of the profession and of the system of charging fees.

If you mean to become a good lawyer, and not merely an attorney-at-law, and will follow the methods suggested herein, or some method of your own (provided it is intelligently thought out), you will find your period of preparation one of the most pleasant and valuable periods of your legal career.

II. THE BAR AND THE YOUNG MAN

Just a few words now about the attitude of the bar towards the young man. As a fundamental principle, I think the bar ought to be extremely careful about admitting new members. It is a perfectly legitimate position for the practising members of the bar to desire to keep its ranks as limited in numbers as possible, because every new recruit necessitates a new distribution of the business and a consequent lessening of the share of each member; that is, unless, as a young lawyer once remarked to me: "the more the lawyers the more the litigation." But the lawyers do not make the litigation; at least they do not theoretically, and they should not, practically. Lawyers should keep down litigation, just as physicians should not cause sickness, but should prevent it. But there is a more worthy and liberal reason why the bar should guard well its portals. The public is necessarily benefited or injured by the quality of its lawyers.

> Look you at home, or turn your eyes afar,
> A town is always what its lawyers are.

A high patriotism, therefore, should move those who hold the responsibility for the quality of the new members. No young man should be allowed to take the welfare of other men and women into his hands until he shows himself actually qualified, both mentally and morally, for that high task.

But the bar should look well that the requirements go directly to the issue, and are not arbitrary obstacles thrown in the way of the earnest young man, while allowing the more fortunate of circumstance (of parentage it may be) to overcome them easily, regardless of actual qualifications. To begin with, it is my opinion that the age of the applicant is wholly immaterial. Some men are wiser at twenty than others at forty. Besides, time will cure this defect, while a defect of mentality nearly always remains uncured throughout life. If the young man can stand the test, why have any concern for his years? The fact that he can stand it at an early age is good evidence that he is of exceptional ability and will make the bar a valuable member.

In the second place, I think the num-

[1]Original with the writer of this article.

ber of years the applicant has attended law school or the length of time he has spent in preparation should be far from the examiners' thought. What time a young man has spent in preparation pales before the real question, how well prepared is he? If seventeen years of actual practice did not qualify one man for an examination that the youth fresh from college is expected to pass creditably, then how much weight can we place upon the number of years as a test of ability? Some young men who are in earnest can prepare themselves for the bar in half the time it takes others who are going "to become lawyers" just because their fathers were lawyers, or because the profession seems to offer fine opportunities for displays before the public. Patrick Henry, so history tells us, studied law only six weeks before he entered the profession. Why cannot others, not quite so gifted as he, but of unusual quickness of mind and singleness of purpose, become qualified by a very short period of specialized study?

The question of real importance, it seems to me, is, can the applicant stand the test provided by those who have the bar examinations in charge? And the single test that can afford the bar the protection it should have is a test that only the fittest can survive. The young man should not be allowed to salve his fears with the comforting thought that because he is fortunate enough to be "sent" to a law school for three or four years he will pass into the legal field with all the glory of a conqueror. In broader justice to a greater number, he should be allowed to feel that though he is not able to attend law school or to wait three or four years, he can, by hard and systematic work, by real manhood and earnestness of purpose, qualify himself without the term in college, and it may be, by an unusual effort, do it in two, or even in one year's time. Four years of preparation, whether in or out of college, cannot make a young man a lawyer; ten, yea in some cases, twenty, years has failed to do that. But the one thing that, while it will not make a lawyer out of the young man, will discover whether he is a lawyer in time to protect the profession, is the proper kind of bar examination.

I have not the space at my disposal to discuss at length the various tests I think ought to be put to the applicants. I can, in concluding, only enumerate some of them. The saddest lack of most beginners at the bar is their sublime ignorance of how to commence and conduct a law suit. They may know the substantive law, they may be well informed in the law of evidence, and they may know something about pleading; but not very many of them can tell you the first steps towards instituting a law suit. This knowledge should be required of them before they are allowed to enter the profession. The applicant should exhibit a degree of conversance with legal ethics. He should know something of the principles upon which to base the charging of fees. He should be able to answer "yes" or "no" to a legal question, or to say whether or not the question can be answered by yes or no. He should be required to show that he can, from a given statement of facts, find cases to support, or defeat, or both to support and to defeat it. For this purpose an examination in a law library is highly desirable. Too many lawsuits have been lost by lawyers who have read case after case to the Court that were about as applicable to the facts involved as a rule of common law, which has been substituted by a different constitutional provision, would be to a matter of present day conduct.

It is a thing not to be condemned that the examiners very often have a kindly feeling towards the young applicant, and so give him the benefit of any doubt. But the fate of more than one person is involved in a case of that kind. The examiner should consider also the profession itself; and should not forget, as well, that the public has entrusted him with a great trust, which he should perform with an eye single to the greatest good to the greatest number the greatest part of the time.

Dallas, Tex.

The Dilemma

By Daniel H. Prior, of Albany, N. Y.

A YOUTH there was, both bold and wise
Who would a lawyer be,
But could not differ a devise
From a contingent fee.

He chanced to meet a friend indeed,
A counsellor who said,
"I'll teach you all the law you'll need
If to me in hand paid,

You promise me my goodly fee
When your first case you've won."
And when to this they did agree,
The teaching was begun.

The youth a barrister became,
But not a case he tried;
The counsellor, grown old and lame,
Thought of his fee and sighed.

At last he haled the youth before
Twelve honest men and true;
But to decide the cause was more
Than these twelve men could do.

For when the young man rose to speak,
He said, "Now, gentlemen,
The justice which my friend doth seek
Is beyond human ken.

If you now say I must not pay,
'Twill cause me no chagrin;
But if you say I must, then pray
Will I my first case win?"

The old man spoke, and argued thus,
"My dear good sirs," quoth he,
"Declare for either one of us,
'Twill bring no grief to me.

"If you decide that I am right,
I shall obtain my fee;
But should he win this, his first fight,
He will my debtor be."

The parties both have long since died.
And all the jurors too;
This issue they could not decide,
Pray, reader dear, can you?

What Legislation by Congress is Desirable to Give Effect to State Liquor Legislation?

By Frederick H. Cooke, of the New York Bar

It is well established that the reserved powers of a state include the power to prohibit the sale, manufacture and transportation of intoxicating liquors. That is, within the limits of the state.[1] Yet in *Bowman* v. *Chicago, &c. Ry. Co.*,[2] and *Leisy* v. *Hardin*[3], the result was reached that such power does not extend to prohibiting the transportation of such liquors into the state at any rate, in the absence of enabling legislation by Congress. It is my present purpose to consider what legislation by Congress is most likely to give effect to legislation by a state, by way of prohibition of such transportation into its territory.

But, before discussing the particular case of transportation of intoxicating liquors, I propose to show that there are decisions of the Supreme Court, later than these two, that seem to go far toward sustaining the general proposition that the power of a state to prohibit the sale, manufacture and transportation of an article includes, as an incident, the power to prohibit the transportation thereof into the state.

Thus a state has power to prevent the sale and transportation of diseased cattle, and such power includes the power to prohibit the transportation thereof into the state.[4] So as to quarantine regulations preventing the transportation of persons.[5] So the state has power to prevent fraud or deception in sales, and such power includes the power to prohibit, or at any rate, to impose restrictions upon transportation into the state[6] So the state has p owe

[1] *Mugler* v. *Kansas*, 123 U. S. 623 (1887).
[2] 125 U. S. 465 (1888).
[3] 135 U. S. 100 (1890).
[4] See *Asbell* v. *Kansas*, 209 U. S. 251 (1908).
[5] See *Compagnie Francaise de Navigation, &c.* v. *Louisiana State Board of Health*, 186 U. S. 380, 387 (1902).
[6] See *Plumley* v. *Massachusetts*, 155 U. S. 461 (1894).

to prohibit the sale and transportation of game, a subject of common ownership, and such power includes the power to prohibit the transportation thereof into the state.[7]

Now, if we had merely these decisions to take into consideration, I find it difficult to avoid the conclusion that we should be justified in stating, as a general proposition, that the power of a state to prohibit the sale, manufacture and transportation of a given article includes the power to prohibit the transportation thereof into the state. But we know that in *Bowman* v. *Chicago, &c. Ry. Co.*, and *Leisy* v. *Hardin* it was very distinctly held that such power was *not* included.

I do not propose to argue, as I think it plausibly might be, that *Bowman* v. *Chicago &c. Ry. Co.* and *Leisy* v. *Hardin* have been overruled by these later decisions. Nor do I propose to deny that language was employed in the opinions in those two cases that is not to be harmonized with the proposition just formulated. What I do propose to show is that, *on the facts*, those decisions are not out of harmony with such proposition, so that, speaking generally, it is as applicable to intoxicating liquors as to other articles.

That is to say, in view of the particular situation presented in those cases, it failed to apply to intoxicating liquors, *because Congress had so legislated as to intoxicating liquors as to make them a subject of interstate commerce*, thus putting it beyond the power of the states to exclude them from interstate commerce. So far as I can see, Congress might with like effect, make any other article, say of food or clothing, a "subject of interstate commerce."

Thus in *Leisy* v. *Hardin*,[8] it was said: "Whatever our individual views may be as to the deleterious or dangerous qualities of particular articles *we cannot hold that any articles which Congress recognizes as subjects of interstate commerce are not such*, or that *whatever are thus recognized can be controlled by state laws amounting to regulations, while they retain that character.*" In *Schollenberger* v. *Pennsylvania*,[9] a like result was reached as to oleomargarine, which Congress had recognized "as a proper subject of taxation and as one which was the subject of traffic and of exportation to foreign countries and of importation from such countries." The above language in *Leisy* v. *Hardin* was repeated, it being also said: "We think that what Congress thus taxes and recognizes as a proper subject of commerce cannot be totally excluded from any particular state." Not without significance seems the following language in *Austin* v. *Tennessee*:[10] "Whatever product has from time immemorial been recognized by custom or law as a fit subject for barter or sale, *particularly if its manufacture has been made the subject of federal regulation and taxation*, must, we think, be recognized as a legitimate article of commerce."

In this view, it seems obvious what legislation by Congress is most likely to give scope to the power of a state to prohibit the transportation of intoxicating liquors into its territory, Congress might repeal all legislation, having the effect to recognize intoxicating liquors as *subjects of interstate commerce*. But if this be regarded as impracticable, it seems to me that the same result might well be attained by an explicit declaration by Congress

[7] See *Sils* v. *Hesterberg*, 211 U. S. 31 (1908).
[8] P. 125.
[9] 171 U. S. 1, 9, 13, 19 (1898).
[10] 179 U. S. 343, 345 (1900). Here, however, as to cigarettes, the prohibitory power of the state was sustained.

that, for the purpose of giving effect to state prohibitory legislation, intoxicating liquors are not to be regarded as "subjects of interstate commerce."

Such legislation would seem free from the constitutional objection that has been urged against the proposition to extend the scope of the Wilson act, namely, that it is an invalid delegation of the powers of Congress to the states. The act, as interpreted, does not become effective until arrival of the liquors at their destination within the state, coupled with delivery to the consignee[11] though, as proposed to be extended, it would be thus effective upon such arrival at the boundary of the state.

[11] See *Heyman* v. *Southern Ry. Co.*, 203 U. S. 270 (1906).

The Law and the Lady

By Frederick G. Fleetwood, of the Vermont Bar

[At the recent meeting of the Vermont Bar Association, Mr. Fleetwood responded felicitously to the toast, "The Law and the Lady," in words that created some merriment. His remarks are here printed.—*Ed.*]

MR. President and Brothers in Law:

The Law and the Lady. The one always troublesome to a lawyer, the other equally vexatious to a bachelor. Both are uncertain, variable, varying, requiring constant interpretation. The one harks back to precedent, the other is a creature of the compelling present. The authority of the one rests on the written opinion, the authority of the other fastens itself to the spoken word. The centuries bound the age of the one, the other never crosses the great divide of forty years. Reason fortifies the one, emotion controls the other. The great commandment of the one is, "Thou shalt not"; the credal statement of the other is, "I will." Both delight in declarations and pleas. Rejoinders are rare in the one but persistently present in the other. Replications appear in the one, supplications are the life of the other. Mergers are common to the one while the other is never merged or submerged but is ever paramount. Estoppels often bar the application of the one but never control the conduct of the other. Both frequently use the aid of twelve good men and true.

The relations of the Law and the Lady have been three-phased. First came the period of infraction, then the age of subjection and finally the era of enfranchisement. The first lady of the land did what we commensals are doing, she ate what she ought not. Disaster followed her, dyspepsia us. As a penalty for her transgression she was cast out of the garden of Eden along with her husband with no reduction of sentence through good behavior. She should have been placed upon probation, which would not have harmed her and might have purged her. As it is we are tainted, tinctured and tarnished with this first great fault of our forbears. In revenge for this disregard of its precepts the law at once overwhelmed the lady with punishments. Moses had no faith in her vow but allowed her husband or brother to disallow it. She

could not inherit, when men were born to the household. She could not obtain a divorce, for that right was reserved exclusively to the husband.

Buddha classed her as a mere chattel without freedom, liberty or rights. The Roman law, at least to the time of the luxurious Augustus, gave her no privileges. She could neither be tutor, curator, witness or surety. She could make no will, could not contract, was unable to adopt or be adopted. She was ever under the complete control of husband or kinsman. The common law continued her disabilities. Her property became her husband's, she could not sue or be sued singly and was otherwise laden with heavy burdens. If a woman committed the crime of simple larceny, sentence of death could be passed upon her, while a man for the commission of the same offence was only punished by being burned in the hand or given a few months' imprisonment. If a baron killed his *femme* it was the same as if he had killed a stranger. If a *femme* killed her baron she was punished as in case of treason, and it was the same as if she had killed her king.

The modern law looks with disfavor upon the early subjugation of the lady and has freed her from nearly all restraints. Like Minerva, who sprang full-armed from the brain of Jove, she is now strongly fortified by the law and can enter upon the contest of life on an equality with man. In Vermont few rights and privileges are now denied her. The suffrage has not been conferred upon her, but ere long we men may be desirous of granting her that right in order to purify conditions of our own creating.

The hour demands that I should now leave the subject and the presence of the lady. The rules of court can be compressed into small compass, but the rules of courting can not be indexed, codified or revised, they spring from the heart and make captive the head.

The truth of the matter is, the lady is above the law. To apply to her the fine phrase of Virgil, "By her mien she reveals herself a goddess," the goddess of our hearts and homes. Statutes cannot define her affections, constitutions cannot limit her sympathy, the opinion of the court cannot abridge her sacrifice. Her law is life and the soul of her life is love.

The Meaning of a Rare Legal Form

THE old case of *Skelton* v. *Skelton*, decided by Lord Nottingham in 1677 and reported in 2 Swanston's Reports, 170, opens with this statement: "The bill was exhibited against a jointress to stay maresme in felling timber." The sentence would seem to indicate that the Reporter used the word maresme as meaning waste, by the destruction of wood, and explained the peculiar kind of destruction charged against the jointress by saying that her maresme was the felling of timber.

The word is comparatively rare in the law and has had a curious history, as is indicated by the following memorandum which I have received from my friend Mr. George F. Deiser, an authority in such matters. Mr. Deiser says:—

The word "maresme" or "marisme" has had a checkered career. It appears in Modern French as "merrain" and is defined as "wood cut into planks and prepared for use" (for any purpose, fire, timber and the like). Coke says (Institutes) that "maremium, the Latin term, comes from Old Norman 'marisme.'" This was spelled variously

merrain, mairen, merrien, marrin, and marisme or maresme. Thus disguised one can scarcely realize that it is simply Latin "materia bois," "wood" or "timber." The transitions are, then:

Latin—materia.

Low Latin—materiamen (becomes by action of the yod)

Provençal—mairam (Brachet and Toynbel par. 10 and 51)

Wallon—mairan.

Old French—marisme, marrain, maresme, marrin, mairen, merrein, which was re-Latinized into Law Latin, maeremmium, sometimes maheremium.

Modern French—mairain or merrain.

Hence Modern French has two words identical in derivation from Latin materia. One is "matiere" and the other "merrain" above described. See E. Littré, Dictionnaire de la Langue Française, Tome III, p. 526, also Coke's Institutes, Edition of 1738, folio 53, and Darmesteter, Dictionnaire Gen., etc.

Mairan has a special meaning, also, viz.: Oak planks used for barrel staves.

In the 24th of Charles 1, 1649 (Styles' Reports p. 155) one Philips moved the Court to quash an indictment for pulling down the house of a baron, because the indictment used the word "lignum" for the timber of the house, whereas it should have been "maremium." Whether the court decided the point raised by the defendant is not certain from the Report, but it would seem from the above that the objection was well taken and that "maremium" was the proper word to use where the defendant was charged with destroying the wooden materials of the house, rather than the general term "lignum." While on the other hand to say what the equity-pleader apparently did in the case of *Skelton* v. *Skelton*, that the defendant committed "maresme" in felling timber, was an improper use of the word, as the timber destroyed was not "material made of wood."

WILLIAM DRAPER LEWIS.

The Constitutional Crisis in England

THE budget bill which the House of Commons passed and the House of Lords declined to approve without a clearly expressed popular demand, carried with it taxation measures of constitutional importance. The term "constitutional," however, has a very different meaning in England from what it has in the United States. As Professor Dicey, one of the foremost living authorities on the British Constitution, has remarked, there is in England no clear distinction between laws that are constitutional and those which are not of the nature of fundamental laws. Obviously, with Parliament supreme and clothed with the full powers of a constitutional convention as well as of an omnipotent legislature, the only way that laws could be classed as constitutional or purely secondary would be with reference to their subject-matter. The constitutional character of any new scheme of taxation involving considerable re-adjustments of the rights of private property to a new conception of the powers of government is so evident that it is unnecessary to cite any authority in support of it. Whatever view be taken of the taxation features of the budget, whether they be deemed socialistic or not, they truly partake of a constitutional character. Mr. Asquith did not correctly state the position of the upper house when he declared: "The Lords say, 'Tax any property but land, any one but us.'" The Lords' real opposition was not to higher duties, imposed under established principles of the Constitution, but to particular methods of taxation involving the application of entirely new principles. That new constitutional questions were involved, in the real sense of the word, is alone sufficiently proved by the acrimonious controversy which has divided the whole nation. The result is, therefore, that the House of Commons asserts that under its exclusive power to deal with all money bills, it can adopt constitutional measures which the House of Lords has no right to reject, while the House of Lords, in forcing an appeal to the country before it gives its assent, is practically declaring its right to be consulted regarding amendments to the British Constitution.

So vague, in England, is the distinction

between constitutional and other laws that scarcely any one seems to have raised the question whether the prerogative of the popular branch with reference to money bills carries with it, by implication, the right to exclusive jurisdiction over constitutional measures dealing with fiscal matters. Those who have defended the right of the Lords to intervene in the present case have never, to our knowledge, argued from precedent that the Lords might have something to say about money bills when important constitutional matters are involved. Some approach was made to this principle in the arguments of Unionist peers. And many have affirmed the familiar principle, long established by a standing order of the House of Lords, that no measure of general legislation shall be tacked to a money bill. But none seems either to have affirmed or denied the principle that a money bill itself, without "riders," can be rejected if it involves a constitutional question. Thus Lord Avebury (Sir John Lubbock) in the *Nineteenth Century* declares:—

> Parts of the present budget—the land clauses, for instance, which are no fewer than twenty-eight in number—are really a bill in themselves tacked on to the budget bill. If the contention of the government were correct, any measure could be passed over the head of the House of Lords by simply tacking it on to a money bill. . . . It is no doubt unusual for the House of Lords to amend a money bill, but it is unconstitutional to insert legislative proposals in a measure which ought to be confined to finance.

Another writer observes (W. G. Howard-Gritten in the *Fortnightly Review*, v. 86, p. 815, Nov. 1909):—

> The House of Lords would be totally within their rights in rejecting the bill, if for no other reason than that they are the guardians of that constitutional usage which it contravenes by tacking and introducing under cover non-financial measures. In the words of Mr. Gladstone: "The illegitimate incorporation of elements not financial into a financial measure accurately describes the position today."

Such observations, it will be noticed, leave unsettled the question of the power to reject money bills as unconstitutional, when nothing non-financial is tacked to them. Such a question is important because there is room for a reasonable doubt as to whether the bill did in fact offer an example of "tacking." To quote a writer in the *Contemporary Review* (Mr. Alexander Grant, K. C., in *Contemp. Rev.* v. 96, p. 540, Nov. 1909) :—

> No doubt the bill contains novel principles of taxation, and seeks for new methods of raising money for the needs of the state, but there is nothing in it which is not directly and immediately concerned with the provision of the necessary funds to meet supply. A case of tacking could only arise when a measure having no connection whatever with finance was foisted upon a finance bill, in order that the latter might carry through the Lords an alien and separate proposal. It does not support a suggestion of tacking to point out that the principles of the new taxes are strange and unprecedented, or that the methods of raising them have never before been employed.

Obviously if the bill was not an instance of tacking, the reason for the intervention of the Lords was by no means removed; the "strange and unprecedented" principles of the new taxes, far more than the tacking, would furnish the real justification for the Lords acting as they did.

Generally speaking, the Lords have not the legal right to meddle with money bills. The barrister just quoted is doubtless right when he says (*ibid.*, p. 539):—

> No one now disputes, nor has for generations disputed, the rule that the Lords cannot amend a money bill. Thus law is ousted by convention, and the privileges of the Lords are narrowed by their habitual acceptance of a limitation of their rights enforced upon them by the claim of the Commons to a superior and overriding right.

Further, as to the rejection of a money bill,—

> It is now too late in the day to attempt to interfere with the established usage of the Constitution, and to revive the obsolete and abandoned privilege of the Lords.

On the other hand, the privilege of the House of Commons is restricted to money bills, and a typical money bill is an administrative measure rather than a modification of the fundamental law. Shall the broader or the narrower interpretation of the privilege of the Commons prevail? In England the constitutional law of legislative power and privilege, it is to be remembered, is construed not by the courts but by Parliament itself, not by adjudication but by action. The rule of the privilege of the Commons is after all only a convention between the two houses. One has as much right to dissolve it as the other has to say that it shall not be dissolved. In the long run, the only test of the constitutionality of a legislative act in England is the test of public opinion. Departure from precedent may be validated and the new precedent thus created cited with approval, if it is subsequently found to have been based upon wise statesmanship and social justice. The Lords therefore have been justified in seeking to limit the prerogative of the Commons so as to protect their own jurisdiction over all constitutional questions. Parliamentary sovereignty does not imply

that the House of Commons should rule the kingdom. In a country where the Constitution is subject to Parliament, rather than Parliament to the Constitution, and where there is no tribunal having power to declare a law unconstitutional, the removal of every possible limitation on the power of the House of Commons would be in the highest degree hazardous and harmful. Lord Morley has quoted Burke to the effect that the House of Lords has no right in any sense to the disposition of the public purse. But it is problematical whether Burke, if he were living today, would assert that the disposition of the public purse included the right to alter the Constitution.

The reason why the Lords have not expressly asserted the right to pass on all constitutional measures is probably because they have not dared to take any step which might be misconstrued. From the standpoint of the House of Commons, such a rule might be made the pretext for interference with almost all money bills. For the distinction between constitutional and other measures is obscure, and the Lords are to be judges in their own case; and even were there any possible way of submitting the question to the arbitrament of the highest court, the House of Lords would then nevertheless be the judge in its own case. Such fears would not be wholly unfounded. Thus is disclosed a serious defect of the government of Great Britain, the absence of a disinterested supreme tribunal possessed, like the Supreme Court of the United States, of the right to subject the legislative power to constitutional restraints. Far better were it, however, that the House of Lords should be the judge in its own case, exercising its own discretion in determining what measures are and what are not unconstitutional, than that the House of Commons should be liberated from every restraint, and should, when money bills are before it, arrogate to itself exclusive power to alter the Constitution at will.

The policy which has been pursued by the House of Commons is open to serious objections. A financial emergency renders the immediate raising of a vast revenue imperative. Under the guise of a money bill, the House takes advantage of this emergency to attempt to force the passage of measures of far-reaching constitutional significance, measures also partaking of a strongly partisan character. Such a course is in many respects inconsistent with sound public policy. The House of Commons has virtually exceeded its prerogative in the matter of money bills. England is still a free trade country, but if a less radical money bill could not have been drawn to meet the emergency, the constitutional issues should have been separated from the budget and framed up in a separate bill for submission to the House of Lords, to open an unobstructed path for the budget itself.

The final outcome of the present crisis probably cannot be as grave as some have feared. It does not seem as if the British Constitution had been "cast into the melting pot," or as if it were likely to be. A Unionist writer (Mr. J. Ellis Barker in the *Fortnightly Review*, v. 86, p. 799, Nov. 1909) is not in his partisan zeal wholly blinded to facts, when he says:—

> The British nation is not a Liberal-Radical-Socialist but a Conservative nation. The present House of Commons, with its flabby, cosmopolitan, and un-national sentimentalism, and its predilections for socialism and bureaucratic absolutism, misrepresents a male, individualistic, patriotic and Imperial race.

If the Liberals triumph at the coming election the country will certainly survive a forced system of taxation without representation. If the House of Lords is reformed, that is a reform which prudent, conservative counselors like Lord Rosebery have for some time advocated, and the reform, when we consider the respect of Englishmen for tradition, is not likely to be carried out in a destructive or revolutionary spirit. If the election by popular vote of a Liberal upper house ever becomes possible, any possible danger may perhaps be offset by the undiminished fluence and power of the upper chamber. The fears of Lord Rosebery and the Archbishop of York, of the abolition of the upper chamber, or other men's fears of a socialistic upper chamber, are as ill-founded as Mr. Frederic Harrison's fears for the safety of the monarchical form of government. The worst that can happen is a dangerous curtailment of the powers of the House of Lords. Such a misfortune, however, would have been invited rather than repulsed had the Lords mildly surrendered to the Commons instead of pursuing a sound and reasonable course.

To Samuel Johnson

By Harry R. Blythe

[Samuel Johnson once remarked that if he had more money he would have been a lawyer.]

HAD fortune smiled you say you would have been
Not author, but a frequenter of courts,
Pressing your petty case of crimes or torts,
Or laying down shrewd argument for men
Who paid you fees to drag them from the fen
Of legal woe—that swamp of sad resorts.
As though, dear Sam, your name in the Reports
Could ever wield more magic than your pen!

Oh! well for us you never had your way,
Dining with silver spoon and golden plate,
Else we had never known you, Sam, today,
And loved you for your every human trait.
The gods know best. 'T is useless to inveigh
Against their wishes—no man fashions fate.

The Standard Oil Decision and the Sherman Act

THE attitude of the press toward the *Standard Oil* decision may be taken as tolerably expressive of the state of enlightened public opinion with reference to the Sherman act. There has been more unfavorable than favorable comment in influential quarters. There are, to be sure, some conservative newspapers which approve of the decision. Thus the *Boston Advertiser*, whose editorials on legal subjects sometimes have weight, says:—

"The decision in the St. Paul case is wholly satisfactory and is in the interests of the public welfare. It should serve as a warning to the other great trusts, organized in restraint of trade between the states. Their turn, too, must come, sooner or later, unless they are ready to submit to such government supervision as will regulate them, for the public's welfare and safety."

Likewise, the *Providence Journal* considers the ruling "in accord with a widespread public conviction." A more typical attitude, however, is expressed by the *New York Times*, which observes:—

"That the law should be permitted to remain what it is would be shocking to the moral and business sense of the country. The Standard Oil Company has been a great sinner, but that furnishes no reason why innocent business methods should be punished, or why Justice should have her scales strapped over her already bandaged eyes. We feel sure that if the Senators and Representatives will read with an open mind the opinion in the *Standard Oil* case and will candidly weigh the objections to the law, they will enact such changes as will convert it into a reasonable and workable statute, which it is not now."

It is probable that many members of Congress are of one mind with the *New York Times*. Congressman Charles G. Washburn of Massachusetts has declared:—

"The crux of the situation is that business combinations affecting interstate business

cannot now be made without violating the Sherman act, and it is, of course, incumbent upon the Executive to enforce the laws as they stand, good or bad. How can the Sherman law be so amended as to permit reasonable combinations and at the same time adequately protect the people from the evils of monopoly? This is the problem with which Congress is confronted."

The *New York Commercial* thinks that if the decision is ultimately sustained commercial chaos will ensue:—

"Under sharp or fierce competition among seventy-odd oil companies and oil-carriers many of them would have to be operated at a loss or else go out of business; for under the law as interpreted they could not sell out to the Standard or to each other and could not combine with each other in order to effect economies and to reduce or to meet the competition—for that would be 'in restraint of trade'—and eventually there would be chaos in the oil business here in the United States. We don't believe the American people, as a whole, want to see that sort of competition."

John W. Griggs of New York, who was Attorney-General under McKinley, expresses somewhat similar views:—

"I regard the decision as only another illustration of the inherent deficiencies of the Sherman act, in regulation of business. I think that the business men of the United States are entitled to a more clear and explicit statement of the rule of conduct which Congress means them to conform to than that which is expressed in the present law. I hope that the efforts of the President and of his Attorney-General to evolve a better bill will be sustained by public sentiment and approved by Congress."

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*Review of Periodicals**

Articles on Topics of Legal Science and Related Subjects

Bank Guaranty Laws. "The Insurance of Bank Deposits in the West." By Thornton Cooke. *Quarterly Journal of Economics*, v. 24, p. 85 (Nov.).

The author reserves his conclusion for a future article, merely describing the conditions attending the Oklahoma experiment, which was tried with faithful purpose to make it succeed, and to do away with the paralysis of trade and the human misery that have followed bank failures.

Bankruptcy. "Concealment of Assets in Bankruptcy Cases." By Lee M. Friedman. 23 *Harvard Law Review* 30 (Nov.).

"Even though imprisonment for contempt may be the ultimate outcome of a petition to require the return of secreted assets by a bankrupt, still the correct rule of law is that applied in ordinary chancery suits. A proceeding to procure the return of concealed assets is neither criminal nor quasi-criminal in its nature. Such proceedings retain their character as civil throughout. . . . The bankrupt who has a statutory duty to make true and full disclosure of his property and his dealings does not stand protected by any presumption of innocence nor is he entitled to any special protection from the court."

"Right of Fraudulent Vendee to Share with Attacking Creditors in Proceeds or Property as to Debt Unconnected with Fraud." By James F. Minor. 15 *Virginia Law Register* 497 (Nov.).

"Where creditors successfully attack, as fraudulent in fact, a conveyance of property by their debtor to one who also holds a pre-existing valid debt against the debtor, an interesting question arises as to whether such fraudulent grantee, who is thus also a creditor, is entitled to a *pro rata* share with the attacking creditors in the proceeds of the sale of the property thus fraudulently conveyed."

Basis of Law. "Le Droit Commun International comme Source du Droit Inter national Privé." *Journal de Droit International Privé*, 5th year, nos. 3-4, 497 (May-Aug.).

"To me, private international law is not merely the science of the conflict of laws, it is private law (*droit*) considered from the point of view of the juridical needs of a community larger than a state. I have been able to confirm my thesis that the settlement of conflicts is a means and not an end, and

*Periodicals issued later than the first day of the month in which this issue of the *Green Bag* went to press are not ordinarily covered in this department.

that international custom, the important source of positive private international law, may rest as securely on the foundation of right as on the authority of law. This is true in an even greater degree of codified international law. In all cases, whether customary or codified, private international law is a phase of private law: it is able to decline politely but firmly the support of the law of nations."

Bill of Rights. "Prosperity with Justice." By Peter S. Grosscup, Judge of the United States Circuit Court of Appeals. *North American Review*, v. 190, p. 721 (Dec.).

"The question now, as in 1854 (when the Missouri Compromise was repealed), and the years immediately following, is one of *human right*. It was the institution of human slavery on American soil that at that time was the wrong that had become intolerable; and the right of every man, white or black, to eat the bread earned in the sweat of his face, the human right that would no longer keep down. . . .

"Our present tariff policy, and our present corporation policy, twin wrongs feeding upon twin human rights, are fast becoming institutions, and as such are fast becoming intolerable. What political organization will take up the cause of this new attack on human rights?

"The relation of the individual to prosperity in the mass cannot, I repeat, remain what it is today. Either individualism will broaden until, including every class, it comes in touch again with every interest—property interests as well as political and moral interests—or it will disappear, reappearing ultimately in a form of civilization of which we have nothing except man's dreams."

See Property and Contract.

British Constitution. "An Inaugural Lecture." By J. H. Millar, Professor of Constitutional Law and Constitutional History, University of Edinburgh. 21 *Juridical Review* 219 (Oct.).

"I do not suggest that it is possible to treat of constitutional law and yet ignore the customs and conventions of the Constitution, but I think it is plain that the question whether the Lords are constitutionally justified in their action, whatever it may be, is one which falls to be decided, not by judicial authority, but by the electorate, a considerable proportion of whom are evidently assumed (to judge from the arguments addressed to them) to be as little likely to pay heed to the claims of precedent as to the rights of property."

"When the Door Opened: My First Report on the Exploration of the Other World." By W. T. Stead. *Fortnightly Review*, v. 86, p. 853 (Nov.).

"All the great statesmen of the past who came through our Open Door expressed the liveliest concern at the prospect of a conflict with the Lords over the Budget. There were two exceptions—Lord Palmerston and the Duke of Wellington. I reminded Lord Palmerston that when he was Prime Minister Mr. Gladstone forced the Lords to accept the Paper Duty. His reply was concise: 'That was paper, now it is land.'"

Conflict of Laws. "Conflict of Laws and the Enforcement of the Statutory Liability of Stockholders in a Foreign Corporation." By Edwin H. Abbot, Jr. 23 *Harvard Law Review* 37 (Nov.).

"The writer has discovered no American case which directly passes on this question of assent to jurisdiction by a stockholder. It seems to be assumed as a matter of course that a mere provision for service upon non-resident stockholders by publication, without more, will not draw after it an assent that such service shall be sufficient. . . .

"It may be, indeed, that to require non-residents as distinguished from residents to assent to such service would be unconstitutional. This analysis would depend on the question, whether the right to hold stock in a domestic corporation upon the same terms as domestic stockholders is a privilege or immunity of citizens of the several states. The question is remote at present and has no place in this article. But it may become serious in the future."

See Contract.

Conflict of Laws. "What Law Governs the Validity of a Contract; I, The Origin and History of the Doctrine." By Prof. Joseph H. Beale. 23 *Harvard Law Review* 1 (Nov.).

Professor Beale considers the origin and history of the doctrine that the validity of a contract is governed by the *lex loci contractus*. He proposes to consider in a subsequent article the condition of the authorities in England and in the various jurisdictions of the United States,

"The influence of Judge Shaw and the power of his reasoning have been sufficient to gain considerable adherence to the doctrine that a contract is governed by the law of the place of contracting. Still oftener the court relies on his reasoning to support the rule that the law of the place of making the contract governs, unless there is some extraordinary provision which shows that another law was contemplated. But on the whole, as will be shown, the prevailing tendency of the American cases is to regard the intention of the parties as controlling; and this intention is often conclusively found to be in favor of the law of the place of performance."

Same Subject, II, The Present Condition of the Authorities." By Prof. Joseph H. Beale. 23 *Harvard Law Review* 79 (Dec.).

This installment discusses the present condition of the authorities in England, in the English colonies, in the Federal courts, and in the courts of various states.

"It will thus be seen that almost every rule

ever suggested for determining the law applicable to the validity of a contract which has ever been seriously urged in a common-law court has at one time or another been adopted by the Supreme Court of the United States as the basis of its decision; that each decision has been made apparently without realizing its inconsistency with former decisions; and that many of the decisions are self-contradictory. As is natural where the judges come from different states where different views are held, the opinion is apt to express the doctrine accepted in the state from which the judge came. Thus, Mr. Justice Gray, in *Liverpool Steam Co.* v. *Phenix Insurance Co.*, expresses in substance the rule accepted in Massachusetts; while Mr. Justice Peckham, in *London Assurance* v. *Companhia de Moagens*, expresses the view firmly established in New York. It is natural that the inferior federal courts should reflect the same confusion of opinion. It would be almost impossible to make a complete citation of the decisions and *dicta* of these courts on the general question; those cases which have been found have been collected and classified in an appendix."

See Debt, Conflict of Laws, Property and Contract.

Copyright. "Copyright." By T. Baty, D. C. L. 35 *Law Magazine and Review* 59 (Nov.).

"If copyright, saving existing interests, were done away with tomorrow, would Mr. Hall Caine and Mr. Silas Hocking cease to write? . . . . The public wants their work—in some form or other it is very certain that it will get it. . . . The publishing trade would put their heads together and agree on some cartel to maintain prices."

Corporations. See Conflict of Laws, Industrial Evolution, Interstate Commerce.

Courts. "The Enfeebled Supreme Court." Editorial. *World's Work*, v. 19, p. 12311 (Dec.).

"It has almost always been true that some of the Justices have been more or less weakened by age; and it is and ought to be a body of venerable men. But it has not often happened, if it ever before happened, that the Court was capable of such little work as it is now able to do. That the Justices should serve as long as they please is, perhaps, the best principle; but this principle is open to the practical objection that the condition of the Court now presents. The most venerable members of the Court are incapable of sustained labor; the calendar is crowded; important causes press; and the public welfare inevitably suffers."

See Lawyers' Court.

Debt. "Imprisonment for Debt." By Lex. 35 *Law Magazine and Review* 8 (Nov.).

A somewhat sarcastic comment on the report of a committee of the House of Commons appointed to "inquire into the existing law relating to the imprisonment of debtors and to report whether any amendments are desirable."

"I venture to make a further suggestion with regard to these Parliamentary committees. Many of the most valuable members do not belong to the legal profession, and would be greatly assisted in their labors if they had before them a succinct statement of what the present law on the subject is. . . . It is hardly possible that the Committee on Imprisonment for Debt could have arrived at the report on which I have been commenting, if such information had been given to it. As it is the import of some of its most important recommendations is rendered doubtful by its ignorance of the law."

Declaration of London. "The International Naval Conference and the Declaration of London." By Ellery C. Stowell. *American Political Science Review*, v. 3, p. 489 (Nov.).

"It is curious to think that although the society of states is rudimentary as yet, a legislative organ has already been established. It took centuries of political education before the human mind could conceive of legislation, and yet the nations possess this great potential instrument of progress."

Domicile. "Trade Domicile in War." By T. Baty, D.C.L., LL.D. 21 *Juridical Review* 209 (Oct.).

A reply to Prof. Westlake's criticism of Dr. Baty's views in the *Journal of the Society of Comparative Legislation.*

Election Laws. "The Last Illinois Primary Law Decision." By Prof. Louis May Greeley. 4 *Illinois Law Review* 227 (Nov.).

The author takes issue with the decision of the Supreme Court of Illinois in *People* v. *Strassheim* (240 Ill. 279), and holds that "a different result might perhaps have been reached, and an act of vital importance to the people of the state sustained."

Employer's Liability. "Employer's Liability." By Prof. Floyd R. Mechem. 4 *Illinois Law Review* 243 (Nov.).

"The most rational solution of the whole difficulty under present conditions appears to me to be found in the efforts of those who are attempting to induce both employer and employee, in consideration of the undoubted advantage to each of them, to unite in furnishing an adequate insurance in view of the exigencies of the employment; and to eliminate entirely the question of legal liability, which is not likely to be settled to the satisfaction of either of them.

"It will be a matter for sincere regret if it shall prove that the contract clause of the new Federal Employer's Liability Act will interfere with such arrangements."

Eugenics. "Mating and Medicine." By S. Squire Sprigge, M.D. *Contemporary Review*, v. 96. p. 578 (Nov.).

"In the absence of more precise knowledge, medical inspection yielding an unfavorable report might prevent marriages that would have brought content and healthy children in their train—how many perfectly healthy people of quite advanced age do we not know who can tell a story of a consumptive grandmother?"

European Politics. "The Isolation of Germany." By Prof. Edwin Maxey. *Forum*, v. 42, p. 424 (Nov.).

"Upon the whole there has been partly as a result of successful English diplomacy and partly as a result of Germany's own acts, decided progress in the movement toward isolating her. The features of German policy which have done most toward bringing about her isolation are: her insistence upon being considered the arbiter of Europe; her attempt to force France into war over the Moroccan question; the undiplomatic speeches and telegrams of her Kaiser; her manifest leanings towards absolutism and emphasis of the importance of physical force; her ambitious naval policy, which can in no wise be considered necessary for her defence."

Foreign Relations. "The American Attitude Towards Germany." Editorial, *Fortnightly Review*, v. 86, p. 761 (Nov.).

"Americans realize that if Germany ever won the mastery of the sea, it might not be so easy for either English-speaking Power to get it back. The Monroe Doctrine and the security of the Panama Canal might prove to be worth just nothing if the immense military resources of the German Empire once secured full maritime mobility.

Government. "Shall the Constitution be Amended?" By Henry Litchfield West. *Forum*, v. 42, p. 391 (Nov.).

"There are three questions which are paramount. The first is whether there is any limitation of time which renders nugatory the action taken by legislatures during a series of years; the second is whether it is obligatory upon Congress to respond to the application of the legislatures; and the third is whether a constitutional convention, if called, can be restricted in its discussions to the one subject which was responsible for its creation.

"According to the consensus of expert opinion, the first question must be answered in the negative. . . . It would seem, unless one is inclined to raise technical objections, that the constitutional requirement has been fully met when the legislatures of two-thirds of the states have made application for a constitutional convention. . . .

"The third question, all authorities agree, must be awswered in the negative. . . .

"The conclusion is thus forced upon every thinking mind that the Constitution could be beneficially amended. Whether it is wise to attempt its amendment is another matter entirely. It certainly cannot be amended without precipitating a period of national concern. At the same time, it is a vital question whether or not this anxiety would be more apparent than real."

"Amending the Federal Constitution." By Tipton Mullins. 13 *Law Notes* 146 (Nov.)

"The voting strength of each state in such a national convention must be determined in some way. In the absence of regulations or precedent on this point must Congress, the only authority which can call the convention, determine this matter, or will the convention itself determine it? . . . May not Congress fix the qualifications of members of such state conventions and prescribe by whose votes they shall be chosen? . . .

"It seems to me that the method adopted by the legislatures in furtherance of the cause of popular elections of Senators is one of serious importance, and suggests the consideration: Shall state activity on the question be along the line of memorializing Congress in such way as to avoid the effect of a legal application for a national convention, resulting if possible in an inducement to Congress to submit amendments to the several legislatures in the manner uniformly followed up to this time, or shall a legal application for a national convention be made?"

"The Study of Governmental Agencies." By John E. Macy. 19 *Yale Law Journal* 26 (Nov.).

"The law of governmental agencies is a department of public law, as contrasted with private law—a department of the law that governs the state and its instruments of government, as distinguished from that which governs private individuals in their relations toward each other. Much of the confusion that is found in the decisions has been occasioned by stupidly applying the doctrines of private law to these agencies. A total separation of the two systems would give great aid in treating and in studying them. . . .

"Recently several eminent scholars have advocated the separate classification and connected study of public law topics—International Law, Constitutional Law, Public Officers, Public Corporations. Concurrently there has been an effort made to gather the branches that deal with public agencies into a single field. There appear to be three main departments of public law—Public International Law, which governs the State in its relation to other States; the Law of Constitutional Limitations, which limits the power of the State over the individual; the Law of Governmental Agencies, which governs the state's instrumentalities of government."

This writer refers to the title Administrative Law, which has been adopted by Prof. Frank J. Goodnow and by several law schools:

"The term 'administrative' is not significant in itself under the American system; and it leads to unfortunate confusion among the less initiated because of its universal association with probate law. Would the title 'Governmental Law' or 'Governmental Agencies' be proper?"

It seems to us that the law of government quite as properly includes what this writer terms the law of constitutional limitations as the law of public agencies, and that the term "governmental law" is not concise enough for the purpose indicated, which is best served by the adoption of the term "law of public agencies," unless a shorter and less clumsy one can be found.

"The Fifth Wheel in our Government." By Senator Albert J. Beveridge. *Century*, v. 79, p. 208 (Dec.).

"As now constituted, the Vice-President is absolutely without any power whatever in the Senate except that of casting the deciding ballot in the event of a tie, which occurs so seldom that it is almost no consideration. . . .

"Suppose that the power of appointing the committees of the Senate was given to the Vice-President. He would at once become a determining factor in government—a working bee making honey every day, instead of a queen bee with nothing to do. . . .

"'If this suggestion for the enlargement of the Vice-President's powers in the legislative branch is not acceptable, suppose his powers be enlarged in the executive department. Why not make him a sitting, voting member of the Cabinet?"

"In the Supreme Court—The People of the United States; *Insurgents* v. *Aldrich, Hale, Cannon, Payne, et al.*" By Henry Beach Needham. *Everybody's*, v. 21, p. 797 (Dec.).

"Mr Aldrich is neither the ablest nor the best informed man among his associates," replied Mr. Dolliver. . . . "The majority obtained by Mr. Aldrich in the Senate does not come from an appeal publicly and squarely made to the judgment and conscience of the Senate, but from a species of reciprocity of benefits, all centering in the so-called 'citadel of protection.'"

This is the first installment, others to follow, giving the testimony of other Senators.

Chile. "Parliamentary Government in Chile." By Prof. Paul S. Reinsch. *American Political Science Review*, v. 3, p. 507 (Nov.)

"While the radicals and liberals originally resisted such general social legislation from the point of view of their national *laissez-faire* theories, all parties have now come to adopt into their program resolutions favoring improvement in the condition of the poorer classes. . . .

"Many Chilian public men bewail the growing materialism of the country; the insistence upon private interest they attribute to a waning of the more ideal enthusiasms of former eras. In that respect, however, Chile with the rest of the world must adjust herself to conditions in which the material interests of the nation are, as a matter of fact, given a great deal of attention. But a nation which energetically develops its resources, which introduces efficiency of organization and administration, which demands exact methods in public accounting, is not, though insisting upon material matters, by any means necessarily shut out from molding all these material concerns into a broad and stable basis for a national life in which all the higher interests may find development and expression."

China. "A Parliament for China." By Prof. Paul S. Reinsch. *Atlantic*, v. 104, p. 790 (Dec.).

This article by an eminent authority has timely interest because of the recent beginnings of parliamentary government in China.

"A national parliament must be created; and it must, moreover, be a body truly representative of the intelligence and energy of the nation. . . . New imposts of taxation will be given authority by acceptance through representatives, and the financial administration of the empire will benefit through parliamentary control. . . .

"With the achievement of parliamentary institutions . . . the solution of the other difficulties and problems will have been rendered far easier than it would have been in the hands of an administration working at cross purposes with an independent public opinion."

Great Britain. See British Constitution.

India. "The Situation in India." By Sir A. H. L. Fraser. *Contemporary Review*, v. 96, p. 562 (Nov.).

"The gravity of the situation ought not to be exaggerated. The extent of the unrest and disaffection is distinctly limited. Lord Kitchener's statement, that the Indian army is unaffected by the efforts made to corrupt it, is encouraging and may be accepted."

South Africa. "South African Union." By A. Berriedale Keith. *Journal of Comparative Legislation*, v. 10, pt. 1, no. 21, N. S., p. 40 (Oct.).

"It must be said at once that perhaps too much has been claimed for both the originality and the excellence of the draft. The constitution is as a matter of fact indebted very greatly to previous constitutions, and in a few cases has perhaps followed its models with excessive fidelity. None the less it is certainly an excellent piece of work both as regards drafting and contents."

See Bill of Rights, Courts, Interstate Commerce, Socialism, Taxation.

History. "John Brown—Modern Hebrew Prophet." By E. N. Vallandigham. *Putnam's*, v. 7, p. 288 (Dec.).

"Tried by all conventional standards John Brown's attempt was, as the conservative historian has said, 'crime and nothing but crime,' crime against both constitutional and statute law then acquiesced in by the great majority of his countrymen; and viewed with dispassionate criticism, his must probably be acknowledged to have been as to its

mmediate practical results a vain adventure; yet something within us that is better than bad laws and base compromises must always cry out in irrepressible admiration of one who 'gave the last full measure of devotion' to a despised cause that for a lifetime he had held sacred."

Immigration. "Immigration and the Future American Race." By Dr. Albert Alleman. *Popular Science Monthly*, v. 75, p. 586 (Dec.).

"It is impossible that a general intermixture throughout this mighty empire can take place, much less will the later immigrants be able to supplant the descendants of those sturdy pioneers who first settled the vast prairies and fertile valleys of this great republic. . . .

"In the great struggle for existence which, in future centuries, will grow in intensity, the negro will he eliminated, 'he will melt away before the breath of the white man as snow melts under a hot wind.' This is the probable solution of the negro problem in the United States."

Industrial Evolution. "American Shoemakers, 1648—1895; a sketch of Industrial Evolution." By Prof. J. R. Commons. *Quarterly Journal of Economics*, v. 24, p. 39 (Nov.).

This is an important contribution to the study of industrial evolution, the author having made a painstaking historical analysis of the typical case of the shoe industry, the conditions of which have been closely paralleled in a large number of other leading industries. He shows how—

"The ever-widening market from the custom-order stage, through the retail-shop and wholesale-order to the wholesale-speculative stage, removes the journeyman more and more from his market, diverts attention to price rather than quality and shifts the advantage in the series of bargains from the journeymen to the consumers and their intermediaries. . . .

"The conflict is ultimately one between the interests of the consumer and the interests of the producer. Wherever the consumer as such is in control, he favors the marginal producer, for through him he wields the club that threatens the other producers. Consequently the producers resort either to private organizations equipped with coercive weapons to suppress their menacing competitor, or else they seek to persuade or compel the government to suppress him. In this way the contest of classes or interests enters the field of politics, and the laws of the land, and even the very framework of government, are the outcome of a struggle both to extend markets and to ward off their menace. . . .

"After the merchant-capitalist period, the slogan of the protective tariff became protection for labor, where formerly it had been protection for capital. Eventually, with the further separation of labor under its own leaders, protection took the additional form of suppressing Chinaman and the alien contract-laboror. Turning to the state governments, labor has summoned its political strength for the suppression of the internal menace of long hours, prison labor, child and woman labor. And finally, where neither politics nor organizations suffice to limit the menace of competition, both 'manufacturers' and workmen in the shoe trade strive to raise themselves above its level by cultivating the good will of the consumers, the former by his trade mark, the latter by the union label."

The economic position of labor of course acts directly upon legislation and the common law, and in large measure determines what interpretation shall be placed upon the police power of the state, and upon the law applicable to large combinations of labor and of capital. For this reason Professor Commons' investigation, with his comprehensive general deductions, will repay the careful study of publicists and lawyers.

Interstate Commerce. "State Control of Foreign Corporations." By George W. Wickersham. 19 *Yale Law Journal* 1 (Nov.).

This is the paper which the Attorney-General read last July at the annual meeting of the Kentucky State Bar Association. An abstract of its contents has previously appeared in the *Green Bag* (21 *G. B.* pp. 428-9). He analyzes the control which states may exercise over foreign coporations, with the object of showing that national incorporation would secure "more undisputed and clearly defined protection" than is now afforded corporations engaged in interstate commerce "from state interference and discriminatory legislation." This of course suggests a constitutional question, for a corporation engaged in interstate commerce may or may not be subject to far-reaching state regulations in its intra-state business, according to whether the commerce clause of the Constitution is construed in a broad or in a narrow sense. "It would be rash at this time to suggest a definition of what constitutes interstate commerce," says Mr. Wickersham. He thinks that the decisions of the United States Supreme Court in *Caldwell* v. *North Carolina* (187 U. S. 622), and *Loewe* v. *Lawlor* (208 U. S. 274) are "suggestive of the extent of interstate trade or commerce now recognized to be within federal control."

But Mr. Wickersham's contention that federal incorporation would enable corporations engaged in interstate commerce to free themselves from state interference is of doubtful soundness. Such corporations in their intra-state transactions ought to be, and perhaps would be, subject to a certain measure of state control. On this point one may refer to another article in the same review:—

"The Supreme Court, The Commerce Clause and Common Law Rules." By Frederick H. Cooke. 19 *Yale Law Journal* 32 (Nov.).

This writer refers to the decision of the

Supreme Court in *Western Union Tel. Co.* v. *Call Pub. Co.* (181 U. S. 92), which held that the states may apply the principles of the common law to all interstate commercial transactions.

Such a rule is illogical, if the power of Congress under the interstate commerce clause prevents the exercise of state regulation under the authority of state legislation. Numerous decisions have established this exclusive power of Congress so far as statutory regulation is concerned. We submit that the recognition of common law principles as operative, if sound in principle, shows that the accepted doctrine that no power of regulation may be exercised under the authority of state legislation is not wholly reasonable. Mr. Cooke, however, is not arguing that *Western Union Tel. Co.* v. *Call Pub. Co.* was wrongly decided. He has no criticism to offer on the doctrine that the states can apply common law principles in dealing with interstate trade.

He complains that less than eight years later, when *Missouri Pacific Ry. Co.* v. *Larabee Mills* (211 U. S. 612) came to be decided, the decision in the earlier case was forgotten or ignored. The Supreme Court avoided the point, introducing what he calls an irrelevant distinction between "matters national" and "matters of local interest," holding that the latter, but not the former, are subject to regulation under state authority in the absence of regulation by Congress.

We agree with Mr. Cooke that it would have been "highly appropriate to consider the effect" of the earlier decision. The powers of the states at the present time are harder to define than they would have been if the Supreme Court had considered the bearings of the rule stated in the earlier case.

Such considerations show the law to be still in an unsettled state. It is doubtful if the Supreme Court would ever care to overrule *Western Union Tel. Co.* v. *Call Pub. Co.*, though such a result would doubtless be highly acceptable to Mr. Wickersham and others who favor national incorporation as assisting corporations to obtain immunity from state interference.

It seems not unlikely, in fact, that the Supreme Court, in its decisions dealing with the taxing power, will be forced to declare that states have exclusive power directly to tax intra-state business of corporations engaged in interstate commerce, and that the interstate commerce clause will be given a less sweeping construction than has of late been the tendency. Such an inference is to be deduced perhaps from a second article by Mr. Cooke:—

"The Commerce Clause, and Taxation of Gross Receipts and of 'Intangible Property.'" By Frederick H. Cooke. 8 *Michigan Law Review* 25 (Nov.).

The rule allowing the imposition by a state of a tax on gross receipts derived from interstate commerce, "having been solemnly ejected by the Supreme Court through the front door, has been allowed to sneak in through the back door, though under a different name, so that it continues triumphantly in possession. This result has been reached by the establishment of the rule allowing taxation of '*intangible property*.'

"Now the idea of *property* is without substantial significance, apart from some use to which the property is—or may be—put. I might conceivably own real estate in the moon, or in the immediate vicinity of the North Pole, but the idea of any *property* therein would be a barren abstraction, there being no *use* or prospect of any use to which such property can be put."

Mr. Cooke goes on to say that when the capitalized earning power of a corporation is $10,000,000, and its gross receipts are $500,000 a year, and the state imposes a tax amounting to $50,000 a year, "the practical effect is the same, whether such sum be regarded as ten per cent of the gross receipts, or as one-half of one per cent of the 'intangible property.' . . . Yet, according to the Supreme Court, the tax of $50,000 is invalidly imposed, if regarded as a percentage of $500,000, the amount of the gross receipts; it is validly imposed, if regarded as a percentage of $10,000,000, the value of the "intangible property.' Is not this a case of tweedle-dum and tweedle-dee? . . .

"Now the decision in *Galveston, Harrisburg &c. Ry. Co.* v. *Texas* (210 U. S. 217) seems to me to indicate that at last the Supreme Court has come, or is coming to, a realization of the inconsistency that I have discussed. . . . Nevertheless the opinion contains the following attempt at reconciliation: 'Yet the distinction is not without sense. When a legislature is trying simply to value property, it is less likely to attempt to or effect injurious regulation than when it is aiming directly at the receipts from interstate commerce. A practical line can be drawn by taking the whole scheme of taxation into account. That must be done by this court as best it can.' I am not sure that I fully understand what is meant here, but there seems involved the idea that, as to the action of state legislatures, it is likely to make a good deal of difference by what name a given scheme of taxation is called. I confess to failure to be entirely satisfied with a distinction based on such a supposition."

See Interstate Commerce Commission, Monopolies.

Interstate Commerce Commission. "The Force and Effect of the Orders of the Interstate Commerce Commission." By H. T. Newcomb. 23 *Harvard Law Review* 12 (Nov.).

The author summarizes his conclusions as follows:—

(1) As Congress could not confer legislative power upon the Commission, and as merely ministerial methods are incompetent to perform the tasks of rate-regulation, the orders which the regulative agency is empowered to make must depend upon inquiries of judicial quality.

(2) These orders cannot have compulsory force of themselves but must depend for their enforcement upon the federal courts.

(3) The forfeitures attempted to be provided for failure to obey orders must fail, as only a legislative body can define an act or an omission which by such definition becomes penal.

"It may be, also," he adds, "that the rates named in an order made by the Commission are entitled to weight as *prima facie* evidence of what is just and reasonable, in a suit brought under section 8, by a plaintiff claiming damages for the omission of an act, *viz.*, the act of obedience to an order, required by the law. When asked to enforce an order of the Commission the federal circuit court must proceed substantially as it did under the 'Cullom' law, except that it no longer has the aid of a *prima facie* case made up by the Commission."

International Law. See Basis of Law, Declaration of London, Domicile.

Jury. "The Jurors and the Judge." By George W. Warvelle. 23 *Harvard Law Review* 123 (Dec.).

"In the absence of constitutional or statutory recognition of the right, the volume of authority now seems to sustain the doctrine that the jury are not judges of the law in criminal cases. . . .

"In many of the states, however, the old rule remains intact. In such states, while it is the duty of the court to aid the jury by instructing them upon all matters of law necessary for a proper determination of the issue, yet the instructions so given do not bind the consciences of the jurors but are regarded merely as an aid in arriving at a correct judgment."

Juvenile Crime. "The Juvenile Court." By Julian W. Mack. 23 *Harvard Law Review* 104 (Dec.).

"The work of the juvenile court is, at the best, palliative, curative. The more important, indeed the vital thing, is to prevent the children from reaching that condition in which they have to be dealt with in any court, and we are not doing our duty to the children of today, the men and women of tomorrow, when we neglect to destroy the evils that are leading them into careers of delinquency, when we fail not merely to uproot the wrong, but to implant in place of it the positive good. It is to a study of the underlying causes of juvenile delinquency and to a realization of these preventive and positive measures that the trained professional men of the United States, following the splendid lead of many of their European brethren, should give some thought and some care."

"The Judicial Treatment of Juvenile Offenders." By Henry H. Brown. 35 *Law Magazine and Review* 1 (Nov.).

"The *criteria* which rule the adoption of particular methods of treatment in individual cases are four: (1) The age and sex of the offender; (2) The gravity of the offense charged; (3) The antecedents and character of the offender; and (4) The character of the offender's home surroundings.

"I am inclined to attach special importance to the last of these."

"The Beast and the Jungle" (continued). By Judge Ben B. Lindsey. *Everybody's*, v. 21, p. 770 (Dec.).

"Do you know that over half the inmates of reformatories, jails, and prisons in this country are under twenty-five years of age? Do you know that an English prison commission not long ago reported to Parliament that the age of sixteen to twenty was the essentially criminal age? . . . I may be very crazy, and yet not be as crazy as the people who, in the face of these facts, believe that the criminal methods of our civilization are anything but a gigantic crime and a stupendous folly."

Labor Laws. "The Illinois Ten-Hour Labor Law for Women." By Andrew Alexander Bruce. 8 *Michigan Law Review* 1 (Nov.).

"The argument against the shorter day is based purely on a theory of a supposed property right, the supposed right of a man to do as he pleases with his own, and to contract as he pleases. But this theory has no real foundation in our legal history. Opposed to it is the maxim that the public welfare is the highest law, and the growing belief that human lives and human souls are of more value than many sparrows—that even liberty itself, for it is for them that liberty exists and property was created."

See Industrial Evolution.

Lawyers' Court at Pittsburgh. "The Lawyers' Court of Compulsory Arbitration." By J. McF. Carpenter. 13 *Law Notes* 165 (Dec.).

Describing the thus far remarkably successful experiment at Pittsburgh, made under the authority of the act of 1836, which "contains many provisions regulating the proceedings before arbitrators, the filing of the award, appeal to the court, etc. It confers upon the arbitrators power to require the production of books; to judge of the competency and credibility of witnesses; to administer oaths; to adjourn meetings; to decide the law and the facts; to issue subpœnas and attachments for witnesses; and to punish for contempt."

Legal Education. "A History and Estimate of the Association of American Law Schools." By Dean Charles Noble Gregory, University of Wisconsin. (Delivered as the President's address before the annual meeting of the Association of American Law Schools at Detroit, August 25, 1909.) 19 *Yale Law Journal* 17 (Nov.).

"In submitting this review of our nine years of existence, it is interesting to observe that,

although the statistics are not wholly exhilarating, yet there were in the past year, as shown by the report of the Commissioner of Education, 1,515 fewer students in regular medicine, 575 fewer in homœopathic medicine and 1,408 fewer in dentistry than nine years, ago, whereas, as we have seen, there are 5,553 more law students than nine years ago. In fact, the growth in law schools in that period has vastly exceeded that in any professional schools, except those in veterinary medicine, a comparatively new branch of instruction in which there has been a marked and sudden development."

Legal History. "Divorce in Rome." By R. Vashon Rogers, K. C. 29 *Canadian Law Times* 997 (Nov.).

"Not one of the Emperors who busied himself with the matter, undoing the work of his predecessors and substituting legislation of his own quite as complicated and futile, thought of interfering with the old principle that divorce ought to be as free as marriage, and independent of the sanction or decree of a judicial tribunal."

Legal Philology. "'The French Influence in Braid Scots.'" By Charles Menmuir. *Westminster Review*, v. 142, p. 531 (Nov.).

"French influence in legal matters is found in the term 'remeid' of 'law,' which was formerly applicable to that practice whereby justice might be obtained by appeal from a lower to a higher court, when the judgment of the former was considered to be at fault."

Marriage and Divorce. "Divorce and Public Welfare." By George Elliott Howard. *McClure's*, v. 34, p. 232 (Dec.).

"Bad marriage laws are, of course, less harmful than are marriages biologically or morally bad. Here, too, the power of the lawmaker is limited. Yet a bad marriage law will account for divorce in far more cases than will a bad divorce law."

See Legal History.

Monopolies. "The Law as to Combinations." Memorandum. By Sir John Macdonell. *Journal of Comparative Legislation*, v. 10, pt. 1, no. 21, N. S., p. 144 (Oct.).

"The existing English law as to restraint of trade . . . is tolerably complete and intelligible as to the interests of private persons; it is imperfect, undeveloped, and doubtful as to the interests of the public. . . .

Reviewing the general tendency in all countries, the author reaches several conclusions of interest, including the following:—

"That there is, generally, a tendency to attempt (by legislation or judicial decision) to maintain competition, and to prevent the creation of monopolies by combinations, especially as to necessary articles or services."

See Industrial Evolution.

Penology. "On Reclamation as a Penological Method." By Carl Heath. *Westminster Review*, v. 142, p. 515 (Nov.).

"Such diminution in crime as there is, is not due to prisons, police, and punishments, but to the rise in social and humanizing conditions outside the penal system. Prisons, with their degrading punishments, only further degrade a man, producing fitness, as one of the reports of the Borstal Association has it—'for nothing but further terms of imprisonment.' The fact is, the more severe the punishment, as punishment, the less likely it is to have any effect in diminishing crime; nay, the very reverse. . . .

"Reclamation, as the object to be aimed at in the treatment of every prisoner capable of being reclaimed, is a penological policy at once more reasonable and humane, and vastly more in the interests of an intelligent and civilized community, than the hopelessly inefficient method of punishment—of society conceiving itself to possess some divine attribute of justice. For, as Alfred Russell Wallace has truly said: 'We never can know all the complex forces which drove the guilty man to the fatal deed.'"

"The Secrets of the Schluesselburg." By David Soskice. *McClure's*, v. 34, p. 144 (Dec.).

Describing Russia's political prison the writer says:—

"The régime and the aspect of the prison had been most carefully thought out and planned, being, as the ministers visiting the Schluesselburg repeatedly declared to the prisoners, intended to demonstrate to them that it was destined to be their grave. . . . Their food was abominable: bread, half raw, made of rotten flour; and a plate of hot water in which floated a few shreds of meat or the traces of an onion."

Practice. "The Bar in Austria-Hungary." By E. S. Cox-Sinclair. 35 *Law Magazine and Review* 42 (Nov.).

Two main features distinguish the history of the Hungarian bar; (1) the early date at which the complete status of the advocate was evolved; (2) his extraordinary struggle throughout the centuries for the recognition of Hungarian national rights.

See Procedure.

Probation. See Juvenile Crime.

Procedure. "The Trouble with the Criminal Law." By William Dudley Foulke. *Docket*, no. 7 (Oct.–Nov.), also *Ohio Law Bulletin*, v. 54, p. 458 (Nov. 29).

This is an extract from Mr. Foulke's paper on "The Trouble with the Law," read before the Indiana State Bar Association at its recent annual meeting.

"What are the technicalities through which the guilty so often escape? Here are a few of them:—

"First. Every link in the chain of evidence must prove the defendant's guilt beyond all reasonable doubt, and twelve men must concur in having no such doubt. . . .

"Second. No man accused of crime can be required to furnish any evidence of guilt against himself. . . .

"Third. Certain irregularities in the grand jury room which could not possibly affect the merits of the actual trial are often allowed, not only to delay the course of justice, but to reverse a proper conviction; and informalities in the indictment, . . . often prevent a trial or reverse a conviction.

"Fourth. Trifling errors in the admission or rejection of evidence, or in the charge of the court, or the behavior of the court or prosecutor, will defeat a conviction. . . .

"Fifth. The defendant is not allowed to waive certain of his rights, his right, for instance, to be tried by twelve jurymen. . . .

"Sixth. The provision that no man shall be tried twice for the same offense results in liberating men who are mistried. . . .

"It was well enough to say that no man accused of crime could be required to testify against himself when he was not permitted to testify in his own favor; but experience shows that in the long run truth is best determined when no reasonable source of inquiry is omitted. Now that the accused can testify in his own behalf, why should he not be examined and required to testify, whether the evidence criminates himself or not? The protection to the innocent which is sought under this provision is just as illusory as the protection to the innocent sought to be secured by the other technicalities, which lead in the end to lynch law, where he has no protection at all. Since he cannot be required to testify against himself, the police authorities seek to obtain confessions by extrajudicial examinations not subject to legal scrutiny. They take him to the room of the chief of police, or perhaps to his cell, and there they put him through the sweating process—the third degree—and nobody knows what may be the inducements or the threats, nor how reliable may be the report of the confession made. The police authorities are not greatly to blame for this. Where a crime has been committed, it is their business, their duty, and their pride to secure evidence to convict the man whom they believe to be guilty, and they have to do this outside the law. . . .

"Unless we can protect the community as well as the men charged with crime, we will continue to have exhibitions of lynch law and private vengeance inflicted by individuals upon those from whom they have suffered injury."

"Procedure in the American Courts; Impressions of an English Barrister." London *Law Journal*, v. 44, p. 644 (Oct. 30).

While some of this writer's statements are inaccurate, his main contentions are in large measure just. He was deeply impressed by the want of respect and dignity of bench and bar in the United States, in their relations with each other. The popular election of judges often results in a weakening of respect for the bench, and the preparation given in many American law schools is distinctly inferior. The absence of the barrister's wig and gown deepens the impression of a lack of dignity. Cases are conducted in a far more free-and-easy way than is conceivable in an English court.

"A trial before the Supreme Court resembles rather our proceedings before a master with their quick exchanges of conversation and their unceremonious argument. Yet it is not managed with the same dispatch. It is remarkable that a people who are famous for their hustle and their desire to save time should tolerate the slowness in the dispatch of legal business which is regular in American courts." He thinks that the division between the two branches of the profession, while it may make litigation cheaper, necessarily renders it slower. "The 'omnibus' lawyer—if one may use the term—does not put his argument as briefly, does not narrow down the issue of fact as concisely, nor appreciate when the judge has taken his point as readily as the English barrister."

Another fruitful source of delay is the crowded calendar, with the opportunity given to counsel to secure postponements.

"So much for the cumbrousness of the American procedure. There are upon the other side of the account certain features which merit our favorable notice. Some time is saved, and a greater measure of accuracy is secured, by the rule that in every civil as well as in every criminal case the evidence is taken down in shorthand by a stenographer, and read out to the witness at the close of the examination, so that its correctness is ascertained. It may be that the judge does not grasp the salient facts as clearly by this method as if he were to make his own abstract of the witnesses' statements, but the taking of evidence is certainly expedited. Another difference in procedure, which has much to recommend it, is that in every appeal the statement of the main facts and the legal arguments, statutes and authorities upon which each of the parties will respectively rely are embodied in a printed 'brief,' which is laid before the court. In other words, what is done here in appeals to the supreme appellate tribunals, is done in America in the case of all applications to revise the decision of a lower court, and it is, in fact, done more thoroughly, inasmuch as the 'brief' deals as fully with the legal issues as with the issues of fact."

"Particulars and Interrogatories in English Practice." By A. M. Hamilton. 21 *Juridical Review* 230 (Oct.).

"The adoption of the application for particulars might be styled a development of our [Scots] practice rather than an innovation on it. . . . No serious difficulty should be anticipated in fitting the essentials of this procedure into our system."

"The German Law-Suit without Lawyers." By Chief Justice Simeon E. Baldwin. 8 *Michigan Law Review* 30 (Nov.).

"In most cases there must be written pleadings drawn by lawyers, and a trial conducted by lawyers. A plaintiff is not allowed to conduct his own cause in any of the higher courts. But the plaintiff has his option of

suing by a lawyer, or not, in petty causes, involving not over three hundred marks, or a greater sum when arising from certain kinds of controversies, as between landlord and tenant, master and servant, travellers and innkeepers, or seamen and ship. Should he elect not to have a lawyer to try his case, the defendant cannot have one either."

Property and Contract. See Labor Laws.

Professional Ethics. "The Ethics Report to the Illinois State Bar Association." Editorial. By George P. Costigan, Jr. 4 *Illinois Law Review* 272 (Nov.).

"It would seem to be desirable that the various state codes of legal ethics should be uniform in arrangement as well as in substance. Those codes are meant to start the young lawyer in right paths when he enters the profession and to furnish a basis for compelling ethical action on the part of all lawyers. From both points of view it is desirable not only to have uniformity in substance among the states but also to make that uniformity apparent at a glance by a uniform arrangement and classification of the ethical rules adopted."

Quasi-Contracts. "Money Paid Under Mistake of Law." Paper read before the Kansas State Bar Association. By R. O. Douglas. 9 *Brief of Phi Delta Phi* 122 (Nov.).

The writer disputes the proposition that a person cannot recover money which he had paid under a mistake of law "when it appears that the payee is not entitled to it and should not in good conscience retain it."

Race Problem. "The Conflict of Color; IV, The World's Black Problem." By B. L. Putnam Weale. *World's Work*, v. 19, p. 12327 (Dec.).

Mr. Weale looks for a federation of the dark races of the earth—a union between the blacks themselves and a closer bond with the Arab and the Turk. "The Arab is the one man who can really conquer and improve the negro in his African home."

"The Social Position of the Maoris." By Mabel Holmes. *Contemporary Review*, v. 96, p. 614 (Nov.).

"The Maoris are perhaps the only colored race in the world who are allowed to stand, legally and socially, upon an absolute equality with the white man."

See Immigration.

Sales of Goods. "Commercial Morality." By G. W. Wilton. 21 *Juridical Review* 237 (Oct.).

The writer discusses two recent cases of gross imposition in trade, one illustrating American business methods, "in their degraded form," in the sale of a cathartic pill in Scotland by full representations, the other exemplifying the practice of certain coal dealers in England and Scotland, in substituting coals from other collieries in violation of the spirit and letter of mercantile engagements; and discloses the power of the criminal law in dealing with such conditions.

Scientific Progress. "Environment and Productive Scholarship." By Dr. W. J. Humphreys. *Popular Science Monthly*, v. 75, p. 597 (Dec.).

"This great inequality . . . in productive scholarship between the northern and the southern parts of our country can have but one explanation—*difference in environment;* and it explains too the inferior part we as a nation are taking in preparing the way for any real advance in civilization."

Socialism. "Eyes and No Eyes." By W. S. Lilly. *Fortnightly Review*, v. 86, p. 833 (Nov.).

Many of the author's views are fallacious, but he writes with refreshing keenness.

"In this same city of New York, men are crowded four thousand, and even more, to the acre, and are living in conditions as filthy, as wretched, as inhuman as can be found in any London slum. . . .

"There can be no doubt that this state of things is the outcome of the economical doctrines unquestioningly received and believed in the civilized world for well-nigh a century from Adam Smith's time. It was in 1776 that in his 'Wealth of Nations' he laid down the doctrine of *laissez-faire*. . . .

"He forgot that parity of condition is a condition of *freedom* of contract; and the generation to which he appealed did not happen to remember it. His doctrine was soon everywhere received and believed as a new economic gospel—with the consequences which we all know. . . .

"Freedom of contract between the man who owns land, mines, machinery, and the man who owns only his ten fingers, skilled or unskilled—'lord of himself that heritage of woe!' It was under this system, described as 'free competition working by demand and supply,' that colossal fortunes were built up in England in the nineteenth century. This 'free competition' was really a most atrocious tyranny of capital. . . .

"Professor Menger has well observed that it is a function of government to 'extract from the interminable popular and philanthropic utterances constituting socialistic literature the underlying ideas, and to translate them into scientific concepts of right.' . . .

"First, as to capital and labor, . . . the state should actively encourage, and by wise legislation aid, the systematic organization of industrial society. . . . Secondly, the state should effectively interfere in industrial contracts for the protection of those who are unable to protect themselves. . . . Thirdly, as to monopolies . . . the case for state ownership of public utilities is overwhelming. . . . Fourthly, as to taxation. . . . Two imposts much debated just now are the income tax and the death duties. Who can rationally doubt that these imposts should be progressive? The principle of equality of sacrifice absolutely demands it. . . . Fifthly,

as to the unearned increment, especially in the case of land, . . . it seems just that at all events a considerable portion of it should be taken by the community. . . .

"Lastly, speculation in stocks and shares . . . to get possession of wealth without earning it . . . is morally wrong, and should be branded as legally wrong."

"Socialism and Human Nature." By Amber Reeves. *Contemporary Review*, v. 96, p. 568 (Nov.).

"Even under the present conditions, the socialist movement could make use of its journalists to teach the people how to think. . . . If once they can create any sort of collective mind, any power of thinking and acting together, they will be nearer effective socialism than they would be if Parliament were to pass a Fabian program within the next five years."

South African Union. See Government.

Stocks and Bonds. "Sale of American Securities in France." By Frank D. Pavey. *North American Review*, v. 190, p. 811 (Dec.).

"In the case of new issues, bankers and promoters who wish to offer securities for sale in the French market will do well to lay the foundation for that purpose by the insertion of suitable clauses in the bonds and mortgage which will anticipate some of the difficulties."

Supply and Demand. "Elicitation: An Unrecognized Law." By F. W. Orde Ward. *Westminster Review*, v. 142, p. 576 (Nov.).

"Not merely in patent medicines, whether drugs or dogmas, do we find the effective supply creating the demand, but in almost every department of life, and in all sections of society. Any one with the true genius can make any one else accept his creed or cure, too frequently, and pay dearly for it. It is only a question of patience and pressure, till the right degree of elicitation has been reached."

Tariff. "The Tariff Debate of 1909 and the New Tariff Act." By Prof. F. W. Taussig. *Quarterly Journal of Economics*, v. 24, p. 1 (Nov.).

"The most depressing part of the new tariff is in some of the petty items, important not in themselves but because of the mode in in which they were dealt with. A constituent secures the ear of an influential Congressman or Senator, proposes a high rate on an article he produces or wishes to produce, and gets it enacted by the log-rolling process. Where such changes concern important articles, like cottons, woollens silks, hosiery, there is usually some public discussion and at least *pro forma* justification. But where minor articles are to be affected, the new rates are quietly put through without check or scrutiny."

"The Tariff of 1909, I." By H. Parker Willis. *Journal of Political Economy*, v. 17, p. 589 (Nov.).

"This is the first of a series of three articles on the tariff of 1909 which Mr. Willis will contribute to this *Journal*. This second article is to deal with the legislative history of the bill. The third will discuss the bearing of the tariff upon the foreign relations of the United States."

Taxation. "Some Observations upon the Federal Corporation Tax Law." Editorial. 19 *Bench and Bar* 43 (Nov.).

In case of those corporations whose revenues are the joint product of the property and the business activities of the corporation, "the question whether a tax on such product would be a direct tax was not decided by the *Income Tax* cases. It seems not unreasonable to suggest, however, that if a tax on income wholly derived from property is a tax on the property itself, a tax on income derived from the combination of capital and labor might be deemed to some extent a tax on the capital, and hence a tax on property. . . .

"If the foregoing reasoning is correct, and the corporation tax is to some extent a direct tax, then, to that extent, the law is unconstitutional, and, if so, its valid and invalid portions seem so interwoven that they can not be separated and the whole law must be declared void (*Income Tax* cases, 158 U. S., pp. 635–7).

"If we may assume, on the other hand, that the tax is not a tax on the net income but on the franchise, the first consideration that suggests itself is that the corporate franchises of most companies have been created by the state governments, and that for the federal government to tax rights thus given by the states constitutes an infringement of the powers and rights of the states, to which alone the corporations owe their existence. . . .

"The mere fact that a corporation is created by a state government does not seem sufficient to prevent the federal government from taxing the franchise of such a corporation." But in *Veazie Bank* v. *Fenno* (8 Wall. 533) there was a remark of Chief Justice Chase that might "lead to the conclusion that a tax on the franchise would be a direct tax, and hence must be apportioned. If this be so, it is fatal to the present law, if that be construed as imposing a tax on the franchise and not the net income.

"It has been suggested that if the tax imposed by the recent act is to be regarded as an impost or excise, it is not uniform. There seems to be no objection to the law on this ground, however. It has effect and the same effect throughout the United States, and that has been declared to be the true test of uniformity (*Knowlton* v. *Moore*, 178 U. S. 41)."

"Is the Federal Corporation Tax Constitutional?" By Charles W. Pierson. *Outlook*, v. 92, p. 639 (Nov. 20).

Mr. Pierson takes the ground that this tax is imposed on the privilege of doing business

and is unconstitutional because the federal government has no power to tax franchises granted by the states.

"The language of the act, as well as the declarations of its sponsors, clearly indicate that it is intended not as a direct tax on property but as an excise tax on privilege." It is "a tax upon the privilege of doing business in a corporate capacity. . . . It is familiar law, re-iterated over and over again by the Supreme Court, that Congress cannot tax the means or instrumentalities employed by the states in exercising their powers and functions. . . . The right to grant corporate charters for ordinary business purposes is an attribute of sovereignty belonging to the states, not to the general government."

"The New Federal Corporation Tax." By Clare E. More. *National Corporation Reporter*, v. 39, p. 399 (Nov. 11).

"The act does not provide for a uniform tax upon each class of subjects, but does provide for a tax upon one class of subjects. It is not a tax upon the occupation, because it excludes those corporations which do not have an income of $5,000 or more. This also adds to the fact that it is a direct tax upon the property of the corporation, for the reason that it exempts from taxation a certain amount of that property.

"While we are not yet prepared to say that the law is unconstitutional, still our inclination is that there is sufficient doubt as to the constitutionality of the law that every step taken by members of this association towards compliance with the law should be taken under protest."

"Inheritance, Income and Corporation Taxes—United States." By Robert Argyll Campbell. *American Political Science Review*, v. 3, p. 577 (Nov.).

"The situation is not altogether deplorable. The inheritance tax in the form introduced should have been voted down. The inheritance tax belongs to the states and has no place in the financial system of the nation. The income tax bill, while the best that has been introduced in America, is still defective, and more study and thought must be given to its administration. If the constitutional amendment passes the way will be clear to introduce an income tax modeled after those of foreign countries. In the meantime, the administration of the corporation tax will throw light on the difficulties of administering the income tax. It is true, the corporation tax will be shifted in whole or in part, depending largely on whether the business is subject to competition or is a monopoly. It will, however, expose some of the evils of corporate management and in the end may give way to a just and well-administered income tax."

"England's Epoch-Making Budget." By Justin McGrath. *Cosmopolitan*, v. 48, p. 43 (Dec.).

"It must be clear that the predatory and other kinds of wealth do not receive very much consideration at Mr. Lloyd George's hands. Clearly, his idea is to tax wealth rather than indigence."

See Interstate Commerce.

Universities. "In Heidelberg." By George A. Katzenberger. *Phi Delta Phi Brief*, v. 9, p. 113 (Nov.).

"It is not my opinion that the courses offered are of much practical value to an American law student unless he has had a thorough education in a university, stays abroad long enough to master the language and complete the course, covering four years, and intends to prepare himself as a lecturer on those subjects; and even then, under the present conditions, the wisdom of his choice is questionable."

"The Law of the Universities; IX, Miscellaneous." By James Williams, D.C.L., LL.D. 35 *Law Magazine and Review* 25 (Nov.).

Dealing with (*a*) Practice and Evidence' (*b*) Differences between Oxford and Cambridge, (*c*) Acts of Parliament Affecting colleges, and (*d*) The Undergraduate.

Vice-President of the United States. See Government.

Wills and Administration. "The Post-Mortem Administration of Wealth." By Daniel S. Remsen. 19 *Yale Law Journal* 36 (Nov.).

"Whatever we may think or say concerning executors and trustees the fact remains that administration of property after death depends primarily upon the testator. He may direct it into any channel, giving or withholding such directions, powers and discretions as seem to him best. As he has the power he must accept the responsibility. If he plans his will wisely, makes sure that it will stand the strictest scrutiny after death, and selects his executors and trustee carefully, requiring bonds where desirable, he may reasonably expect satisfactory results, but not otherwise."

"Form of Will of an Alien in France." By Oliver E. Bodington. 35 *Law Magazine and Review* 34 (Nov.).

Commending the decision of the Court of Cassation in *Gesling* v. *Vidits*, holding that it is optional for a testator to adopt the form of will recognized by his own country.

Miscellaneous Articles of Interest to the Legal Profession

Army. "The 'National Guard'—A Hint from the United States." By Lieut.-Col. Alsager Pollock. *Nineteenth Century*, v. 66, p. 910 (Nov.).

"There are but two ways of filling the ranks of an army with suitable raw material—the one by compelling good men to enlist, and the

other by making it worth their while. In the United States the iron hand of compulsion is normally encased in the velvet glove of voluntary service."

Biography. *Fielding.* "Henry Fielding: Some Unpublished Letters and Records." By G. M. Godden. *Fortnightly Review*, v. 86, p. 821 (Nov.).

"Prison reform, poor-law reform, reform of the scandal of public executions, solutions for the problems of unemployment, of the housing of the poor, and of vagrancy, are but a few of the matters dealt with in pamphlets weighty with the learning of an accomplished lawyer, and written by the pen that wrote "Tom Jones."

Hobbes. "Thomas Hobbes." *Contemporary Review*, v. 96, Literary Supplement, p. 19 (Nov.).

"Had Hobbes lived a century and a half later he would probably have been a profound and enthusiastic idealist. That mighty 'working head' would have worked backwards from his definitions instead of forward, would have gone to the root of the things and surpassed the analysis of Kant. But his age compelled him to take the line he did, a line that was primarily intended to clear the world of cant, of self-deception, of decadent scholasticism. He had to stand on his definitions or give up the struggle."

Sorel. "A French Defense of Violence." By Ernest Dimnet. *Forum*, v. 42, p. 413 (Nov.).

"The French Socialists are nearly all of them *bourgeois* — sometimes uncommonly wealthy—who, for purposes of their own, deceive and befool both the *prolétaires* and the richer classes. . . . None of them plays that part better than Jaurés, and none is in consequence more objectionable to M. Sorel. . . . The reintroduction of morals into the metaphysics of labor is a wonderful change for the better."

Vattel. "The Great Jurists of the World; XI, Emerich de Vattel." By J. E. G. de Montmorency. *Journal of Comparative Legislation*, v. 10, pt. 1, no. 21, N. S., p. 17 (Oct.).

"Certainly it appears to me that Wolff was by far the greater thinker of the two, and no doubt Vattel himself would have admitted this. But, on the other hand, Vattel was a practical man, and he brought Wolff's doctrines, with certain modifications, into the domain of practical life."

Commerce. "American Business Conditions." Being v. 34, no. 3, of the *Annals of the American Academy of Political and Social Science* (Nov.).

This interesting number contains the following articles, each by an expert in his own field:—

"The Securities Market as an Index of Business Conditions," by Thomas Gibson; "Present Condition of International Trade," by John J. Macfarlane; "Conditions in Stove Manufacturing," by William J. Myers; "The Stove Trade," by James W. Van Cleave; "Difficulties and Needs of the Paper and Pulp Industry," by Arthur C. Hastings; "Prospects of the Meat Packing Industry," by Michael Ryan; "Revival of the Trade in Woolens," by William Whitman; "The Prosperity of the Brewing Industry," by Hugh F. Fox; "The American Iron Trade of 1909 and the Outlook," by A. I. Findley; "The Outlook for Paint Manufacture," by G. B. Heckel; "Trade Revival in the Lumber Industry," by John E. Williams; "South America—Our Manufacturers' Greatest Opportunity," by Hon. John Barrett; "The Yellow Pine Situation," by C. D. Johnson; "Hosiery Manufacture in the United States," by C. B. Carter; "The Market for Locomotives," by Alba B. Johnson; "Automobile Sales and the Panic," by David M. Parry; "Government Assistance to Export Trade," by C. S. Donaldson; "The Return of Prosperity," by Hon. O. P. Austin; "Present American Business Conditions in the Distilling Industry," by Morris F. Westheimer; "Recent Developments in the Life Insurance Business," by L. G. Fouse; "The Recovery from the Depression," by John Moody; and "The Present Supply of Freight Cars," by Arthur Hale.

Conservation of Natural Resources. "What Conservation Means to the Nation's Progress and Prosperity." By Day Allen Willey (after interviews with Senator Francis G. Newlands). *Putnam's*, v. 7, p. 259 (Dec.).

"If by uniting the powers of the states and the powers of communities and the powers of individuals with the powers of the national government, we can diminish the cost to that government and make feasible projects which would otherwise be so costly as to be impracticable, shall we hesitate to enlist that cooperation? Good business judgment requires it."

"Mr. Ballinger and the National Grab-Bag." By John L. Mathews. *Hampton's*, v. 23, p. 825 (Dec.).

"His talents as a lawyer have ever been employed by corporations or individuals who believe that the treasures of the public domain should become their property. . . . His point of view may be old-fashioned, but it is not likely that he can be proved guilty of corrupt acts."

"The A B C of Conservation." By Gifford Pinchot. *Outlook*, v. 93, p. 770 (Dec. 4).

"It is just as essential for the public welfare that the people should retain and exercise control of water power monopoly on navigable as on non-navigable streams. If the difficulties are greater, then the danger that the water powers may pass out of the people's hands on the lower navigable parts of the streams is greater."

Germany. "The New Germany—an Object-

Lesson." By Rudolf Cronan. *McClure's*, v. 34, p. 183 (Dec.).

"The policy of conservation that made German forestry such a success is applied also to agriculture. . . . Deserted farms, which as a result of soil exhaustion can be found all over the eastern half of the United States, are absolutely unknown in Germany."

Fiction. "The Unjust Judge." By John Luther Long. *Success*, v. 12, p. 777 (Dec.).

The first installment of a readable story in two parts, dealing with a criminal trial.

History. "The Story of the Santa Fé Trail." By Charles M. Harvey. *Atlantic*, v. 104, p. 774 (Dec.).

"In the later sixties and early seventies from five to eight million dollars in merchandise passed over the trail annually, for New Mexico and California."

Manchuria. "Manchuria, Desired of Nations." By George Marvin. *Outlook*, v. 93, p. 671 (Nov. 27).

"After all the treaties and the notes and the lapse of years, the definition of the 'open door' does not seem identical in all languages."

This article, however, does not pretend to discuss the political situation, but merely describes the country.

Mexico. "Barbarous Mexico—III, With the Contract Slaves of the Valle Nacional." *American Magazine*, v. 69, p. 250 (Dec.).

"The towns in the valley provide policemen to hunt runaway slaves, not one of whom can get out of the valley without passing through them. Every runaway slave brings a reward of $10 to the man or policeman who catches and returns him to his owner."

Opium Traffic. "The American Opium Peril: Growing Use in this Country of a Drug That Elsewhere has Slain its Millions." By Hugh C. Weir. *Putnam's*, v. 7, p. 329 (Dec.).

"Opium is not a foe to be conquered by halfway measures. Either its illegal use must be checked entirely or not at all. We have prohibited it absolutely in our Philippine territory. We must also prohibit it in our American territory."

Railways. "Highways of Progress; II, From Minnesota to the Sea." By James J. Hill. *World's Work*, v. 19, p. 12339 (Dec.).

"The embodiment in practice of the principle that railroading is a business enterprise and not a speculation; that its chief interest is in the field, the factory and the mine rather than upon the stock exchange; that the intelligent and just system of profit-sharing beteeen carrier and shipper embodied in reasonable rates will best promote the prosperity of both and enlarge the common heritage, is not the least of the contributions made by the Northwest to the development of the nation and the world within the last fifty years."

South America. "The Individuality of the South-American Republics." By Rev. Francis E. Clark, D.D., LL.D. *North American Review*, v. 190, p. 785 (Dec.).

"They are as distinctive in their national characteristics, their aspirations, their hopes and their patriotism as the countries of Europe that lie side by side and occupy a much smaller territory than South America."

Sugar Trust. "Spreckels and the Philadelphia Sugar Trust Fight." By Judson C. Welliver. *Hampton's*, v. 23, p. 755 (Dec.).

"The first case which the Supreme Court of the United States decided under the Sherman law was the case of *United States* v. *E. C. Knight Company et al.* . . . The effect of that victory was to convince the country that the anti-trust act was worthless."

"The Rebate Conspiracy." By Charles P. Norcross. *Cosmopolitan*, v. 48, p. 65 (Dec.).

"The game [of getting unlawful rebates] was worked from so many angles that it became a perfect maze. It must have run into hundreds of thousands of dollars a year."

Taft's Administration. "Eight Months of President Taft." By Sydney Brooks. *Fortnightly Review*, v. 86, p. 903 (Nov.).

"He found ready to hand the atmosphere and the state of mind most propitious for the kind of constructive work in which he excels. He has, moreover, a reflective, probing, disentangling mind; he is strong, cautious, and serene; his mountainous geniality makes innumerable friends and no enemies; he is almost startlingly unprovocative; his gift of lubricating sagacity is precisely the gift most likely to ensure harmony between the White House and Congress; and he is thoroughly experienced in the work of administration. . . .

"But there is no essential difference in the aims and spirit of the two men [Roosevelt and Taft]; the difference is one of manner and training merely; and if Wall Street is misled by Mr. Taft's moderation of speech and bearing into the belief that the days of McKinley and Hanna are about to re-visit the land, Wall Street will find itself prodigiously mistaken. Mr. Taft will talk less and in milder tones than Mr. Roosevelt, but he is likely to accomplish more, if by accomplishment is meant the translation of policies into laws."

Reviews of Books

SIR HENRY MAINE ON POPULAR GOVERNMENT

Popular Government. Four essays: The Prospects of Popular Government, The Nature of Democracy, The Age of Progress, The Constitution of the United States. By Sir Henry Maine. Popular ed. John Murray, London. Pp. 254 + index 17. (2*s.* 6*d. net.*)

THESE four essays, though published a generation ago in the *Quarterly Review* in their original form, and issued as a book in 1885, are not the best known and most read in the United States of Sir Henry Maine's productions. The publisher has now issued the first popular edition, and as time goes on the American demand for a work which must always possess interest for thoughtful readers will doubtless increase. On account of its broad generalizations based on a wide survey of historical facts, its timeliness is quite as great now as in 1885; some observations, such as those regarding the British Constitution, are in fact even more significant with reference to current events than to conditions of yesterday.

The writings of Sir Henry Maine have taken their place with the world's great literature, so it is idle to praise their analytical acumen, rich learning, and striking literary beauty, and equally needless to dwell upon the desultory and inexact method sometimes pursued. It is proper, however, to discuss the substance of his main contentions within the restricted space available.

"Popular government," the term which he adopts after some deliberation as best suited to his ends, is somewhat vague in its application. Sir Henry Maine himself perceives that there are many forms of government by the many. He evidently does not consider, however, the diversity of form so great as to weaken the opportunity for formulating generalizations applicable to all government by the many. But the Many and *hoi polloi*, as the words are currently used, are not exactly synonymous. Popular government doubtless includes government by the mob, but does include something more. Monarchy and oligarchy have both passed away in most western countries. Monarchical and aristocratic forms still largely survive, but in some countries nominally governed by a king, the people are intrusted with large powers of legislation, and even, to a large extent, with that to alter the Constitution itself. Moreover, where the people do not in fact govern, the power to govern is often in western civilization conferred upon them both by the law and by the sanctions of public opinion. Consequently popular government is not to be treated as an abnormal phenomenon.

On the contrary, there is a species of popular government which, by carrying out policies springing from partisan exploitation of the class interests of the proletariat, is bound sooner or later to disrupt the natural organization of society, and may result in conditions such as those to be seen in the French Revolution, and in the political vicissitudes of some of the less stable governments of Latin America and Latin Europe. Toward this extreme democracy it may seem that the more conservative countries, under the stress of Radical propagandism, are trending, but such an impression is largely if not wholly superficial. While Radicalism is often rampant it is but seldom, and then usually only temporarily, triumphant. Moreover, it is utterly inconceivable that countries like Great Britain and the United States should ever come to be, once for all, popular governments in the sense of being governed by the mob. It is thus evident that government by the Many presents two distinct varieties: one in which the balance of power is in the hands of a minority too large and too popularly constituted to answer to the name of an aristocracy, or of a conservative majority which upholds the moral interests common to society rather than those of a special class; the other, in which the balance of power has passed to a radical majority not sensitive to broad ethical considerations, and bent on wiping out every inequality of political and social, and sometimes even of economic status. The former answers to the description, probably, of what is meant in our Constitution by the words "a republican form of government"; the latter is Radical Democracy—a thing, fortunately, which exists rather in the oratory of demagogues and imagination of socialists than, to any considerable extent, with any substantial permanence, in the actual world.

It is of Radical Democracy that Sir Henry Maine is writing when he says (p. 35): "*Secu-*

rus judicat orbis terrarum were the words which rang in the ears of Newman and produced such marvelous effects on him. But did any one in his senses ever suppose that these were maxims of progress?" The motto in no way signifies *securus judicat vulgus*. Otherwise what would become of the sanctions of social opinion which give effect, not only to the authority of governments, but to private law and to international law as well?

That the confusion entailed by the use of a vague term leads to some fallacious assumptions may be readily surmised. One of these is the fallacy of the Wire-puller. In a wide democracy, argues the author in the first essay, political power is subdivided into such small morsels that men are not content and desire more than their share. Thus arises the Wire-puller. His function is to collect and utilize the rejected fragments. He would be powerless to achieve anything were it not for party feeling, which does not rest upon intellectual conviction but is a matter of primitive instinct. Intellectual, moral or historical differences go such a little way down into the population that the Wire-puller seeks only to appeal to the electors with ideas likely to win favor with the greatest number. Thus extensions of the suffrage are a favorite weapon of the Wire-puller.

Such observations may be applicable to an imaginary society illustrative of Hobbes' dictum, which Sir Henry Maine adopts, that liberty is power cut into fragments, and to some real societies which by the employment of violent and suicidal measures try to realize the Utopia of an absolute equality founded on liberty. But they are only partly applicable to a sound republicanism. Society perceives the futility of attempting to divest individuals of every vestige of power conferred upon them by their natural capacity for leadership or by their economic or intellectual supremacy. Society loves, in fact, a certain amount of inequality. Equalization, howsoever it may progress under a *régime* of free institutions, cannot advance beyond the barriers of human nature itself. Absolute political equality is a chimera because it would necessitate the abolition of all disparity between habits, between opinions, between the moral virtues which often underlie natural leadership and political influence, and between powers of intellectual and oral persuasion. The consequence is that in a naturally constituted democracy political power is not subdivided into infinitesimal fragments. Liberty not only tolerates a certain amount of privilege, if it may be so called, but positively demands it in order to protect itself from decay. Therefore the Wire-puller has little room for his operations. His place has been largely preempted by others whose power is exercised not solely for selfish purposes.

Another misconception is shown in the author's argument in the third essay, that because the greater portion of the human race has shown an extreme tenacity of its social and political institutions, popular government, with its restless craving for endless change, is abnormal, and is proved by human experience to be doomed to a brief existence. He falls into this error through his failure to distinguish between the stable and the unstable varieties of popular government.

The volume contains an account of the government of the United States, full of pregnant and by no means unfavorable comment and worthy of the study of those who would understand the American Constitution. Sir Henry Maine considers, evidently, that our government is not a popular government in his own sense of the term, owing to the fixity of our Constitution and to the functions of the Supreme Court and national Senate. His conclusion, however, that the President of the United States is likely usually to be a mediocrity (p. 248), is as unsound in theory as in fact.

The book, however, is itself a solemn warning against the dangers of a too wide democracy, which may block the wheels of progress and create greater social injustices than it can possibly remove. These essays have a good lesson for Americans, and should cause us to be on our guard against injurious influences of speculation or passion that may tempt the country to remove those checks on the supremacy of the proletariat which were wisely provided in our federal Constitution. They should always lead us to give pause and consider carefully all reforms which are put forward in the name of Democracy, to make sure that they truly answer to the requirements of a sound and progressive Popular Government. They should also stimulate us to seek an ideal Popular Government in a higher sense of the term than that used by Sir Henry Maine,—one in which all class interests are subordinated to those of the entire community, and the discipline of the state is exercised over the great and the humble, the rich and the poor, the capitalist and laborer, in like degree for the good of all.

GENERAL DRAPER'S AUTOBIOGRAPHY

Recollections of a Varied Career. By William F. Draper. Little, Brown & Co., Boston. Pp. 399 + index. With nine illustrations. ($3.00 *net.*)

THE Drapers of Hopedale are one of the families in which Massachusetts takes proper pride, in view of many substantial qualities and useful public services. The great manufactory of textile machinery which has been built up in the model Massachusetts town testifies to the sagacity and thrift of several generations, and the family has furnished many men of strong and upright character readily responsive to the call of public duty, among them the present Governor of Massachusetts, who is the younger brother of the author of this notable autobiography.

The Drapers have had an unusual history, as every one in the direct line for three centuries back, in New England, has been directly connected with the manufacture of cloth. Several of General Draper's ancestors were also officers in the Colonial and Revolutionary wars. The paternal side of the family may be said to have had for its symbols the loom and the sword. These hereditary influences were mingled on the maternal side with those of a line of forbears who were chiefly farmers and soldiers. The Draper ancestry thus offers a typical example of energetic New England stock. Such antecedents explain in some measure General Draper's chief characteristics, his industry, practical wisdom, courage and love of simplicity.

One of his grandfathers, Ira Draper, was an inventor of cotton machinery who never succeeded in turning his inventions to pecuniary profit. The other, Benjamin Thwing, was a school-teacher noted in his profession. The inventive genius of Ira Draper was transmitted to the second and third generation, but the grandson fortunately inherited from his father a strong business faculty which enabled him to become more successful in placing his inventions upon the market than either the father or the grandfather, and the result was that by means of close economy in early life, by intense application to business, and by twenty years of concentrated effort he was able to amass a large fortune. This was acquired mainly as a recompense for his own exertions, and as his father, though he later became well-to-do according to the standards of an earlier time, was not in a position to assist him materially, General Draper might in a sense perhaps be called a self-made man. Besides inheriting his father's business ability, he also shared his self-assertive individuality and active interest in public questions. It was but natural, therefore, that the son should distinguish himself not only in business but in public service, that he should fight honorably as an officer on the Union side in the Civil War, should be sent to Congress for two terms, and should be selected by President McKinley for Ambassador to Italy, besides holding such offices as that of president of the Home Market Club, which has always actively led the protectionist movement in New England.

General Draper was always a strong protectionist. He refers somewhat humorously to his father having been thrown out of employment in 1839, owing to the depression in manufacturing caused by the reduction in the tariff, when, after looking vainly for work, he finally had to accept a position as an operative at Lowell at five dollars a week. This experience convinced the elder Draper of the advantage of a protective tariff and he never forgot it. The son found the business of the Hopedale mills much affected by the tariff discussions and the reductions involved in the Wilson bill. The number of employees went down from twelve hundred employed at full time in 1892 to a little more than three hundred at three-quarters time in 1894, and wages had to be reduced. According to his protectionist theories, Republican success in 1896 was to result in a great stimulus to the business, and this proved to be the case, for in 1897 the force had to be increased to seven hundred, and during the next two or three years it had gradually swelled to eighteen hundred. It then became evident that radical enlargement must be made, and in the course of a forty days' leave of absence from diplomatic service, plans for more than doubling the plant were developed with the result that in short time three thousand operatives were at work. As a policy of rapid expansion was under discussion, General Draper then felt obliged to resign his Ambassadorship in order to retain his leadership of the business. His description of the vicissitudes of the great establishment and of details of the industry is most interesting. It affords a striking example of the practical operation of a high protective tariff.

General Draper's reminiscences give an interesting portrayal of business and social

conditions in New England in so far as his life was directly concerned with them, and he devotes many pages to the discussion of the business aspects of important legislation. His residence and frequent visits abroad, his life at Washington, where he maintains a winter home, his family connections, his second wife being the daughter of General Preston, an eminent Kentuckian, and the marked social attentions which have been paid to him as the natural incidents of a distinguished career, lend to the account a broader and more human scope. It is a fascinating story of the life-work of an inventor, man of affairs and publicist.

A PRACTICAL BOOK ON PENOLOGY

The Crime Problem; What to Do About It, How to Do it. By Col. Vincent Myron Masten. Star-Gazette Co., Elmira, N. Y. Pp. 156. ($1.50.)

THE author, who, is military instructor in the New York State Reformatory at Elmira, and has spent the greater part of his life in working with criminals, writes this book as a protest against three evils from which the American penal system suffers and with respect to which much is to be learned from the British system. He protests against the promiscuous herding of criminals and their subjection to a uniform treatment, against a too indulgent attitude on the part of society toward the criminal, and against the practice of imposing sentence for a definite period of imprisonment. The book is thus an argument for a more enlightened and progressive penal system, the chief features of which would be special institutions for different classes of criminals, the careful grading of criminals, and the indeterminate sentence.

Colonel Masten gives a good description of the English prison system, and in showing that some of its characteristics might well be imitated, he is performing a service which should be highly appreciated by the legal profession and by all interested in social problems. His recommendations with regard to prison reform are good, and deserve study. He has much to say, also, about improving the administration of prisons by equipping them with better trained officials. Incidentally he speaks a good word for children's parole courts, which his system of graded punishment in fact presupposes.

The author considers immigration largely responsible for the evils of crime in this country. Readers will not entirely agree with this conclusion, nor with all of his recommendations with regard to the further restriction of immigration and the placing of aliens on probation for several years before granting them naturalization, with the possibility of the transportation of those discovered to be undesirable newcomers. But some of these suggestions stimulate thought, and they do not invalidate the substantial soundness of the writer's plan for penal reform.

The book evinces keen sympathy for an insight into the lives of criminals and expresses a humane spirit, while at once it rebels against the sentimentality which has foisted upon the American people in many parts of the country a crime-breeding system of institutions which are far from having a deterrent or reformatory effect upon the vicious impulses of their inmates. "We know of no British writer of standing," he says, "who will assert of the British system that it is crime-breeding," but "plenty of our best informed sociologists and penologists so hold as to our prison system."

Colonel Masten's book is based upon practical experience rather than upon scientific theory. His ideas on prison discipline are admirable. The principles which should control the grading and classification of criminals are not outlined. However, it is probable that grading by an empirical method, by temporary confinement of all criminals, after sentence, in institutions where they can be kept under careful observation, would yield results quite as satisfactory, if not more so, and as morally just, as the application of definite scientific principles, whether or not embodied in legislation. Hence readers should not be repelled by the fact that the writer's system is not built upon a scientific foundation.

If the literary form and typography of the book cannot be heartily praised, the substance of its ideas is, as we have said, excellent, and it is a book which deserves a wide circulation.

HUDDY'S AUTOMOBILE LAW

The Law of Automobiles. By Xenophon P. Huddy of the New York bar. 2d ed. Matthew Bender & Co., Albany. Pp. xxvi, 317+ table of cases and index 43. ($4.)

THE law of automobiles is developing rapidly and is moving steadily towards that stage of development at which it will

lend itself readily to codification in the interest of uniformity. The second edition of Mr. Huddy's work on the subject illustrates the Swift growth of the law since 1906, when the first edition appeared. Since then many questions have been settled. Mr. Huddy's work treats of every phase of the law, such as the nature and status of the automobile, the right to use highways, registration and licenses, rights, duties and liabilities of drivers, duties of pedestrians, evidence and proof of speed, and the like. The volume contains a good deal of discussion on taxicabs, defenses in speed cases, the liabilities of guests, interstate contracts, speed traps, and so on.

AN ATTACK ON THE ACCEPTED NOTION OF FREE SPEECH

Free Press Anthology. Compiled by Theodore Schroeder. Truth Seeker Publishing Co., New York. Pp. viii. 266. ($2.)

IT is evident from a first glance that this book has been compiled largely for the purpose of offering a protest against restraints on the free discussion of sexual subjects. Extracts from the compiler's writings on this particular topic are included, and apart from the pages dealing with what Mr. Schroeder considers the unconstitutional censorship of obscenity, sex-discussion and sex literature, there is nothing, unless we except a chapter on freedom of speech for anarchists. to furnish any *raison d'etre* for such a heterogeneous collection as has here been brought together.

It is therefore with surprise that one finds inside the title page the following motto, quoted from Westermarck: "The concealment of truth is the only indecorum known to science." Such a quotation is grotesque in its irrelevancy. Had Mr. Schroeder read Westermarck more sympathetically, he might have discovered a sound ethical explanation of the reserve which marks modern society's treatment of certain matters.

Obviously the existence of such a volume as this is to be explained only by those qualities of temperament which array some men in irreconcilable conflict with social convention. They are blind to the fact that the dividing line between morality and convention is indistinctly defined, and they cannot free themselves from the delusion that on questions which merely involve good taste every man is entitled to express opinions of his own.

This "anthology" contains some extracts from great writers worthy of inclusion in a volume devoted to the literature of free speech, but there is much that should not have been included and which looks absurdly out of place beside the classic utterances of Milton, Spinoza, Locke, and Voltaire. The symmetry of what might otherwise have been a well-balanced collection is hopelessly destroyed by an eccentric scheme of selection, and we cannot recommend the volume as deserving our readers' attention, or as worthy of the great principle which it purports, and utterly fails, clearly to set forth.

NIMS ON THE LAW OF UNFAIR BUSINESS COMPETITION

The Law of Unfair Business Competition, including chapters on trade secrets and confidential business relations; unfair interference with contracts; libel and slander of articles of merchandise, trade names, and business credit and reputation. By Harry D. Nims of the New York bar. Baker, Voorhis & Co., New York. Pp. xlvi, 516, index and table of cases 65. ($6.50 *net*.)

THE first book which has ever been prepared on the law of unfair business competition is now offered to the general practitioner and student of legal principles. Topics that have usually been scattered through different works, such as "Trade-Marks and Unfair Competition," "Corporations," "Libel and Slander," "Literary Property," "Injunctions" and "Trade Secrets," are here collected in a unified treatise. Mr. Nims shows a firm grasp of the legal principles involved. He presents the subject in an orderly and logical form, and has in fact made a somewhat important contribution to the organization of the prevailing doctrines into a systematic whole. He threshes out every branch of the subject with care and accuracy, and his citation of cases is adequate.

The law of unfair trade has developed rapidly during the past few years and is now a very important branch of commercial law. Courts of equity have greatly extended the scope of the relief granted for anything in the nature of fraudulent imitation of the articles of another, and the field which Mr. Nims has ably covered is one of complexity and wide extent. The book is marked by discernment as well as by completeness, and the results achieved are distinctly praiseworthy.

MACOMBER'S FIXED LAW OF PATENTS

"The Fixed Law of Patents, as Established by the Supreme Court of the United States and the Nine Circuit Courts of Appeals." By William Macomber. Little, Brown & Co., Boston. Pp. cxxxix, 907 + index 17. ($7.50 *net.*)

AN encyclopedic digest of the law of patents, dealt with in a systematic, clear and comprehensive manner, is the more valuable in this case because the law is stated wherever possible by direct quotation of the language of the courts. Mr. Macomber prepared this work primarily for his own use because he did not consider reports and digests adequate, and because he preferred the law in its own language to inadequate *syllabi* and digests. He therefore resorted to the method of quotation. He has confined the treatise strictly to the settled law, and when the question is not settled he does not discuss it or include any rule stated on the authority purely of a court of original jurisdiction. This work will therefore have some permanent value, because it does not deal with the sort of law which can be overruled at any time by courts of last resort, and patent lawyers will doubtless appreciate the utility of a treatise designed upon this plan. The book, however, is written first of all for the general practitioner, and it treats with fullness such subjects as "Licenses," "Contracts," and "Employer and Employee." The typographical arrangement is clear and attractive.

FROST ON NEW YORK BUSINESS CORPORATIONS

A Treatise on the Business Corporation Law of the State of New York. By Thomas Gold Frost, LL.D., PhD., of the New York City Bar. Matthew Bender & Co., Albany. Pp. xviii, 796 + forms and precedents 272 + index 29. ($6.30 delivered.)

A WORK which abounds in useful information and which covers the entire subject in an effective manner is the new work of Thomas Gold Frost on New York Corporations. The volume is in three parts. The first consists of between four and five hundred closely printed pages of text treating of the law of corporations upon a plan devised with reference to the new consolidated laws. Mr. Frost is the author of "Incorporation and Organization of Corporations" and "Guarantee Insurance," and has been an active practitioner at the New York City bar for many years. Having had much experience in corporation practice he is well equipped to write a comprehensive and practical as well as authoritative text-book.

The second part comprises the rather bulky text of the statutes which go to make up the New York corporation law, and the third part contains a complete set of forms and precedents, which are collected upon an elaborate plan and are most practical. The carefully prepared index adds to the value of an important work.

MORINE'S MINING LAW OF CANADA

The Mining Law of Canada. By Alfred B. Morine, K. C., LL.B., of the Bar of Nova Scotia, Newfoundland and Ontario. Canada Law Book Co., Toronto; Cromarty Law Book Co., Philadelphia Pp. xxxvii, 349, + statutes 314 + glossary and index 37. ($7.50.)

THE mining law of Canada has been somewhat changed of late years by the adoption of amendment of statutes and by new decisions, and Mr. Morine, in making the first attempt in ten years to set forth the common and statute mining law of Canada, is able to present much new material, as he attempts to bring the law of all the provinces down to date, and his treatise is marked by voluminous notes and care in collecting new material. The statutes of the Dominion and the provinces relating to mining are set forth in an appendix, and the author in the text digests these statutes. The book is written with the idea of being of some use to the general practitioner. There is an unusually complete index.

BRIEF-MAKING AND THE USE OF AUTHORITIES

Brief-Making and the Use of Law Books. By William M. Lile, Henry S. Redfield, Eugene Wambaugh, Edson R. Sunderland, Alfred F. Mason and Roger W. Cooley. Edited by Roger W. Cooley. 2d ed. West Publishing Co., St. Paul, Minn. Pp. xii, 302 + appendices (2) 255 and index 14. ($2.50.)

THIS work is designed not merely for law students, as the title might suggest. Many lawyers are lacking in experience in brief-making and in the use of important tools of their profession. The average law graduate is ignorant of brief-making. A work like this, therefore, will be found to contain some helpful suggestions with regard to "Where to Find the Law," "How to Use Decisions and Statutes," "How to Find the Law," "The Trial Brief," and "The Brief on

Appeal." These topics are separately developed and there are two bulky appendices, one of which contains definitions of 412 main heads of the law, and the other an exhaustive list of abbreviations of law publications. The present edition differs from the first in that much new material has been added and the discussions of "How to Find the Law" and "Where to Find the Law" have been rewritten. The new edition is edited by Roger W. Cooley, who is a special lecturer on Legal Bibliography in the Law Schools of the University of Michigan, the University of Chicago, the University of Wisconsin, the University of Virginia, the George Washington University, Cornell University, and some twenty other well-known law schools.

SELECTED NEW YORK STATUTES

Selected Statutes of the State of New York. As amended to close of legislative session of 1909, comprising the following consolidated laws: Decedent Estate Law, Domestic Relations Law, Lien Law, Negotiable Instruments Law, Personal Property Law, Real Property Law. 6th ed. Matthew Bender & Company, Albany, N. Y. Pp. v, 457. ($2 *net*.)

THIS work is a compilation of general laws of New York State recently consolidated, containing those which may be considered of frequent use and authoritative importance. The statutes are annotated to show the source or derivation of each section, and the consolidators' notes are the result of extensive research. A separate index has been made for each of the laws, and the book is particularly useful as rendering more accessible the laws in question, in the form of a reprint containing the consolidators' notes and tables and other practical features.

NOTES

Not lawyers alone, but all to whom legal processes are of importance, will welcome a new book by the author of "The Art of Cross-Examination." In his new work, "The Day in Court; or, The Modern Jury Lawyer," Mr. Francis L. Wellman describes and analyze those legal processes which are more or less a mystery to the average layman.

The eighth edition of the Phi Delta Phi Directory, edited by George A. Katzenberger of Greenville, O., contains a history of the fraternity and much information with regard to the geographical distribution of its nine thousand members, giving the chapter, year of graduation, and address of each member. The book contains portraits of several hundred prominent men of the fraternity, including many lawyers and judges of national prominence.

The volume containing the Proceedings of the thirty-second annual meeting of the New York State Bar Association, held at Buffalo one year ago, should be of wide interest to members of the bar not only because of the important papers which the printed volume contains, but particularly on account of the notable discussion such topics as those of the reform of procedure, professional ethics, and medical expert testimony brought forth. As this meeting received extended notice in the February, 1909, number of the *Green Bag*, it is unnecessary to give the titles of the most important papers read, dealing with such subjects as federal control of state corporations, the reform of procedure, the consolidation of the New York laws, etc.

NEW BOOKS RECEIVED

RECEIPT of the following new books, which will be reviewed later, is acknowledged:—

Dorian Days. Poems. By Wendell Phillips Stafford, Justice of the Supreme Court of the District of Columbia. The Macmillan Co., New York. Pp. vi, 112. ($1.25 *net*.)

"Retrospections of an Active Life." By John Bigelow. Baker & Taylor Co., New York. V. 1, pp. xiv, 645; v. 2, pp. vii, 607; v. 3, pp. vii, 666 + index 16. ($12 *net* for the set.)

Latter-Day Problems. By J. Laurence Laughlin, Ph.D., Professor of Political Economy in the University of Chicago. Charles Scribner's Sons New York. Pp. xi, 298 + index 3. ($1.50 *net*.)

Readings in American Government and Politics. By Charles A. Beard, Ph.D., Adjunct Professor of Politics in Columbia University. The Macmillan Co., New York. Pp. xxiii, 620 + index 4. ($1.90 *net*.)

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*.)

The Development of the State: Its Governmental Organization and Its Activities. By James Quayle Dealey, Ph. D., Professor of Social and Political Science at Brown University. Silver, Burdett & Co., New York, Boston and Chicago. Pp. 326 + index 18. ($1.50.)

Letters to *The Times* upon War and Neutrality (1881–1909), with some commentary. By Thomas Erskine 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*.)

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*.)

Latest Important Cases

Admiralty. *Vessel Burned in a Dry Dock is Within Admiralty Jurisdiction of United States—Right to Recover for Salvage Services.* U. S.

In *Simmons* v. *Steamship Jefferson*, decided Nov. 29, the United States Supreme Court decided that claim for salvage may be within the admiralty jurisdiction where a vessel in drydock was rescued from perils of fire by a tug. (158 Fed. Rep. 255 reversed; reported in *N. Y. Law Jour.* Dec. 13.)

The Court, per White, J., said:—

"In the nature of things it is manifest, and indeed it is settled, that because of the broad scope of the admiralty jurisdiction in this country, the perils out of which a salvage service may arise are all of such perils as may encompass a vessel when upon waters which are within the admiralty jurisdiction of the United States, from which it follows, in view of the broad scope of the admiralty jurisdiction in this country, that the right to recover for salvage services is not limited to services concerning a peril occurring on the high seas or within the ebb and flow of the tide. And although in defining salvage the expression 'peril of the sea' has sometimes been used as equivalent to peril on the sea, it is settled that the distress or danger from which a vessel has been saved need not, in order to justify a recovery of salvage compensation, have arisen solely by reason of a peril of the sea in the strict legal acceptation of those words."

Automobiles. *New Jersey Licensing Statute Upheld—Power of State to Tax Those Carrying Interstate Goods Sustained.* N. J.

The Supreme Court of New Jersey, in a decision rendered Nov. 16 by Reed, J., upheld the constitutionality of the Frelinghuysen automobile law in the test case brought by the White Steamer Company.

One of the questions raised was that of the constitutionality of a law compelling the license of an auto carrying interstate goods. The Court held such licenses a legitimate exercise of the police power, and that even if their object was to impose a tax for revenue they would not be unconstitutional. The statute was upheld on all the points raised n the case, including that of the right of the state to license automobiles not according to true value but according to horse power, and that of the imposition of a double tax, as the first tax was levied by the assessors of taxes.

Banking. *Honest Taker Who Obtains Money Embezzled by Bank Teller Acquires Good Title, Though Teller Does not Receive Check on Bank's Funds from such Taker.* La.

A decision of somewhat astonishing character, which has called forth much adverse criticism, was rendered by the Supreme Court of Louisiana some time ago. In *First National Bank* v. *Gibert* (reported in 49 So. Rep. 593, discussed in *Chicago Legal News* Oct. 16, *Central Law Journal* Nov. 5, *Columbia Law Review* Dec., *Canada Law Journal Nov.* 15) it was held that when money transferred to an honest taker has been obtained through a felony by the one transferring it, the honest taker, who receives it without knowledge of the felony and in due course of business, acquires a good title to it as against the one from whom it was stolen. Bad faith will alone defeat the right of the taker. Mere ground of suspicion, or defect of title, or knowledge of circumstances which would create suspicion in the mind of a prudent man, or gross negligence on the part of the taker, will not defeat the title. Bad faith alone will defeat the right of the taker without knowledge. The test is honesty and good faith, not diligence.

Nicholls, J., delivered the judgment. "The bank," he said, "itself placed Chisholm in the position which enabled him to abstract the moneys and furnished him with the opportunity for doing so. Its own negligence was the direct cause of after consequences. Plaintiff lays great stress upon Chisholm's paying the margins which were needed for carrying out the cotton contract over the counter of the paying teller to Hayes, the cashier of the Birmingham branch of defendant's firm; but if Chisholm was acting, as he represented himself to be, as the agent of a depositor in the bank, there was every reason for Sims and Hayes to believe, if their attention had been drawn at all to that fact, that the paying teller had at that time in his possession a check of that depositor on the bank

for the amount of the margins called for, which justified the payment by him of the margins."

The *Central Law Journal* takes issue with this view of the case, and points out that the decision was based only on one authority, namely, that of *Merchants' Loan & Trust Co.* v. *Lawson*, 90 Ill. App. 18. To quote:—

"Does one who gets what he knows to be a bank's money without giving the teller what is usual to give therefor have reason to believe he is not getting it as he should get it? When a man of business, acquainted with all business usages, participates in such a transaction not once but repeatedly, and receives money in different sums month after month in this irregular manner until the taking amounts to nearly one hundred thousand dollars, and all the while the matter is secret between the giver and the taker of the money, the giver speculating in margins, through the taker, and losing as he goes, it beggars credulity to affirm he had no suspicion that the teller was using the bank's money for his own use and profit."

Defamation. *Libel Against a Non-Resident—Such a Crime May be Committed Through a Book as Well as a Newspaper—Publication.* N. Y.

In the Court of General Sessions of the Peace, Carlo DeFornaro, a newspaper writer and cartoonist, was found guilty in New York City early in November of the rare crime of libel committed against a non-resident, namely Rafael Espindola, a Mexican editor, and sentenced to one year at hard labor in the penitentiary. Application for a certificate of reasonable doubt was made to the Supreme Court. Seabury, J., in denying the application on Nov. 27, said:—

"The indictment brought against De Fornaro on April 2 is based on the sale of 24 copies of the book to Brentano. That the book contains the libel does not admit of doubt, nor does the evidence in justification do more than create an issue of fact, which the jury decided adversely to the defendant. The contention that the crime of libel against a non-resident relates exclusively to a libel published in a newspaper and not in a book s based on an erroneous conclusion. It should be borne in mind that the law punishes as libelous only the abuse of the right of the freedom of the press and in no respect places any restriction on the free exercise of the right. Our law not only safeguards the freedom of the press but our Constitution guarantees that in every prosecution for libel it makes the jury and not the judge the arbiter not only of the facts, but of the law.

"It is not necessary in order to constitute the crime of libel for a book to have been read by any person, if the defendant knowingly disposed of or parted with a copy under circumstances which exposed it for sale."

Due Faith and Credit Clause. *Deed Issued in One State Under a Decree of Divorce Need Not be Recognized in Another State.* U. S.

In a decision rendered by the Supreme Court of the United States Nov. 1, in the case of *Fall* v. *Eastin* (*Chicago Legal News*, Dec. 11), it was held that a deed to land situate in Nebraska, made by a commissioner under the decree of a court of the state of Washington in an action for divorce, need not be recognized in Nebraska under the due faith and credit clause of the Constitution of the United States. The Court (McKenna, J.) said:—

"However plausibly the contrary view may be sustained, we think that the doctrine that the court, not having jurisdiction of the *res*, cannot affect it by its decree, nor by a deed made by a master in accordance with the decree, is firmly established. The embarrassment which sometimes results from it has been obviated by legislation in many states. . . . But this legislation does not affect the doctrine which we have expressed, which rests, as we have said, on the well-recognized principle that, when the subject-matter of a suit in a court of equity is within another state or country, but the parties within the jurisdiction of the court, the suit may be maintained and remedies granted which may directly affect and operate upon the person of the defendant, and not upon the subject-matter, although the subject-matter is referred to in the decree, and the defendant is ordered to do or refrain from certain acts toward it, and it is thus ultimately but *indirectly* affected by the relief granted."

Employers' Liability. *Federal Act of* 1906 *Valid in District of Columbia and Territories.* U. S.

In *El Paso & Northeastern Ry. Co.* v. *Gutierrez*, decided by the Supreme Court of the United States Nov. 15, the federal Employers' Liability Act of 1906, which had

been held unconstitutional in the *Employers' Liability* cases, 207 U. S. 463, was held valid so far as it relates to common carriers engaged in business in the territories and in the District of Columbia. (Reported in 215 U. S. 87, 54 L. ed.——.) To quote from the opinion, which was delivered by Mr. Justice Day:—

"It is the duty of the court, where it can do so without doing violence to the terms of an act, to construe it so as to maintain its constitutionality; and, whenever an act of Congress contains unobjectionable provisions separable from those found to be unconstitutional, it is the duty of this court to so declare and to maintain the act in so far as it is valid. It was held in the *Employers' Liability* cases that in order to sustain the act it would be necessary to write into its provisions words which it did not contain.

"Coming to consider the statute in the light of the accepted rules of construction, we are of opinion that the provisions with reference to interstate commerce, which were declared unconstitutional for the reasons stated, are entirely separable from and in nowise dependent upon the provisions of the act regulating commerce within the District of Columbia and the Territories. . . . We reach the conclusion that in the aspect of the act now under consideration the Congress proceeded within its constitutional power, and with the intention to regulate the matter in the District and Territories irrespective of the interstate commerce feature of the act."

Insurance. *Attempted Modification of Original Contract by Amendment of Constitution or By-Laws of Association.—Mutual Benefit and Fraternal Insurance Societies.* N. Y.

In *Dowdall* v. *Catholic Mutual Benefit Association*, decided by the New York Court of Appeals Nov. 23 (*N. Y. Law Jour.* Dec. 4), it was held that provision in a certificate of life insurance issued by a mutual benefit association that it was issued upon the express condition that the insured should "in every particular while a member of said association comply with all the laws, rules and regulations thereof," will not justify a subsequent amendment by the association of its constitution binding upon the insured whereby single assessments are largely increased beyond the rate fixed by his contract of insurance. The Court said:—

"There is a conflict of judicial decisions in the various states on the point now presented, but a careful examinatoin of the cases shows that the great weight of authority is in favor of the position that the original contract cannot be impaired."

In *Wright* v. *Knights of Maccabees*, decided in the same Court on the same date (*N. Y. Law Jour.* Dec. 8), it was held:—

"Benefits cannot be reduced or new conditions forfeiting the benefits added by an amendment of the by-laws, even when the general right to amend is expressly reserved."

Monopolies. *"Standard Oil Decision"—Sherman Anti-Trust Act Construed—Power to Prevent Competition, Apart from Exercise of Such Power, can Bring Combination under Ban of the Law—Congress can Regulate All Instrumentalities Tending to Produce Restraint of Interstate Trade—Restraint of Trade Illegal only when Direct and Substantial—Power to Restrain Trade Directly Equivalent to Actual Restraint—Attempts to Monopolize Part of a Trade, Prohibited by Sherman Act, do not Include Such Attempts Made by Legitimate Means.* U. S.

The United States Circuit Court for the eastern district of Missouri (Sanborn, Van Devanter, Hook and Adams, J. J.) in *U. S.* v. *Standard Oil Co.*, decided Nov. 20, granted a decree for the petitioner, holding a combination such as that effected by single ownership of stock in the oil industry illegal under the provisions of the Sherman Act (reported 173 Fed. Rep. 177, also in *Chicago Legal News*, Nov. 27; *National Corp. Rep.* Dec. 2). The facts are familiar, and only the important parts of Judge Sanborn's opinion dealing with matters of substantive law are here quoted:

"Repeated discussion and consideration of the purpose and meaning of this act [the Sherman law] have established, by controlling authority, beyond debate in this tribunal, these pertinent rules for its interpretation and application to the facts of this case. The test of illegality of a contract or combination under this act is its direct and necessary effect upon competition in intertates or international commerce. If the necessary effect of a contract, combination or conspiracy is to stifle, or directly and substantially to restrict, free competition in commerce among the states or with foreign nations, it is a contract, combination or conpiracy in restraint of that trade and it violates this law. The parties to it are presumed to intend the inevitable result of their acts

and neither their actual intent nor the reasonableness of the restraint imposed may withdraw it from the denunciation of the statute. . . . The exchange of the stock or shares in the ownership of competitive corporations engaged in interstate or international commerce for stock or shares in the ownership of a single corporation, the necessary effect of which is a direct and substantial restriction of competition in that commerce, constitutes a combination in restraint of commerce among the states or with foreign nations that is declared illegal by this law. . . .

"It was the granting of the power to prevent competition to the holding company, not the subsequent exercise of that power, that in the opinion of the Supreme Court brought the combination under the ban of the law, *Harriman* v. *Northern Securities Company*, 197 U. S. 244, 297, and a similar but greater power was vested in the principal company in this case by the trust of 1899. For some time, therefore, before the transfer in each of these cases a group of stockholders controlled a majority of the stock of potentially competitive corporations which they vested in the holding company, so that the latter had the power to operate them together without competition, and the rule which governs one must control the other. . . .

"Congress has plenary and indisputable power under the commercial clause of the Constitution to restrict and regulate the use of every instrumentality employed in interstate or international commerce so far as it may be necessary to do so in order to prevent the restraint thereof denounced by the anti-trust act of 1890. . . .

The purpose of the act of July 2, 1890, was to prevent the stifling and the substantial restriction of competition in interstate and international commerce. The test under that act of the legality of a combination or conspiracy is its direct and necessary effect upon such competition. If its necessary effect is but incidentally or indirectly to restrict competition while its chief result is to foster the trade and increase the business of those who make and operate it, it is not violative of this law. *Hopkins* v. *U. S.*, 171 U. S. 578, 592; *Anderson* v. *U. S.*, 171 U. S. 604, 606; *U. S.* v. *Joint Traffic Association*, 171 U. S. 505, 568; *Addyston Pipe & Steel Co.* v. *U. S.*, 175 U. S. 211, 245.

"But if its necessary effect is to stifle, or directly and substantially to restrict, free competition in commerce among the states or with foreign nations, it is a combination or conspiracy in restraint of that trade and it falls under the ban of the act. *U. S.* v. *Trans-Missouri Freight Association*, 166 U.S. 290, 339, 340, 342; *Addyston Pipe & Steel Co.* v. *U. S.*, 175 U. S. 211, 234; *U. S.* v. *Joint Traffic Association*, 171 U. S. 505, 576, 577; *U. S.* v. *Northern Securities Co.* 120 Fed. 721, 722.

"And the power to restrict competition in interstate and international commerce vested in a person or an association of persons by a contract or combination is indicative of its character, for it is to the interest of the parties that such a power should be exercised and the presumption is that it will be. . . .

"There is much more probability that corporations potentially competitive will separate and compete when each of their stockholders has a separate certificate of his shares of stock in each corporation which he is free to sell than when a majority of the stock of each of the corporations is held by a single corporation which has the power to vote the stock and to operate them. . . .

"Because the power to restrict competition in interstate commerce granted to the Standard Oil Company of New Jersey by the transfer to it of the stock of the nineteen companies and of the authority to manage and operate them and the other corporations which they controlled was the absolute power to prevent competition among any of these corporations; because this power was greater, more easily exercised, more effective and more durable than that which the three thousand stockholders of these corporations previously had; because many of these corporations were potentially competitive and were engaged in interstate commerce, and the necessary effect of the transfer of the stock of the nineteen companies to the holding company was, under the decision in the case of the Northern Securities Company, a direct and substantial restriction of that commerce; that transfer and the operation of the companies under it constituted a combination or conspiracy in restraint of interstate and international commerce in violation of the anti-trust act of July 2, 1890.

"Every sale and every transportation of an article which is the subject of interstate commerce evidences a successful attempt to monopolize that trade or commerce which

concerns that sale or transportation. If the second section of the act prohibits every attempt to monopolize any part of interstate commerce, it forbids all competition therein and defeats the only purpose of the law, for there can be no competition unless each competitor is permitted to attempt to draw to himself and thereby to monopolize some part of the commerce. This is not, it cannot be, the proper interpretation of this section. It must be so construed as to abate the mischief it was passed to destroy and to promote the remedy it provided. It was enacted, not to stifle, but to foster, competition, and its true construction is that while unlawful means to monopolize and to continue an unlawful monopoly of interstate and international commerce are misdemeanors and enjoinable under it, monopolies of part of interstate and international commerce by legitimate competition, however successful, are not denounced by the law and may not be forbidden by the courts. *Whitwell* v. *Continental Tobacco Co.*, 60 C. C. A. 290, 298, 125 Fed. 454, 462; *Phillips* v. *Iola Portland Cement Co.*, 61 C. C. A. 19, 20, 125, Fed. 593, 594."

Monopolies. *Restraint of Trade Illegal only when Direct and Substantial—Combination Between Corporation and its Officer or Agent Cannot be Formed by Thoughts or Acts of Only One Person.* U. S.

In the United States Circuit Court of Appeals, Judge Sanborn handed down a decision at St. Paul Nov. 19 which had points of resemblance to the opinion which he wrote in the *Standard Oil* case. Thus the principle that competition must be directly and substantially, not indirectly and incidentally restricted, to put a combination under the ban of the Sherman Act, was re-asserted. On the facts of the case, however, judgment was given in favor of the defendants. *U. S.* v. *Union Pacific Coal Co., et al.*

"A coal company engaged in mining and selling its coal is not prohibited by the Anti-Trust act or by the law from refusing to sell its coal, from selecting its customers, from fixing the price and terms. . . .

"A combination between a corporation and its officer or agent in violation of the Anti-Trust act cannot be formed by the thoughts or acts of the officer or agent alone, without the conscious participation in it of any other officer or agent of the corporation.

"The union of two or more persons, the conscious participation of two or more minds, is indispensable to an unlawful combination."

Wills and Administration. *When Income of Life Beneficiary Begins to Accrue—No Distinction between Legacy of Specific Property and Bequest of Residuum or Aliquot Part Thereof.* Ill.

In a controversy with regard to the effect of the will of Marshall Field, the question before the court was whether the daughter of the deceased was entitled to an apportionment of the income accruing to the estate from its personal investments for the period intervening between the death of the testator and the date of the distribution of the trust funds in which, under the terms of the will, she was interested. The Probate Court of Cook County, Ill., answered the question in the affirmative in *Matter of the estate of Marshall Field* (*Chicago Legal News*, Dec. 11), saying in part:—

"It is contended by the executors that there is a distinction between a legacy of specific property to trustees for the use of the beneficiary, for life with remainder over, and a similar bequest of the residuum or an aliquot part thereof. Such distinction has been recognized in one state only (*Welsh* v. *Brown*, 14 Vroom [N. J.] 37,) and the New Jersey cases seem to form an exception to the general doctrine of the American decisions. There are certain English cases also which, while not specifically in point, seem to maintain the distinction and are perhaps fairly interpretable as holding that the rule as to a residuary legacy does not apply in the case of a specific legacy for life with remainder over. See *Lowndes* v. *Lowndes*, 15 Vesey 301; *Gibson* v. *Bott*, 7 Vesey Jr. 89.

"On the other hand there are numerous American cases which seem to support the proposition that there is no appreciable distinction between the two classes of legacies and that the reason for permitting the life tenant of the legacy with remainder over to a third party to receive the income from the date of the death of the testator is perhaps even stronger in the case of one who receives such specific legacy as against one who received a portion of the residuum. . . .

"If then the will is itself silent as to the time when the income derived from the personal estate shall begin to accrue to the use of the life beneficiary, the overwhelming weight of authority is that it begins at the date of the death of the testator."

The Editor's Bag

SECRET DIVORCES

THERE has lately been some controversy in New York State about the propriety of secret proceedings in suits for divorce. Such discussion would have been less likely to occur if there were less confusion in the law of divorce, as it exists in the United States, and the people of this country could come to some sort of a common agreement with regard to the provisions of an ideal divorce law.

It is exceedingly doubtful whether a uniform divorce law will ever be adopted by all the states. When we consider what a gulf separates New York, North and South Carolina, and the District of Columbia from the other states, it determining what grounds for divorce shall be recognized, it does not look as if sectional traditions and prejudices could ever be completely overcome. We are pleased to find, however, that the uniform Divorce Law drafted by the national Commissioners has been enacted in New Jersey, Delaware and Wisconsin, and possibly elsewhere. It is not vain to expect that it may be adopted by a large number of states, and that the remainder may be favorably influenced by the movement to abolish, at least, some of the more objectionable provisions of the older laws. And as former Justice Henry B. Brown has said, while uniformity in the substantive law is not attainable, it may be secured in the law of divorce procedure (see 13 *Law Notes* 128).

The Uniform Divorce Law has a provision relating to that point of procedure which is involved in secret divorces. Section 12 reads:—

> All hearings and trials shall be had before the court, and not before a master, referee, or other delegated representative, and shall in all cases be public.

Section 15 is as follows:—

> No record or evidence in any case shall be impounded, or access thereto refused.

The law of New York is completely at variance with the two foregoing provisions. It allows the referring of contested divorce cases, and the referee may in his discretion exclude the public from the hearing, while the judge is understood to have power, under a rule of practice, to direct the sealing of papers. We may accept as sound the opinion of the *New York Law Journal* that this custom of referring contested cases has resulted in sham and subterfuge, owing to the effect of the provision that the answer in a divorce case need not be verified. This rule has made possible the trying of cases which are really uncontested before referees, and in a defeat of the law that all such cases shall be heard in open court. Probably not enough defenders of the propriety of secret proceedings in uncontested cases could be found to create an issue on that score; the question to be considered is, should all contested cases have a

public trial, and is the Uniform Divorce Law defective in this respect?

We frequently hear the argument that the publication of the repugnant details of divorce cases has a debasing effect upon the public mind; and it is sometimes argued, on the other hand, that such publicity is desirable in the interest of public morals, to cover with shame loss of respect for the marriage tie. But probably it would be possible to abridge the privileges of the press in reporting such proceedings, if it were deemed advisable for the protection of public morals, and the real question is not whether publicity is or is not desirable. It is rather whether the forms of a public trial need to be retained to protect the rights of the parties and the interests of the community.

Secret trials are utterly at variance with the spirit of American institutions. While the right of individuals to settle their private controversies by the arbitrament of any person who may be acceptable to them may be conceded, the process of the court should not issue without full opportunity for public knowledge as to where, how, and why it is issued. In an Anglo-Saxon community, it is repugnant to popular notions of justice that the machinery by which it is maintained be hidden, under any circumstances, from public view. It is certainly no argument for secrecy to-day that the parties desire it, or that the facts are unfit for publication. Such secrecy offers too strong a temptation for collusion, and too great a risk of the maladministration of laws which society wishes to see respected.

We are glad to see that the Royal Commission which is to consider the divorce laws of England will deal specially with the question of the publicity of divorce proceedings. If their report concurs with the attitude of our own Commissioners on Uniform State Laws, an important principle will have received additional influential support, and the grave defect of the New York law will have become even less controvertible.

THE VENERABLE TRADITION OF THE RIOT ACT

THE curious extremes to which the conservative tenacity of their institutions may sometimes be carried by Englishmen is illustrated by an incident which recently occurred in Southwark. We are indebted for the following to a New Jersey lawyer who sends us a newspaper clipping received from a friend in England:—

> Sir Forrest Fulton, K. C., adds to his office of Recorder of London that of Steward of the City Manors in Southwark, and in that latter capacity he was called upon with all solemnity to constitute and preside over the three Courts Leet. A jury having responded, it fell to the Prothonotary (Mr. W. Hayes), a lesser official, to call, "All persons having anything to do with this court draw near and give your attention, on pain of amerciament." Thereafter the faithful twelve took a fearsome mediæval oath swearing to spare no one for love, favor, fear, or affection, and to present no one through hatred, malice, or illwill, the King's counsel to keep, and not disclose the same. Next, the Riot Act was read, due warning being given that tumultuous persons disturbing the proceedings—there were none—"shall be adjudged felons without benefit of clergy, and shall suffer death as in the case of felons without benefit of clergy." But there was nothing to be done, even by the "affearers" whom the Court appointed, and Sir Forrest Fulton having remarked upon the laudable veneration with which the City maintained its ancient institutions and customs, the jury dispersed—not, however, before they had laid proper claim to their right to appoint ale-conners and flesh-tasters, which was granted.

"The fearsome mediæval oath," comments our friend in Newark, "is the usual oath administered to grand jury-

men in New Jersey and I doubt not in most of the states, but the reading of the Riot Act seems unnecessary in a time of profound quiet."

WE DON'T WANT WOMEN JUDGES AND WE NEVER DID WANT THEM

A HIGHLY esteemed legal contemporary did us the honor to take our burlesque "Call to Arms" in the November *Green Bag* most seriously. So seriously, in fact, that it has devoted two or three columns to a refutation of our supposed argument for the admission of women to positions at the bar and on the bench. Such views are by our friends deemed unworthy of a law periodical like the *Green Bag*. It is intensely gratifying to find that our flippant opinions receive as grave consideration as some of the sober observations of our learned contemporaries.

VARIATION OF THE COMPASS

MR. GEORGE R. KLINE, of the law firm of Shipp & Kline, Moultrie, Ga., sends us the following story:—

In a certain wiregrass county of southwest Georgia, a land case was slowly wending its way through the courts. The plaintiff claimed that he had been defrauded of one hundred acres of land, by a line run at an angle of forty-five degrees north of the line claimed by him to be the correct one.

The fact that the county surveyor had been bribed was a matter of general rumor and suspicion; however, nothing to that effect had been proven.

Captain H——, counsel for the plaintiff, was cross-questioning the county surveyor, and asked him the cause of this change from the original line to the one in the northerly direction.

Mr. T—— answered, "It was caused by variation of the compass."

Captain H—— then asked Mr. T—— to explain to the court, the jury and himself, ordinary laymen who were ignorant of this scientific terminology, the meaning of this term.

Mr. T——, who seemed glad to divulge his extraordinary wisdom to the gaping multitude, expressed himself as delighted to do so, and after many preliminaries, proceeded thus: "Variation of the compass is caused by the effect of metallic substances upon the point of the needle—"

Capt. H—— interrupted him there, and said, "So far, so good, Mr. T——, now please enumerate to the judge and jury the basic metals." Mr. T——, not seeing the trap, gladly fell in, and among the metals called silver. Capt. H—— then warmed up, and said:—

"Now, Mr. T—— let me see if I have your idea; the line at a certain point diverged, this divergence was caused by variation of the compass, this variation was caused by the effect of metallic substances upon the point of the needle, and one of the metallic substances is silver. Now, Mr. T—— please answer this hypothetical question. Just suppose, for instance, you were surveying this line in a straight way, then the defendant in this case were to come along and place without your knowledge one hundred and fifty silver dollars in your right hand pants pocket, would this amount of silver cause sufficient variation of the needle to take in this land?"

The question was answered by a verdict for the plaintiff, the surveyor being so embarrassed that no answer would come.

THE FORMAL OATH IN MANY LANDS

THE ceremony of formal oath taking has been known since earliest history, and in thousands of years the only changes in form have been due to the introduction of the Bible and the cross in Christian nations. As administered in most of the law courts of Europe, the form of oath is practically the same as in the United States, though somewhat more ceremonious.

Of all witnesses, the French deponent has the least ordeal to pass through. A crucifix is placed above the Judge's seat, and this is supposed to obviate the necessity of each witness handling one, or a Bible.

"You swear to tell the truth, the whole truth, and nothing but the truth?" the Judge asks, and the witness, lifting up his right hand, answers, "I swear it."

In Austria a Christian witness is sworn before a crucifix placed between two lighted candles. Holding up his right hand he says, "I swear by God, the Almighty and All Wise, that I will speak the pure and full truth in answer to anything I may be asked by the court." If the witness is of the Jewish race, he uses the same words, but places his hand on a Bible opened at the page on which appears the Third Commandment, and the crucifix is removed.

In a Belgian court the witness says: "I will speak the truth, the whole truth and nothing but the truth, so help me God and all the saints." No Bible is required in the administering of this oath.

The Italian witness generally takes the oath in a dramatic manner. Resting his hand on an open Bible he exclaims: "I will swear to tell the truth, the whole truth, and nothing but the truth."

More ceremony attends the administering of an oath in a Spanish court. The witness kneels on his right knee and places his right hand on the sacred book. The Judge then asks, "Will you swear to God and by those holy gospels to speak the truth to all you may be asked?" The witness replies, "Yes, I swear," to which the Judge rejoins, "Then if thus you do, God will reward you, and if not, will require of you." In a few districts this form is varied by the witness placing the middle of his thumb on the middle of his forefinger, kissing his thumb, and declaring, "By this cross I swear."

It is to be hoped that the Norwegian witness is properly impressed with his obligation to speak the truth, or considerable energy is wasted. He is required to raise his thumb, forefinger and middle finger, these signifying the Trinity. Before the oath is actually taken a long exhortation is delivered, running in part:—

"Whatever person is so ungodly, corrupt or hostile to himself as to swear a false oath, or not to keep the oath sworn, sins in such a manner as if he were to say: 'If I swear falsely, then may God the Father, God the Son and God the Holy Ghost punish me, so that God the Father who created me and all mankind in His image, and His fatherly goodness, grace and mercy, may not profit me, but that I as a perverse and obstinate transgressor and sinner may be punished eternally in hell. If I swear falsely, then may all I have and own in this world be cursed; cursed be my land, field and meadow, so that I may never enjoy any fruit or yield from them; cursed be my cattle, my beasts, my sheep, so that after this day they may never thrive or benefit me; yea, cursed may I be and everything I possess.' "

And sometimes all that—and all the rest of it—in the matter of a suit brought to collect for a pair of boots, perhaps.

LAMB AND THE INNER TEMPLE

"IF the proposal made by Mr. E.V. Lucas for the erection of a statue to Charles Lamb in London, be adopted, certainly no more fitting place than the Inner Temple Gardens could be selected," says the London *Law Journal*. "No author has closer associations with the Temple, not even Johnson or Goldsmith, after whom some of its buildings have been named."

APPLYING JUDICIAL ETHICS

THIS joke is told on Elmer E. Rogers, who wrote the first code of ethics for the bench. The scene was in the Circuit Court of Judge Adelor J. Petit, Chicago.

Mr. Rogers, as chairman of the Committee on Professional Ethics of the Illinois State Bar Association, it appears, had written canons of ethics on "The Duties of the Bench to the Bar and the Public," to supplement the ethics of the lawyer. The entire code will not be acted upon by the Association until its annual meeting in June, 1910.

Seeing what he believed to be a good opportunity in a motion in this particular law suit before Judge Petit to initiate one of his novel canons of ethics for judges, Attorney Rogers began: "A judge is more important than the President of the United States. Congress makes laws and the President executes them, but the Supreme Court of the United States may come along and annul the work of both. For various reasons, therefore, the courts, more than any other class of society, are in position to establish ethical standards for the entire nation."

Then he represented that the conduct of opposing counsel had involved a breach of lawyers' ethics, and as section 57 of Bench Ethics provided that "The judge should endeavor to maintain ethical standards, to promote in general the interests of the profession and the welfare of the public," that there would be also a breach of judicial ethics, unless the Court imposed a fine on

opposite counsel. He suggested five dollars as about the correct measure of damages done to legal ethics, and added that it gave the first opportunity for a judge to set a precedent for the American judiciary.

The Court's only response was, "Oh, I have enough to do to look after these lawyers and litigants without troubling myself about ethics."

HIS OPENERS

FROM Panama we have received the following juicy anecdote:—

"Brothers and sisters," began the old parson, "I shall not choose any particular text this morning, but shall preach from where I open the book, and no matter where, I shall find the wrath that is to come upon the wicked who will be cut off when they have shuffled off this mortal coil. . . . It is now open, and"——

Here the parson was interrupted by a lawyer of his flock, Deacon X., who had been asleep and hearing the words "open, cut, and shuffle," forgot himself and cried out: "It's yours! What did you open on?"

The surprise of the good man in the pulpit was great, but the deacon collapsed when the reply from the parson came, "It is opened on Kings."

WHERE THE AUTOMOBILE IS AN UNHOLY THING

A YOUTHFUL member of the M— bar was retained to represent a defendant in a Georgia Justice Court in a case of hog-stealing. Upon the eventful morning, thinking to do the thing up in fine style, he rented an automobile in which to make the trip. Now this was a fatal error, but worse is still to come, for he carried with him about twenty-four volumes of law books. Poor inexperienced youth, he had not yet learned that the jurisdiction of his honor the J. P. was second to none but the Divine Law, and that they often reverse the Supreme Court of the state and sometimes of the United States.

Behold him as he approaches this rustic scene of primitive justice. Under a mighty pine tree, standing as a sentinel, rearing its majestic head above its fellows, as though realizing the extra dignity derived from sheltering so eminent a jurist, stands our august and honorable Justice, upon whose Atlas-like shoulders are borne the burdens of his people and upon whose noble brow the Jove-like thundering of outraged dignity speaks in forked looks like lightning.

The advance army of geese, in pandemonium, thrice cries the call to arms. The mule, which has hitherto been idly flicking the flies from off his sides, in wild alarm strains his halter, and breaks and dashes madly through the woods as though pursued by a thousand demons. The lazy dog awakes, and yelping loudly places his tail between his legs to join the madly scattering caravan. Thus came our hero on the spot.

In a few moments Court was called to order, and the young attorney faced a jury of his peers. The trial was short and speedy. He was fined $1,000 for contempt of court, his automobile levied on, his law book confiscated as seditious matter, and had it not been for cooler heads he might possible have been lynched.

He is now a wiser but sadder man and is trying to have the fine set aside and recover the attached property.

NO INVIDIOUS COMPARISONS.

AN anecdote is told of a certain New England judge who relieved the monotony of his court one day with a quiet though telling observation.

"And, gentlemen of the jury," began a flowery advocate, pleading before his honor, "as I stand at this bar to-day in behalf of a prisoner whose health is such that he may at any moment be called before a greater Judge than the judge of this court, I—"

His honor rapped sharply on his desk. Counsel stopped suddenly, and looked up with an interrogation in his protesting face.

"The advocate," said the court, with great dignity, "will please confine himself to the case before the jury, and not permit himself to make invidious comparisons."

CONGRATULATIONS TO COUNSEL

A YOUNG Concord lawyer, according to the Concord (N. H.) *Monitor*, had a foreign client in police court the other day. It looked rather black for the foreigner, and the Concord man fairly outdid himself in trying to convince the magistrate that his client was innocent.

The lawyer dwelt on the other's ignorance of American customs, his straightforward story, and enough other details to extend

the talk fully fifteen minutes. His client was acquitted.

In congratulating the freed man the lawyer held out his hand in an absent though rather suggestive manner. The client grasped it warmly.

"Dot was a fine noise you make," he said, "T'anks. Goo'-by."

EXAMPLE OF ECONOMY IN JUDICIAL ADMINISTRATION

COLONEL JOSIAH H. BENTON, JR., at the Boston University Law School alumni dinner given recently, told of a judge fining the prisoner at the bar $10. The prisoner, who was a stranger in Kentucky, glanced about the court a moment, and then turning to the judge said: "Your honor, I do not see any one I know here to borrow $10 of, will you be kind enough to lend me the money?"

The judge, hesitating a moment, replied: "In that case I shall have to remit the fine, as Frankfort county can better afford to lose the money than I."

NOT JUST WHAT WAS WANTED

AN American corporation, not so very long ago, was engaged in litigation with a South American republic over certain concessions. One day the head office in New York received from its agent in the country a cablegram reading:—

"Courts have rendered just decision."

An hour later there went over the wires to the South the following:—

"Appeal at once to American Minister for diplomatic intervention."

A NEW SLOGAN

HIST! let all anarchists take note
And learn this slogan here by rote.

With this for war-cry they can come
At once into millennium.

The secret I alone discovered
Through some old volume late uncovered.

"The first thing that we do" 'tis said,
Is kill the lawyers—kill them dead!"

HARRY R. BLYTHE.

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 anecdotes, facetiæ, and anecdotes.

USELESS BUT ENTERTAINING

"Why should my client be convicted of murder?" demanded counsel for the accused. "No other man has ever been convicted in this jurisdiction on such a charge."

The prosecuting attorney admitted that it hadn't occurred to him in that light, and the prisoner was accordingly discharged.

—*Central Law Journal.*

"Were you ever in prison?" demanded the prosecuting attorney insinuatingly.

"Yes, sir," admitted the gray-headed witness for the defense.

"Aha! I thought so. And what for, may I ask?"

"Assault and battery with intent to kill."

"And how long were you in prison?"

"Until I escaped, sir."

The prosecutor turned triumphantly to the gentlemen of the jury.

"So, gentlemen," he said, "we have here, as the chief witness for the defense, an ex-convict and fugitive from justice by his own confession!"

He turned again to the witness. "When and where were you in prison, sir," he sneered.

The old man straightened up and spoke in a strong, clear voice:—

"I was captured, sir, at the battle of Fort Harrison on the twenty-ninth of September, 1864. and sent to Libby Prison, Richmond. I effected my escape while being transferred to Salisbury, North Carolina. As to—"

But that was already more than the prosecutor wanted to know.—*Everybody's.*

NOTICE IN RE *BOUND VOLUMES*

In the December issue an error was made in announcing the publication of bound volumes of the Green Bag "in full morocco at $4.00." This should have read "full buckram." The charge for bound volumes has been fixed at $4.50 for half morocco, and at $4.00 for green buckram.

The Legal World

Important Litigation

In the prosecution of the American Ice Company in New York State, the Donnelly anti-monopoly act, which had been virtually a dead-letter since its passage, was resorted to, and the jury brought in a verdict resulting in the imposition of a fine of $5,000 on the defendant. The Donnelly act, which has been in force for ten years, is patterned closely after the Sherman act. The higher courts are likely to be called up to interpret the law in view of this conviction.

Judge Leet handed down a decision November 24 in Montreal, which if sustained by the higher courts will open the door of the Dominion of Canada to foreign insurance companies. He held that the Canadian insurance act, providing that no unregistered company may write insurance in Canada, is invalid in designating the insurance business as a trade, as "the Dominion Parliament has no power to regulate it in the way in which the act in question attempts to do."

A verdict of not guilty was returned December 8, by the jury in the prosecution of thirty-two defendants at Boston for alleged attempts to defraud by collusive bidding on contracts for structural steel work for the city of Boston, and for having an alleged monopoly of the structural steel business in Massachusetts and the states adjacent thereto. The trial in the Superior Court before Judge Robert O. Harris lasted fifty-four days, and the jury debated nine hours. The counsel for the defense included many leading lights of the Boston bar.

The appeal of Gompers, Mitchell and Morrison from the decision of the Court of Appeals of the District of Columbia (21 *Green Bag* 643) came before the Supreme Court of the United States November 29, on a petition for a writ of *certiorari*. Samuel Gompers had previously asserted that Judge Wright, who found the appellants guilty of contempt for violating the injunction, was "biased and unfit to wear the judicial ermine," and the convention of the American Federation of Labor at Toronto had protested against the court's "unjudicial and intemperate language." The Federation had also voted to continue the salaries of the men, if they are imprisoned, during the terms of their imprisonment. The Central Labor Union had adopted resolutions at Philadelphia November 14 for a general strike by wage workers throughout the country for a period of two weeks, beginning on the date of imprisonment. The issues were also brought before the Supreme Court by the appeal of the Bucks Stove & Range Company from the modifications of the original decree.

The investigation of the sugar weighing frauds by the Department of Justice in November developed the fact that many more Government officials were involved than had been at first supposed. It was also discovered that one of the most important and long trusted superintendents of the American Sugar Refining Company, James F. Bendernagel, was involved. Collector William Loeb, Jr., of the port of New York on November 19 announced the removal of seventy-three employees for corruption or inefficiency. The sugar company has also dropped many of its employees. Several of the cases came to trial before Judge Martin in the United States Circuit Court at New York City, November 29.

TWO SQUEALERS

Williams, in the *Boston Herald*

A cartoon which illustrates the popularity, in many quarters at least, of the *Standard Oil* decision and of the latest developments in the sugar prosecutions.

Suit has been filed in the United States Circuit Court at St. Louis, to prevent the consolidation of the United States Telephone Company with the Bell Telephone system. The Bell companies are accused of attempting to build a monopoly by absorbing independent companies. The purchase of a substantial minority of stock in the Western Union Telegraph Company by the American Telegraph & Telephone Company may have a consequences leading to some significant legal developments. The federal government has since May, 1908, been investigating the telegraph and telephone companies in accordance with a resolution adopted by the United States Senate. A joint legislative committee appointed in New York State to investigate the same business began its work Dec. 1, the same day on which the New York Telephone Company, a subsidiary of the American Telephone & Telegraph Company, cut its suburban rates. The American or "Bell" company had bought the interest of the Western Union in the New York Company, and as the largest individual shareholders in the Bell company control the Postal Telegraph Company, those who believe in competition in this business may feel aggrieved and prosecutions for violation of the Sherman anti-trust law may even be undertaken. In Missouri Attorney-General Major has asked for a special examiner to take testimony with regard to the alleged merger of the Bell company and the Western Union. The independent companies, which are more numerous in the West than in the East, would of course be pleased by any measures to break up a monopoly.

Important Legislation

Alabamans defeated a prohibition amendment to the state constitution November 29, by a majority estimated at from 12,000 to 20,000 votes.

The second session of the 61st Congress of the United States opened December 6. The business of the first day included the presentation of three bills providing for an investigation of the sugar frauds, of one introduced by Representative Mann of Illinois to check the "white slave" traffic, one for the establishment of order in Nicaragua, one for postal savings banks, and one granting statehood to New Mexico and Arizona.

The Immigration Commission issued a report December 10 covering the "white slave traffic," the inquiry covering the cities of New York, Chicago, San Francisco, Seattle, Portland, Salt Lake City, Ogden, Butte, Denver, Buffalo, Boston and New Orleans. The Commission believes the evidence warrants the report being used as a basis for legislative and administrative action. A number of suggestions of administrative changes and more rigid enforcement of existing regulations by the Department of Commerce and Labor, particularly by the Bureau of Immigration, and amendments of the immigration act itself are submitted by the commission. Another recommendation was that the transportation of persons from one state, territory or district to another for the purpose of prostitution be forbidden under heavy penalties. The Commission also expressed the opinion that the Legislatures of the several states should consider the advisability of enacting more stringent laws regarding prostitution. It was suggested that the Illinois statute regarding pandering be carefully considered.

Lord Morley's plan for the reform in the British administration of India went into effect November 15. All religious and special interests may elect representatives to the viceroys and provincial councils, but the imperial and provincial governments may declare ineligible those persons whose election is considered contrary to public interests. The viceroy's council in the future will have 370 members instead of 126. The functions of the council will be considerably enlarged.

The second session of the eleventh Parliament of Canada opened November 11 with the reading of the speech from the throne by the Governor-General, Earl Grey. The speech reaffirmed the position taken by the joint resolution adopted last session regarding naval defense, which enunciates the necessity for Canada's undertaking a share in the empire's naval defense. Regarding tariff changes the speech was non-committal. Indications are that the naval policy will be the principal subject of discussion this session. Other important measures will include a bill to ratify the Franco-Canadian commercial treaty, a bill respecting trade combinations which unduly enhance prices, and a bill to authorize the expansion of the Government railway (Intercolonial) by acquiring branch lines.

Personal—The Bench

Chief Justice W. A. Johnston of the Supreme Court of Kansas was given a dinner recently in honor of his rounding out a quarter century on that bench.

Chief Justice W. J. Mills of the New Mexico Supreme Court was appointed Governor of the territory, November 24, to succeed George Curry, resigned.

Democrats representing sixteen counties nominated Judge Warren E. Settle of Bowling Green, Ky., November 11, to succeed himself as judge in the second appellate district of Kentucky.

Judge Willis Brown of the Juvenile Court in Salt Lake City, Utah, a well-known authority on juvenile court laws, gave a

lecture at Calvary Baptist Church, Providence, R. I., November 17.

Judge Leander Stillwell of Erie, Kan., has been selected for appointment as first deputy commissioner of pensions, to succeed James L. Davenport, elevated to the commissionership.

Judge Robert O. Harris of the Superior Court of Massachusetts addressed the twentieth Century Club of Boston November 21, on "The Responsibility of Society Toward the Discharged Prisoner."

Harrington Putnam of Brooklyn was recently appointed by Gov. Hughes to be Justice of the Supreme Court for the Second Judicial District, to fill the vacancy caused by the resignation of Mr. Gaynor.

Judge Henry J. Wells of Cambridge, Mass., celebrated his eighty-sixth birthday November 16. Judge Wells was born in Charlestown, Mass in 1823. He studied law in San Francisco, was admitted to the bar and finally became a judge.

Chief Justice L. A. Emery of the Supreme Court of Maine described the courts of England, from his observations made abroad last summer, before the students of the University of Maine School of Law, November 8 and 16.

Judge Thomas N. Allen of Olympia, Wash., has put into book form his recollections of a Kentucky village and its inhabitants. The *Tacoma Ledger* says of "The Chronicles of Oldfields": "Kentuckians may well be proud of his sympathetic description of life during ante-bellum days."

The Connecticut Probate Assembly met November 10 at Hartford and listened to a paper read by Judge L. P. Waldo Marvin of Hartford, on "The Relative Right of a Husband and Wife in Estate of Decedent, when Married Prior to June 22, 1849, and to April 20, 1877."

Charles F. Jenney of Hyde Park, Mass., has been appointed to the place on the Superior Court bench made vacant by the death of Judge Robert R. Bishop of Newton. Mr. Jenney was formerly a member of the Massachusetts senate, and has been a lecturer at the Boston University Law School since 1888.

Chief Justice Farmer of the Supreme Court of Illinois says that the law's delay, of which President Taft spoke forcibly awhile ago, is "more imaginary than real." While he admits that there have been "palpable instances of unreasonable delay," he still contends that the courts have given prompt attention to thousands of cases.

The Connecticut State Bar Association intends to give a complimentary banquet in New Haven on the evening of February 7 to Chief Justice Baldwin, who retires from the Supreme Court on February 5; to Judge Hall, of the Supreme Court, who takes the place of Chief Justice; and to Judge Silas J. Robinson, who fills the vacancy.

Leave of absence has been granted by the University of Missouri to Judge John D. Lawson, dean of the Law Department, to visit Europe and the Orient for the purpose of studying the conditions surroundings the enforcement of the criminal laws. He will specially look into the reasons why the procedure in criminal cases is so much slower here than in England. He will be gone a year.

As a tribute to Hon. James Tyndale Mitchell, retiring Chief Justice of the Supreme Court of the Commonwealth of Pennsylvania, the Allegheny County Bar Association held a banquet at the Fort Pitt Hotel, Pittsburgh, Pa., October 28. D. T. Osborn acted as toastmaster, and the speakers included Justice D. Newlin Fell, who succeeds Chief Justice Mitchell, George B. Godon, Wooda N. Carr, Judge John D. Shafer and Charles A. O'Brien.

Judge Charles F. Amidon of the United States District Court for North Dakota, in an address in Fargo, N. D., Nov. 30, advocated the execution, by humane methods, of the professional criminal and the hopelessly insane. He took the position that it costs as much to keep a man in the penitentiary as it does to keep and educate a man in a university and that well-behaved young men should not be deprived of an education by the expenditure of public money to keep an unredeemable bad man under lock and key.

Hon. William H. Pope, who was recently appointed by President Taft Chief Justice of the Supreme Court in the territory of New Mexico, spent his boyhood in Atlanta, Ga. Being graduated from the University of Georgia at the head of his class, he began the practice of law in Atlanta. His successful career, however, was interrupted by ill-health, and under the advice of a physician he went to New Mexico. Here he received first one honor and then another, at length going to the Philippines as Judge of the Court of First Instance.

Governor Hughes of New York has appointed Edward B. Whitney of New York City to take the place of Justice Henry A. Gildersleeve of the Supreme Court, who recently resigned. Mr. Whitney is a son of Prof. William Dwight Whitney of Yale University. He was born in New Haven Conn., August 16, 1857, and was graduated from Yale in 1878. He was graduated from Columbia Law School in 1880. Governor

Hughes in a public speech has given Mr. Whitney credit for having taken the most important part in the struggle that centered in the eighty-cent gas legislation.

Judge Joseph W. Donovan, speaking recently at Ann Arbor before the Senior Law students on "The Golden Age of Now," concluded: "It's a great thing to be living in the world to day; when the doctors know more, the lawyers earn more, the farmers raise more, the merchants sell more, the builders build better, the elevators help more; the schools, churches, charities, hospitals and homes are better; the cars and steamers, trolley and mobiles, magazines and papers, and all of the machines and devices for comfort, conveniences are made to promote happiness. Truly this is a golden age just now."

Chief Justice Simeon E. Baldwin of the Supreme Court of Connecticut made an address on the subject "The Law of the Airships" at the annual meeting of the Connecticut Academy of Arts and Sciences Nov. 19. Judge Baldwin said that necessarily the airship would be used to a great extent for the commission of crime, for murders, and, above all, for smuggling. There would be a law for the high air as well as for the high sea. Lord Coke claimed that a man owned property as high as air should reach or earth should go through, but now this doctrine would now be contradicted. Judge Baldwin inclined to the belief that only through actual damage to the land or injury to persons or property would the owner of the premises have a legitimate grievance. He advocated the calling of an official international convention to consider international laws with respect to the regulation of this new interest and frame international agreements on the subject.

Mr. Justice Henry A. Gildersleeve has resigned from the bench of the New York Supreme Court, first judicial district. Judge Gildersleeve is a veteran of the Civil War, in which he served with conspicuous gallantry. He was admitted to the bar in May, 1866, at Poughkeepsie, N. Y., and shortly after this began the practice of the law in New York City. In 1875 he was elected Judge of the New York County Court of General Sessions. In 1891 he was appointed by Governor Hill to fill a vacancy in the Superior Court of New York City, and in the same year was regularly elected. He became a Justice of the Supreme Court, New York county, in January, 1896. For the past few years he had been presiding justice of the Appellate Term of the Supreme Court. He is the author of "Rifles and Marksmanship," published in 1876. Its author was a famous marksman in those days and earned enduring fame as a member of the American rifle team, which won the international contest at Dollymount, near Dublin, Ireland, in 1875. Judge Gildersleeve is a sound and thorough lawyer and has been a painstaking and conscientious udge. He is beloved and admired by his friends and respected and esteemed by the bar. He returns to the practice of the law, with the well-known firm of O'Brien, Boardman, Platt & Littleton.

Personal—The Bar

Thomas E. Grover, of Canton, Mass., recently resigned as District Attorney of Norfolk and Plymouth counties, Mass., giving ill health as the reason.

Gen. Charles Hamlin of Bangor, Me., has presented the library of the Penobscot Bar Association with a folio edition of Coke on Littleton, and a full set of the *Green Bag*.

Former representative Hepburn of Iowa has decided to open a law office in the Munsey Building, Washington, D. C. He has determined not to enter politics again.

Frank Moss, the reformer, has been selected by Charles S. Whitman as first assistant district attorney of New York City at $7,500 a year. Mr. Moss replaces Francis P. Garvan.

Harry W. Blodgett of St. Louis, United States Attorney for the eastern district of Missouri, has resigned to form a partnership with a former city counselor of St. Louis, Charles W. Bates.

Lloyd C. Griscom, who resigned as Ambassador to Italy because he wished to rear his son in America, became a member of the law firm of Philbin, Beekman & Menken, of New York, December 1.

Judge Emile Godchaux of New Orleans recently elected judge of the Louisiana Court of Appeals, took his seat November 29. He had made an excellent record as an able, indefatigable young attorney.

James Freeman Curtis of Boston took oath of office at the Treasury Department in Washington November 27, as assistant secretary of the treasury, for which office he was selected by Secretary McVeagh.

Judge Frank C. Little of Sparta, Ga., was presented with a silver loving cup November 27 by the bar of Sparta. At the time of his retirement last September he had served for more than a quarter of a century as county judge.

William J. Calhoun of Chicago has been appointed minister to China. Mr. Calhoun was born in Pittsburgh, Pa., October 5, 1848, and was admitted to the bar in 1875. He enjoys a wide reputation as a corporation lawyer, and was entrusted with several delicate diplomatic missions by the late President McKinley.

William F. Johnson, a prominent Philadelphia lawyer, was given a dinner on the evening of November 4 by his fellow-lawyers, in commemoration of the fiftieth anniversary of his admission to the bar, and was presented with a loving cup by Judge Kinsey.

Henry B. Macfarland, for nine years Commissioner of the District of Columbia, handed in his resignation November 13, announcing that he intended to take up the practice of the law, since he had no private fortune and could no longer afford to give his time to the office.

Associate Justice David J. Brewer of the Supreme Court of the United States, in an address given late in November before the Progress Club of Far Rockaway, N. Y., said he knew that labor organizations are sensitive about the granting of injunctions, but he expected that ultimately they will recognize the value of this action in preventing riot and bloodshed. He condemned secret divorces: "I believe that it is better to have no divorce than divorce obtained by secret processes."

Charles S. Whitman, District Attorney of New York county, succeeding W. T. Jerome, is forty years of age. He was born in Norwich, Conn. He was appointed a city magistrate by Mayor Low in 1903, and in February, 1907, was chosen president of the board of city magistrates. In July, 1907, he was promoted by appointment to the Court of General Sessions of New York City at an annual salary of $15,000. When a city magistrate he startled the police of the West Forty-seventh street station, shortly after midnight in March, 1906, by appearing in evening clothes and taking command of the station from the desk sergeant. Then he ordered several saloons to be raided accompanying the raiding party and assisting in the arrest of the bartender. Then he returned to the court room in the station and there held court before daylight.

Hon. George B. McClellan gave the first of two lectures at Princeton University Dec. 9, on "Present Day Legislation." Describing how it was that law was the concrete expression of public opinion, he showed how the legislative power of Congress had been in part yielding up to the other branches of government. Thus to the Executive or to commissions appointed by him had been yielded certain functions, the excuse being that the powers were merely ministerial. An example was to be found in the Hepburn act, which leaves the reasonableness or unreasonableness of railway rates in the hands of the Interstate Commerce Commission and the Supreme Court. The Constitution had been amended by custom, he said, in two important particulars: first, in limiting the service in the Presidency of any one man to two terms; and, second, in entirely altering the method of the Presidential election.

Bar Associations

It is expected that one hundred and fifty or more lawyers will be in attendance at the annual meeting of the Mississippi Bar Association, to be held in Natchez, Miss., in May.

The thirty-first annual meeting of the Ohio Bar Association will be held not at Put-in-Bay Island, where the meetings have been held for a long period, but at Cedar Point, the dates being July 7 and 8.

The New York State Bar Association held a special meeting in Albany Dec. 9 for the purpose of commemorating the life and public services of the late Justice Rufus W. Peckham. President Adelbert Moot of Buffalo presided and short addresses were given by United States Senator Elihu Root, Judge John Clinton Gray of the Court of Appeals, former Judge William J. Wallace of the United States Circuit Court, Marcus T. Hun and Lewis E. Carr of Albany.

One hundred lawyers from twenty-seven counties of California met at San Francisco Nov. 10 and organized the California State Bar Association, with Judge Curtis H. Lindley of San Francisco as president, M. K. Harris of Fresno, Lynn Helm of Los Angeles, and F. W. Street of Tuolumne as vice-president, E. J. Mott of San Francisco as secretary, and Thomas W. Robinson of Los Angeles as treasurer. A constitution and by-laws were adopted. The new association immediately passed a resolution endorsing Erskine M. Ross of California, Judge of the United States Circuit Court, for the vacancy in the Supreme Court of the United States. The annual meeting is to be held in Los Angeles. The Association is not the first of the kind in California, but is the successor of a state bar association organized many years ago, which had become defunct.

The president of the Oregon Bar Association, Wirt Minor, precipitated a sharp debate in the Oregon Bar Association at the annual meeting held at Portland, Ore., Nov. 16–17, by declaring that the people have lost respect for the constitution and that the initiative is a failure in Oregon. He said that the great need in Oregon was a constitutional convention. The Association took action looking toward the close scrutiny of all initiative measures which may be submitted to the voters of the state in November, 1910. For this purpose a meeting will be held on the third Tuesday in May, for the purpose of studying and reporting upon all initiative

petitions circulated before that time. The principal address was delivered by E. T. Post of Spokane, dealing with "Defective Laws Regarding the Election of the Judiciary." The following officers were elected: President, Frederick V. Holman; vice-presidents, J. K. Hanna, H. N. Thompson, Oscar Hayter, C. V. Gantenbein, Grant V. Dimmick, A. A. Jayne, A. S. Bennett, C. A. Johns, George E. Davis, Thomas E. Crawford, C. J. Bright, Thomas H. Crawford, H. L. Benson; secretary, Jerry B. Bronaugh; treasurer, Charles J. Schnabel.

James M. Beck, former assistant Attorney-General of the United States, urged action by the United States Supreme Court with respect to unquestioned perversions by Congress of federal power in an eloquent address before the Rhode Island Bar association, December 6 at Providence, R. I. His subject was "Nullification by Indirection." He said in part: "Unless our dual system of government is to be subverted and chaos is to come again, the Supreme Court must return to the doctrine of Marshall. Already the Supreme Court makes a distinction between a state statute and a federal statute. As to the former, it has declared repeatedly that it will look beyond the form of the statute and even its language, and will consider in the light of its history its substantial purpose and its inevitable effect. As, however, an equal duty is upon the Supreme Court to adjudge a federal act unconstitutional when it invades the reserved rights of the states, why should not the same judicial scrutiny of the obvious purpose and object be had in one case as the other? Is this glaring discrimination either logical or tenable?" The election of officers resulted as follows: President, Dexter B. Potter; vice-presidents, Walter F. Angell and Albert A. Baker; secretary, Howard B. Gorham; treasurer, James A. Pierce; executive committee, William A. Morgan, Harry P. Cross, Arthur M. Allen, John W. Hogan and Frank W. Tillinghast.

Miscellaneous

W. R. Vance, dean of the George Washington University Law School, has retired from that post and accepted a professorship in the Yale Law School.

The new law building of the University of Colorado, at Boulder, Colo., the gift of Senator Simon Guggenheim, was dedicated November 24.

Professor Homer B. Hulbert told the Portland, Me., Board of Trade December 10, that there was now in the making as great a desire for secession on the Pacific coast as there was in the South over the negroes, in view of the Japanese question. He said he had been told in California that they had backed down on account of Roosevelt, but the attitude of the present administration was much stiffer, and Washington had been given just two years to settle the question or they would take it into their own hands.

The statue of General Lew Wallace which was to be put in Statuary Hall in Washington, D. C., was unveiled January 11. The author of "Ben-Hur" was a lawyer, starting in practice in Covington, Ind. Captain John P. Magrew, of the General's command, one of the three commissioners presenting the statue to the national government, presided. Senator Beveridge and Governor Marshall delivered addresses and James Whitcomb Riley read a poem written especially for the occasion. Lew Wallace, Jr., of Indianapolis pulled the cord that unveiled the statue.

Recommendations to correct present abuses in appeals in civil suits are prominent in the report of the special committee of the Association of the Bar of the City of New York appointed by President Edmund Wetmore to consider the simplification of the New York procedure. In order to prevent abuses of the right of appeal, the committee recommends that an amendment to the code be adopted giving the Appellate Division power to award final judgment or direct a verdict wherever the trial justice might do so and to substitute the equity and modern criminal procedure rule that a technical error was presumed to be harmless for the common law rule that it was presumed to be prejudicial.

The House of Governors, composed of the Governors of the various states, will hold its first meeting at the call of Gov. Wilson in Washington on January 18–20. It is proposed that this body meet annually for a session of two to three weeks to discuss, consult, and confer on vital questions affecting the welfare of the states, the unifying of state laws, and the closer unity of the states as a nation. Those active in the movement express the hope that an august, dignified body of forty-five Governors, representing their states, with the lawmaking power of forty-five legislatures behind them, may in time become an inherent part in the American idea of self-government and a powerful factor for good in the nation.

Prof. Charles Gross of the Department of History in Harvard College died December 3. Since the death of Prof. Maitland he had been regarded as one of the leading authorities on early English institutions and constitutional history. He was born at Troy, N. Y., on February 10, 1857. He was graduated from Williams College in 1878, and later studied at the Universities of Leipsic, Goettingen, Berlin and Paris. He was the author of several historical works, among which are "Gilda Marcotaria," "The Exchequer of the Jews of England in the Middle Ages," "Sources of History of English Literature," and "Bibliography of British Municipal History."

Among the works which he translated were "Lavisse's Political History of Europe" and Kayserling's "Christopher Columbus."

Secretary of State Koenig announced December 12 that the four constitutional amendments had been carried in New York State. One of these increases the salaries of up-state Justices of the Supreme Court from $7,500 to $10,000. Not long after the election, the Board of Estimate of New York City, agreeing with the opinion of Mayor McClellan, adopted resolutions raising the salaries of the Supreme Court judges in New York City $4,000, to $21,500 in all. This alleged "salary grab" was denounced by many leading members of the bench and bar in New York City, and public opinion proved so bitter that the resolutions were rescinded at a special meeting of the Board of Estimate called by the Mayor November 29. The New York City Bar Association and the New York County Lawyers Association had opposed the salary increase in Manhattan, as had also all the justices of the second department of the Supreme Court.

The course pursued by the United States in its dispute with Nicaragua had presented, up to the time this issue went to press, several important questions of international law. Zelaya's withholding of any explanation of the shooting of the two Americans, Groce and Cannon, was undiplomatic. The caustic note of Secretary Knox to Mr. Rodriguez suggested that Zelaya had much to answer for in Central America, that the United States would hold the authors of the outrage accountable for their act, and that the revolutionists would be unofficially received by the State Department and put upon an equal footing with Zelaya's government. The note was practically an ultimatum, and was backed up by the display of naval force in Nicaraguan waters, ready to strike any blow which might be necessary to help the United States to discharge its duty "to its citizens, to its dignity, to Central America, and to civilization."

At the invitation of the University of Wisconsin a state conference on criminal law and criminology was held at Madison on November 26 and 27. The number of those in attendance was about 150, and included judges of the Supreme Court and of the district courts, state's attorneys, heads of the state penal and insane institutions, lawyers, teachers, clergymen and medical men. The program included an address by Mr. Justice Timlin, of the Supreme Court of Wisconsin, on "The Problems before the Conference," and by Professor Roscoe Pound, of the University of Chicago, on "The Ritual of Primitive Justice. The second day was chiefly devoted to a discussion of the reports of committees. Among the questions discussed were three-fourths verdicts, the power of judges to sum up the issues and the evidence in the charge to the jury, supplementary examination of witnesses by the judge depositions, examination in court of the accused, the trial of the issue of menta responsibility by separate juries or by juries of experts, expert testimony in insanity cases, appeals by the state on questions of law, restrictions on the right of appeal by defendant, the organization of criminal courts, the trial and punishment of juvenile offenders and the legal responsibility of parents and others contributing to the delinquency of children, recidivism, probation, parole, pardon and indeterminate sentence, and the causes and prevention of crime. A number of questions relating to these topics were referred to committees for report in future. A permanent organization was effected, and Judge E. Ray Stevens of Madison was elected president. The next meeting will be held in November, 1910.

The President in his first annual message to Congress, submitted December 7, commended the Declaration of London as "an eminently satisfactory codification of the international maritime laws," and called attention to the fact that this country would send representatives to the international conference for the promotion of uniform legislation concerning letters of exchange, which is to meet at The Hague in June, 1910. He again expressed his conviction that "a change in judicial procedure, with a view tc reducing its expense to private litigants in civil cases and facilitating the dispatch of business and final decision in both civil and criminal cases, constitutes the greatest need in our American institutions." The recommendation was made that the President be authorized to appoint "a commission with authority to examine the law and equity procedure of the federal courts of first instance, the law of appeals from those courts to the courts of appeals and to the Supreme Court, and the costs imposed in such procedure upon the private litigants and upon the public treasury, and make recommendation with a view to simplifying and expediting the procedure as far as possible and making it as inexpensive as may be to the litigant of little means." He also recommended "the enactment of a statute forbidding hereafter the issuing of any injunction or restraining order, whether temporary or permanent, by any federal court, without previous notice and a reasonable opportunity to be heard on behalf of the parties to be enjoined; unless it shall appear to the satisfaction of the court that the delay necessary to give such notice and hearing would result in irreparable injury to the complainant and unless also the court shall from the evidence make a written finding, which shall be spread upon the court minutes, that immediate and irreparable injury is likely to ensue to the complainant, and shall define the injury, state why it is irreparable, and shall also endorse on the order issued the date and the hour of the issuance of the order."

Necrology—The Bench

Atkinson, Judge George R.—At Smithfield, Va., November 29, aged 86.

Butler, Judge William, Sr.—At West Chester, Pa., November 2, aged 87. Formerly District Attorney of Chester county, Pa., county judge, and for twenty years judge of the United States District Court in Philadelphia.

Eggleston, Judge Arthur F.—At Hartford, Conn., December 1, aged 65. For many years State's Attorney for Hartford county.

Horsley, Judge John D.—At Lynchburg, Pa., November 20, aged 50. Formerly a circuit court judge.

Jenner, Judge John W.—At Ashland, O., November 8, aged 73. For eleven years judge of the fifth judicial circuit of Ohio.

Loew, Frederick W.—At New York City, November 7, aged 74. Served two terms as a judge of the old Court of Common Pleas.

Moore, Judge Samuel H.—At Duluth, Minn., November 27, aged 51. Contributor of stories of western life to magazines.

Morgan, Judge J. H.—At Pana, Ill., November 8, aged 50. Former city attorney and county judge.

Russell, Judge J. C.—At Corpus Christi, Tex., November 4, aged 82. Thirty years a district judge in Texas.

Savage, Judge George.—At Towson, Md., Nov. 6, aged 45. Formerly judge of the Orphans' Court, Baltimore.

Necrology—The Bar

Belford, Irving.—At Toledo, O., November 27. For eighteen years clerk of the United States District Court at Cleveland.

Colerick, Henry.—At Fort Wayne, Ind., November 17, aged 63. Prominent criminal lawyer.

Davis, Walter E.—At Scranton, Pa., November 9, aged 37. An active and popular member of the Lackawanna County Bar Association.

De Armond, Congressman David A.—November 24, aged 65. Practical parliamentarian and one of the foremost Democrats in Congress; representative from Missouri for nineteen years.

Dewing, Benjamin B.—At Revere, Mass., December 2, aged 43. A prominent Boston attorney.

DuBignon, Fleming.—At Atlanta, Ga., November 12. Member Georgia house of representatives and later of the state senate; served as Solicitor-General of the eastern circuit.

Fisher, Henry L.—At York, Pa., November 15, aged 87. Oldest member of the York county bar; formerly one of the leading criminal lawyers in the state.

Flack, Junius B.—November 9, aged 74. Former assistant district attorney in Pittsburgh, Pa.; handwriting expert in famous cases.

Gully, William Court, first Viscount Selby.—At London, England, November 6, aged 74. Called to bar at Inner Temple, made a J. C. in 1877, represented Carlisle in Parliament and became Speaker of the House of Commons, being called one of the best it has ever had.

Hays, Maj. Thomas H.—At Louisville, Ky., November 9, aged 72. Formerly member of state senate; held many public offices.

Hilton, William H.—At Portland, M., November 3, aged 69. Dean of the Lincoln county (Me.) bar; had served as county attorney; one of the ablest lawyers in Maine.

Hopkins, S. H.—At San Antonio, Tex., November 22, aged 39. One of the most prominent young lawyers in southern Texas.

Hutchinson, Eben.—At Buenos Ayres, December 1. Former state senator and police justice in Chelsea, Mass.

Kimball, Jerome B.—At Providence, R. I., December 3, aged 77. Attorney-General of Rhode Island from 1858 to 1860.

Kissam, Edward H.—At New York City, November 5, aged 51.

Lewis, John V. B.—In Albion, N. Y., December 2, aged 60. Partner of William C. Beecher, a son of Henry Ward Beecher, for twenty-five years.

McEwen, Daniel Church.—At Brooklyn, N. Y., Nov. 1, aged 66. At one time private secretary to William H. Seward.

Nickerson, Sereno Dwight. At Cambridge, Mass., November 6, aged 86. Graduated from Dane (now Harvard) Law School in 1847, admitted to the bar but never practised, grand master of the grand lodge of Free Masons in Massachusetts, 1872–4.

Osgood, Howard L.—At Rochester, N. Y., November 5. Member of the Monroe County Bar Association for about twenty-eight years.

Perkins, Charles E.—At Portland, Me., November 29, aged 50.

Sanders, D. W.—At Louisville, Ky., November 2. Former law partner of Secretary of the Treasury John G. Carlisle; well known thoughout the Middle West.

Smalley, Col. Bradley B.—At Burlington, Vt., November 6, aged 74. For many years prominent in railroad affairs in Vermont; president of the Burlington Trust Company.

Smith, Columbus.—At Salisbury, Vt., November 20, aged 90. Well known in Vermont; adjusted many claims for Americans in England and other countries.

Washburn, Frank L.—At Melrose, Mass., November 9, aged 60. Former law partner of the late Benjamin F. Butler.

Young, William Hopkins.—December 1, aged 55. Member of the New York firm of Young, Ver Planck and Prince.

James Wilson

THE FIRST GREAT AMERICAN LAWYER TO PLAN A STATEMENT OF OUR *CORPUS JURIS*

Wilson is the only man in all our history who was both a signer of the Declaration of Independence and a member of the United States Constitutional Convention, and also a Justice of the Supreme Court of the United States

[WILSON IS THE CENTRAL FIGURE SEATED IN THE ABOVE DETAIL FROM THE TRUMBULL PAINTING OF THE SIGNERS OF THE DECLARATION AT YALE]

The Green Bag

Volume XXII February, 1910 Number 2

Memorandum *in re Corpus Juris**

By Lucien Hugh Alexander
of the Philadelphia Bar

"Law is the business to which my life is devoted, and I should show less than devotion if I did not do what in me lies to improve it, and, when I perceive what seems to me the ideal of its future, if I hesitated to point it out and to press toward it with all my heart."
—Holmes.

[Mr. Alexander at the outset desires to direct attention to the fact that "the plan" outlined in this Memorandum (as stated at p. 70 *infra*), is not his own individually, but is the joint product of Professor George W. Kirchwey, Dr. James DeWitt Andrews and himself.]

THIS memorandum relates to the great project urged upon the attention of the profession from time to time by many of our leading and most practical jurists,—a complete and comprehensive statement in adequate perspective of the entire body of American law, our *Corpus Juris*. Upon this subject the late James C. Carter, *inter alia*, said:—

"A statement of the whole body of the law in scientific language and in a concise and systematic form, at once full, precise and correct, *would be of priceless value*. It would exhibit the body of the law so as to enable a view to be had of the whole and of the relation of the several parts and tend to establish and make familiar a uniform nomenclature. *Such a work, well executed, would be the vade mecum of every lawyer and every Judge*. It would be *the one indispensable tool of his art*. Fortune and fame sufficient to satisfy any measure of avarice or ambition would be the due reward of the man, or men, who should *succeed in conferring such a boon*. It would not, indeed, be suitable to be enacted into law for even it would wholly fail were its rules made rigidly operative upon future cases;—it could proudly dispense with any legislative sanction."

This subject will be presented under two heads:—

I. The imperative demand through more than a century of our history for an adequate statement of our *Corpus Juris*.

II. A method for the practical achievement of the desired result.

*This Memorandum was in the first instance prepared for the consideration of one of the Justices of the Supreme Court of the United States. It has since been elaborated and submitted to many of the ablest leaders of the profession for expressions of their opinion upon the importance and practicability of the project. See p. 91, *et seq.*, *infra*.

Most of the italics in the quotations represent the underscoring in the original manuscript of the author of the Memorandum.

I

THE IMPERATIVE DEMAND BY THE PROFESSION

MR. CARTER has by no means stood alone among the great leaders of the profession in insistence upon the vital need of such a work.

Sir Francis Bacon declared:—

"Of the laws of England: I have commended them before for the matter, but surely they ask much amendment for the form; which *to reduce and perfect*, I hold to be one of *the greatest dowries that can be conferred upon this kingdom*."

Again, some eighty years ago the immortal Nathan Dane, chairman of the committee of the Continental Congress, reporting the Ordinance of 1787 for the government of the Northwest Territory, but re-echoed Lord Bacon, in 1823, asserting:—

"We have in the common and federal law *the materials for uniformity. We have a national judiciary promoting uniformity.* We only want a *general efficient plan* supported with energy and national feeling."

He also declared:—

"A serious evil we are fast running into in most of our states, this inundation of books made in different states and nations, will increase until we can shake off more of our local notions. Our true course is plain; that is, by degrees to make our laws more uniform." . . .

Three decades earlier James Wilson, now deemed by so many to be, from the standpoint of things achieved, *facile princeps* among America's greatest statesmen-jurists, not satisfied with his inestimable services to the nation in the matter of the Declaration of Independence and at other critical periods during the stirring times of the Continental Congress, and still later in the great Constitutional Convention, and again on the original bench of the Supreme Court of the United States,—not satisfied with these and other achievements, monumental and important as they were, and (to quote Mr. Justice Moody) "with the keen vision of a seer" foreseeing future chaos in our judicial system if a remedy were not applied, projected the great work of which Carter, Dillon and others later urged the importance. Indeed, Wilson himself commenced the "Herculean task," which unfortunately he did not live to complete, but the vital need of which has been voiced in the most earnest language by the greatest of our jurists in the century which has intervened. This project, which has now staggered the profession for more than one hundred years, was (to quote Wilson's own words), "*To form the mass of our laws into a body compacted and well-proportioned.*"

After he had been engaged upon the undertaking for a year or two, he made a preliminary report upon the *status* of the work, in which, after detailing some of his activities in arranging the material, he called attention to the fact that he had assembled one thousand, seven hundred and two statutes, and said:—

"Their titles I have entered into a book, in the order, usually chronological, in which they are recorded. On some of them, especially those of an early date, I have made and minuted remarks; and have left ample room for more, in the course of my further investigations. I have also reduced their several subjects into an alphabetical order by entering them regularly in a commonplace book." [NOTE: Wilson was unalterably opposed to an alphabetical arrangement for the work itself—see *infra*.] "This process required time, and care, and a degree of minute

drudgery; but it was absolutely requisite to the correct execution of the design. How can I make a digest of the laws without having all the laws upon each head in my view? This view can in the first instance be obtained only by ranging them in an exact common place."

He also declared:—

"To rank in a correct edition, the several laws according to their seniority or in the order of the alphabet would, by no means, be correspondent to the enlarged plan signified by the resolutions of the house. It is obvious, and it was certainly expected, that, under each head, the different regulations, *however dispersed at present among numerous laws, should in the digest, be collected, in a natural series*, and *reduced to a just form*. This I deem an indispensable part of my business.

"But the performance of this indispensable part gives rise to a new question. *In what order should the methodized collections be arranged?*

"*A chronological* order would, from the nature of those collections, be *impracticable; an alphabetical order* would be *unnatural* and unsatisfactory. *The order of legitimate system is the only one*, which remains. This order, therefore, is necessarily brought into my contemplation. My own contemplation of it has been attended with the just degree of diffidence and solicitude. *To form the mass of our laws into a body compacted and well proportioned is a task of no common magnitude.* . . .

"Of this system, I have begun to sketch the rough outlines. In finishing them, and in filling them up, *I mean to avail myself of all the assistance which can possibly be derived from every example set before me.* But, at the same time, I mean to pay *implicit deference to none.*"

He also summed up the situation as follows, and in words which are even more applicable to the chaotic conditions of our time than to those of his own:—

"*The common law is a part, and, by far, the most important part of* her (*our*) *system of jurisprudence.* Statute regulations are intended only for those cases, *comparatively few*, in which the common law is defective, or to which it is inapplicable: to that law, those regulations *are properly to be considered as a supplement.* A knowledge of that law should, for this reason, precede, or at least accompany the study of those regulations.

"'To know what the common law was before the making of any statute,' says my Lord Coke, in his familiar but expressive manner, 'is the very lock and key to set open the windows of the statute.' To lay the statute laws before one who knows nothing of the common law, amounts, frequently, to much the same thing as laying every third or fourth line of a deed before one who has never seen the residue of it. It would, therefore, be highly eligible, that, under each head of the statute law, the common law relating to it should be introduced and explained. This would be a useful commentary on the text of the statute law, and *would at the same time, form a body of the common law reduced into a just and regular system.*"

Thus, in 1791, but two years after the Constitution went into operation, we have the first call in America for an orderly statement of the *Corpus Juris*.

Continuing this subject, he said:—

"With such a commentary the digest which I shall have the honor of reporting to the house will be accompanied. The Constitution of the United States and that of Pennsylvania [the Pennsylvania Constitution of 1790 mainly drafted by Wilson] compose the supreme law of the land; they contain and they suggest many of the fundamental principles of jurisprudence, and must have a governing and an extensive influence over almost every other part of our legal system. They should, therefore, be explained and understood in the clearest and most distinct manner, and they should be pursued through their numerous and important, though remote and widely ramified effects. Hence it is proper that they also should be attended with a commentary."

It is well to remember that Wilson received his general education in the Universities of St. Andrews, Glasgow and Edinburgh, was the founder of the first law school in America and its first

professor, and, from a literary viewpoint, was a man of such ability that he had for a number of years held the chair of literature in the University of Pennsylvania. His following remarks therefore come weighted with all the prestige of the highest literary and professional standing.* Indeed at the time he wrote he was serving, by appointment of George Washington, as one of the first Justices of the Supreme Court of the United States, and, as suggested by Joseph H. Choate, "might well have been made its first Chief Justice." *He was in fact*, as also declared by Mr. Choate, *the first Chief Justice of the Nation*, having been Chairman of the Committee on Appeals of the Continental Congress our first and tothat time only Federal Court of Appeals. Referring to the confused mass of the statutes as they existed in his day, Wilson said:—

"They are crowded with multifarious, sometimes with heterogeneous and disjointed circumstances and materials. Hence the obscure, and confused, and embarrassed periods of a mile with which the statute books are loaded and disgraced."

Then he emphasized the importance of clearness:—

"But simplicity and plainness and precision should mark the texture of a law. It claims the *obedience*—it should be level to the *understanding* of all."

And declared:—

"From the manner in which other *law* books, *as well as statute laws*, are usually written, it may be supposed that law is, in its nature, unsusceptible of the same simplicity and clearness as the other sciences. *It is high time that law should be rescued from this injurious imputation.*"

Also asserting:—

"As were the divinity and the law, such likewise was the philosophy of the schools during many ages of darkness and barbarism. *It was fruitful of words but barren of works*, and admirably contrived for drawing a veil over human ignorance and putting a stop to the progress of knowledge. But at last the light began to dawn. *It has dawned, however, much slower upon the law than upon religion and philosophy. 'The laws,'* says the celebrated Becarria, *'are always several ages behind the actual improvement of the nations which they govern.'*"

And again:—

"Deeply penetrated with the truth and the force of these remarks, which are supported by the most respectable authorities, I shall not justly incur the censure of innovation if I express my opinion, that *the law should be written in the same manner, which we use when we write on other subjects, or other sciences.* This manner has been already adopted with success in the Constitution of the United States and in that of Pennsylvania."

And concerning both, no one could speak with more authority, for modern research has shown that with both James Wilson had had more to do in drafting than any other one man.

I wish space permitted quoting more *in extenso* from Wilson's luminous views upon this important matter. This preliminary report from which the quotations are made was presented in August, 1791, to the Speaker of the Pennsylvania House of Representatives, under the auspices of which the work was undertaken.

Four months later (31 December, 1791) Wilson forcefully expressed to George Washington (in two letters recently located in the government archives in Washington) his conviction of

*Those who desire a closer acquaintance with Wilson are referred to *Wilson's Works* (Andrews edition) Chicago, 1896; to *James Wilson and the Wilson Doctrine*, *North American Review*, Vol. 183, pp. 971–989; to *James Wilson, Nation Builder*, *Green Bag*, Vol. XIX, pp. 1–9; 98–109; 137–146; 265–276; also to *James Wilson* in the *Atlantic Monthly* for September, 1889, pp. 316–330, and to the Wilson Memorial Volume shortly to be published, *sub nomine*, "James Wilson, Nation Builder," and for which the British Ambassador, the Rt. Hon. James Bryce, has written the Introduction.

the necessity of creating a great institutional digest exhibiting the entire American *Corpus Juris*, and he offered himself to undertake the task if Washington could secure the support of Congress. Attorney-General Edmund Randolph, believing it unwise for a Justice of the Supreme Court to engage in the task (and then, too, research discloses that Randolph himself had on hand a plan to secure the publication of a digest of Virginia law) opposed Wilson's proposition to have the work executed under the authority of Congress.

Edmund Randolph in his report to Washington also declared himself in opposition to the suggestion "that a single person should execute the work." He expressed his opinion on that point as follows:—

"The necessary information can be contributed only by a number of able men, differently situated in the United States. *These men can be found;* and perhaps their reluctance may be overcome, and *they may be induced to divide the Herculean task among them.*"

But Randolph's belief that the project was one which would ultimately be carried out is clearly stated, for he declared:—

"*I believe that the digest will sooner or later be attempted;* yet I am sure that the legislature will not cordially patronize it, until its necessity shall be more obvious."

Randolph furthermore expressed opposition to the throwing of the weight of *official character into measures*, when no crisis demands it." This same view would in our own day doubtless block any movement to have this work executed by a federal commission. A complete statement of our *Corpus Juris* must necessarily deal with both federal and state law; many persons would believe, and perhaps rightly, that if the whole were produced under the authority of the federal government, an official weight of federal authority would be given to the treatment of state law, which it ought not to have. Then there are practical reasons why such a work can not successfully be undertaken by representatives of nearly fifty different state governments. And in addition to these practical obstacles, Chief Justice Emlin McClain of the Supreme Court of Iowa answers those who clamor for immediate legislative codification, by directing attention to this fact:—

"It cannot be intrusted to legislation for two reasons, first, because legislation is more immediately concerned with questions of present social and political importance, and second, because what is desired is not legislation at all, but scientific analysis and exposition."

Mr. Carter also declared "The work *would wholly fail* if enacted into law and made operative upon future cases." I will not take space to discuss this phase more in detail, but Wilson's two letters to Washington make clear the great importance of a co-ordinated statement of the federal and state law composing our *Corpus Juris*.

Wilson, unaided by Congressional sanction, undertook the task as a purely individual enterprise, but did not live to complete it. From that day to this, the works of Kent and Story are the only substantial efforts which have been made in America along the lines planned by Wilson until Andrews' American Law was produced.

The main thought I would here emphasize is that Wilson realized even in his day the necessity for a complete, correct statement of "*the whole body of our law* in scientific language," again to quote Mr. Carter, but is the only one who has attempted it on a complete and sufficiently comprehensive scale, for the productions of Kent and Story were

not only incomplete, but lacked in logical arrangement. Andrews is the modern editor of Wilson's Works, and through his study of Wilson, caught his spirit and the importance of such a great system or "*Edifice of Law*," based on an adequate system of logical classification, as it has been so aptly termed by Judge Dillon (see *infra*). Yet Andrews' American Law, which was the result, is of course too condensed to be even an approximation of the complete work Wilson, Carter and others deemed so important, and the production of which present day conditions make imperative. In my judgment, Andrews' real achievement is his practical application to our law as a whole of a logically co-ordinated system of classification. It is well at this point again to recall the words in our own time of that peerless leader of our race, the late James C. Carter:—

"A statement of the whole body of the law in scientific language, and in a *concise and systematic* form, at once full, precise and correct, *would be of priceless value*. It would exhibit the body of the law so as to enable a view to be had of the whole and of the relation of the several parts and tend to establish and make familiar a uniform nomenclature. *Such a work, well executed, would be the vade mecum of every lawyer and every judge*. It would be *the one indispensable tool* of his art. Fortune and fame sufficient to satisfy any measure of avarice or ambition would be the due reward of the man, or men, who should *succeed in conferring such a boon*. It would not, indeed, be suitable to be enacted into law for even it would wholly fail were its rules made rigidly operative upon future cases: it could proudly dispense with any legislative sanction."

Other jurists have advocated this great cause, but I will refer but to a few.

In 1888, Henry T. Terry, then of the New York Bar, and now located in Japan, and a legal scholar and writer of great ability, forcefully placed the problem before the American Bar Association, and in clear and incisive style, summed up as follows:—

"*The thing our law needs above all else is a complete scientific arrangement of the whole body of it*. . . . There is no scientific and rational arrangement based on adequate analysis of legal conception, and a logical marshalling of the elements exhibited by the analysis. . . . *The only way that our law can be kept manageable and knowable is by its development along the lines of principle by having a logical framework upon which every special rule can be adjusted in its proper place*. . . . The end and object of an arrangement is the eminently practical one of making the law easy to find, and it is barren pedantry to sacrifice this to any theoretical excellence of form, yet it is important to bear in mind that the practical end cannot be attained unless the arrangement adopted possesses in a high degree, those characteristics which make it what, for want of a better word, we may call philosophical. . . . If we are to have a place for everything and everything in its place the arrangemnt must be even severely and inexorably logical."

Still later, Judge Dillon in his "Laws and Jurisprudence" (p. 346 *et seq.*) in urging "tacit codification," as Sir Henry Maine termed it, or "expository codification," as Dean Wigmore has suggested, to distinguish it from legislative codification, declared:—

"The materials for such a code already exist. A period of development is at some time reached in the legal history of every people when it is necessary to restate and reconstruct their laws. It seems to me that we have reached that period. Our materials for such restatement and reconstruction, which we may, if you please, call a code, are ample. They surpass in extent, in abundance, in variety, in richness, and above all in adaptation to our wants, any supply that can come from foreign sources.

"What Sir Henry Maine calls '*tacit codification*' is a process which is in constant operation, through the labors of Judges and text-writers. *In this work elementary writers of learning and experience take an important part. In the scattered condition of our case-law their works are indispensable*. When judges and text-writers deduce from the

cases a principle and formulate it, and that formula is stamped with authority, either by long usage or judicial sanction, so that the Courts do not go behind it to the cases from which it was deduced, there you have to this extent codification. . . .

"*What is needed is the constructive genius and practical wisdom that can take these truly rich, invaluable, native but scattered materials,* —using with a wise and generous electicism foreign materials only when the native do not exist or the foreign are manifestly superior, —and out of all these *build an edifice of law,* primarily *designed and adapted to daily use,* which shall be at once symmetrical, harmonious—simple and commodious."

From the days of Justinian and Tribonian, Sir Francis Bacon and the Code Napoleon, we have been continually reminded of the necessity of such a statement of our law, yet James Wilson was the only one to attempt it, and his untimely death prevented its completion. The quotations from Dane, Carter, Dillon and others during the last century of our existence have only served more strongly to emphasize the need. The situation has been as clearly summed up by James Parsons as by anyone, in these words:—

"*The general principles* and broad basis on which our common law reposes and *which tacitly guide the decisions of our Courts,* should be brought to the surface, grouped together, subordinated in their several relations and contrasted in their differences. If such a result could be obtained, the vast area covered by the law would present a district set out in order *in place of a tangled thicket.* The true bearing of each abstract proposition would stand out plainly, because side by side with others of a similar nature. The decisions, which have radiated from some central case, should be classed together and their common principles with the qualifications and limitations extracted. *When the various departments of the law have been regulated, grouped and subordinated* the elaborate train of decisions *constituting the bulk of our law* which has been worked out with consummate ability by the masters of the law, *will remain essentially intact.*"

The same motive impelled David Dudley Field to undertake his vast labors under the name of codification. No one has summed up more tersely and clearly than did he when he said:—

"To reduce the bulk, clear out the refuse, condense and arrange the residuum, *so that the people and the lawyer, and the Judge as well may know what they have to practise and obey*—this is codification, nothing more and nothing less."

For the purposes of this memorandum, it is assumed that at the present time, those who have made a careful study of the subject are substantially unanimous that "*tacit codification*"—that is "expository codification" as distinguished from "legislative codification," is the right solution of our present difficulties, provided of course the work be done in the most thorough manner. Whether or not in the fullness of time complete legislative codification will result is a question which only the far distant future can determine. Much will depend upon how well the work proposed by Carter and others is executed. The main vice of legislative codification, particularly hurried and ill-advised codification, seems to be that the moment the code or statement of the law is enacted into form *as the law,* that instant it becomes a basis for new interpretation by the Courts; instead of being an aid to the profession, a legislative code becomes a new bone of contention. This thought was forcibly brought out by James C. Carter at the same time he declared that "a statement of the whole body of the law in scientific language, and in a concise and systematic form, at once full, precise and correct, would be of *priceless value,*" — for of such a complete thoroughly balanced logical statement, he said, as heretofore quoted:—

"It would not, indeed, be suitable to be enacted into law, for even it would *wholly*

fail were its rules made rigidly operative upon future cases;—it could proudly dispense with any legislative sanction."

Of the importance of such a work, Mr. Justice Holmes has said:—

"The importance, if it could be obtained *cannot be overrated.*"

And within a few weeks, another Justice of the Supreme Court of the United States (Mr. Justice Brewer) has emphasized "*the great blessing to the profession it would be to have such a work.*" And so have many other of the great leaders of our profession during more than a century.

But no one has arisen and accomplished the task, or indeed undertaken it under any systematic plan which would seem to insure a complete statement of our law embodying the best that the profession can produce. Yet our case-law multiplies and our statute law increases with such bewildering rapidity that none who reason can doubt that eventually but one thing, Judge Dillon's suggested "Edifice of Law, primarily designed and adapted to daily use," can prevent ultimate chaos—that chaos which is already "casting its shadow before," ever year by year making more difficult the work of both Bench and Bar. In England a similar condition exists though by no means as acute, for of course there there are not forty-six distinct state jurisdictions constantly flooding the profession and the public with new laws and new judicial decisions, in addition to those from the national legislature and Courts, a large percentage of which as precedents are "deathless—yet valueless."

A Justice of our national Supreme Court has just directed my attention to the following from the pen of Julius Hirschfeld in the April, 1909, number of the English publication, *The Journal of the Society of Comparative Legislation*, to wit:—

"In these days, when signs are not wanting that England is beginning to occupy herself for practical ends with the methods of other nations, it may perhaps be not inappropriate to call to mind that she still stands alone in having done next to nothing towards bringing under one roof *the vast multitude of scattered fragments of her law and moulding the amorphous conglomeration of its rules and principles into something which could go by the name of a scientific system.* Instead of that, she goes on *endlessly piling Pelions upon Ossas of decisions and statutes*, with that most grotesque (though indispensable) fiction writ large over all, that '*Everybody is presumed to know the law.*'"

The 1909 President of the American Bar Association, Hon. Frederick W. Lehmann of St. Louis, within the present year has emphasized the situation as follows:—

"If an American wishes to know the laws of his country he must turn to several hundred volumes of statutes, several thousand volumes of reports of adjudicated cases and almost as many more volumes of text-books, commenting upon and expounding the statutes and the cases, . . . but *the rule by which he is to be governed in any transaction is somewhere in that confused mass of legal lore*, and it is so plain and so simple that it is his own fault if he does not find it or does not undersand when he has found it."

And again he says:—

"*The litigant*, untrained in the law and unused to its mysteries, *must bear the burden of the blunders* of the Court and counsel, grievous as these may be."

Senator Beveridge has the happy faculty of summing up a situation in picturesque and effective language. Concerning conditions in America he most truly says:—

"The multiplication of decisions has reached

a point where practice by precedent, to be exhaustive, *has become impossible;* and so the problem that confronted the Roman emperors and terminated in the Pandects of Justinian is now demanding immediate solution at the hands of American legislators, lawyers and jurists. . . . Scarcely anything has yet been done in law, and what has been done is so *bulky, unorganised and confused*, that to reduce, rationalize and systematize it *is the greatest task of all.*"

So also the distinguished General Thomas H. Hubbard of New York strikes the keynote when he asserts:—

"Statutes are enacted by thousands each year in the federal and state legislatures. Judicial decisions do *and must increase with bewildering rapidity*, while Courts are compelled to deal with multiplying statutes and the multiplying decisions of contemporaneous Courts and the bulk of the earlier decisions which go to make up the common law, and *must attempt to reconcile all these.* Text-books treat separate topics with little regard to their symmetrical relation to other topics that make up the entire body of the law. *Lawyers, Courts, legislatures and the public are burdened with the effort to find what is the law*, and to apply it. It must be hunted through thickets of session laws and reports and digests and compilations and text-books."

Again he declares:—

"To lessen or remove the burden that now exists, and to prevent that burden from being again imposed, would confer upon the country benefits that can hardly be overestimated. *Words can not exaggerate the importance of such a work.*"

He further says:—

"It should collect and collate the principles that are now scattered through reports, and should reduce them to formulas so definite and precise that Courts would not go behind the formulas to the cases from which they are deduced. This would eliminate a mass of judicial decisions, in the sense that it would reduce them to their proper value. . . .

"It should also present a framework upon which the laws of legislatures and of Courts might, in future, be fitted, and *it would methodize and minimize the manufacture of legislative law and judicial law.* . . .

"It is a work *of vast importance to the United States* and to every state of the United States, and *to every Court in the United States and all its states.*"

So also Hon. Francis Lynde Stetson, the President for 1908-9 of the New York State Bar Association, calls attention to the fact that in December, 1907, Professor Leonhard, the then *Kaiser Wilhelm lecturer* in Columbia University, stated that in his opinion such a work is "*the vital need of American law.*"

And Mr. Stetson, speaking for himself, declares:—

"As heretofore I have assured you, I share your conviction as to 'the vital importance and necessity of the production of a logical and philosophical statement of all our law.'

"This necessity *presses most urgently perhaps upon our American Bar*, facing *an overwhelming output of unassimilated opinions from thousands of Judges*, as well as the fragmentary comments of hundreds of text writers, who, with a few fortunate exceptions, produce commercial treatises under the pressure of commercial need and at the behest of commercial publishers, whose commercial instinct in this particular prescribes the limits for both the profession and the general public."

He also asserts:—

"But *the importance of a logical and philosophical statement of all our law* affecting the possessions and the person of every sojourner in the United Staes, *is vital to the public as much as to the legal profession*, which constitutes a part, and only a small part, of the public dependent upon it for learned and accurate advice. Quite recently it was observed by one of the best-known bankers of the world that "*the greatest risk in business is the legal risk.*" The reduction to a minimum of business risks is the mark of business intelligence."

And again:—

"No reflecting business man can be indifferent to any project promising to diminish the greatest of his business risks, law's uncertainty, and to supply for the instruction *and protection* of business men, both independently

and through their legal advisers, *an accessible authoritative and adequate statement* of the whole law of our land.

"No such work now exists."

Mr. Stetson sums up with these forceful words:—

"Though the practice of law is an art, the law itself is a science, and *its final statement must be scientific in process and result.* Otherwise, both those who follow it as a vocation *and the general public*, subject to its control, *at critical moments encounter the destructive unforeseeable and inexorable results* of government according to *the haphazard aggregation of the unrelated expressions of Judges and writers.*

"Some plan such as you offer *must without great delay be adopted and be consummated*, or the profession and the country alike *will be lost in the increasing and bewildering mazes of legal pronouncements.*

"Your plan certainly is ideal, . . . *it is inconceivable that any department of research can involve such beneficial consequences* as would the collection, the revision and the statement in logical and philosophical order of the whole body of the laws governing the rights of persons and property."

And it is well for those who love their profession to mark well this recent utterance of one of the ablest Justices of the Supreme Court of the United States:—

"Every additional day of judicial duty brings to me a deeper conviction of *the absolute necessity* of some *system of orderly and scientific classification of the great mass of confused precedents*, so that they may become useful in developing rules which would be consistent and harmonious."

Some there are who blindly close their eyes to the need of a great co-ordinated statement of the American system of jurisprudence, exemplifying in adequate perspective every branch and department of the law, and suggest that we have particular treatises on particular subjects which are all sufficient in themselves. Fortunately this is only the superficial view. I know of no more scathing indictment of the condition of our written jurisprudence than is contained in a letter recently received from one of the ablest teachers of law in America, the dean now for nearly a decade of a law-school conceded by the profession to be one of the best (Dean Kirchwey of Columbia). He says:—

"I have in mind gone over the various subjects of the law and have been appalled at the meagerness of the result. What is there on Real Property, for example, excepting Rawle on Covenants and Gray on Perpetuities and on Alienation? *Go over the whole field and you will find an abundance of so-called treatises of an encyclopædic character, digests masquerading as text-books, manuals and 'Hornbooks,' which state the more obvious rules of the law with a fair degree of accuracy, but where, with the exception of Evidence, will you find a single topic in the law treated with even a fair degree of thoroughness and philosophical spirit?*"

So also, James Barr Ames,* the brilliant and long-time Dean of the Harvard Law School, emphasizes the same view, declaring:—

"Some of our law books would rank with the best in any country, but *as a class our treatises are distinctly poor.*"

And Sir Montague Crackenthorpe, when visiting this country in 1896 with Lord Chief Justice Russell of England, touched this subject forcefully in his address before the American Bar Association, when he said:—

"We have in our libraries a number of monographs, dealing with the subheads of law in minute detail—books on torts, on contracts, on settlements and wills, on sales, etc. We have also many valuable compendia, dealing with the law as a whole. Each and all of these bear witness to *the disjointed character of our jurisprudence.* The numerous monographs overlap and jostle each other, like rudderless boats tossing at random on the surface of a windswept lake. The institutional treatises, in their endeavor to be exhaustive fail in point of logical arrangement.

*See p. 72, *infra*.

Some day, perhaps, we shall produce *a corpus juris, which shall reduce this legal wilderness to order.*"

Concerning the digests, Hon. Lawrence Maxwell of Cincinnati, Solicitor-General under President Cleveland, reaching the same conclusion expressed by James Wilson a century ago, sarcastically asks: —

"What sort of a science is it that relies for its classification upon a digest of titles arranged alphabetically, according to the whim of an indexer, whose skill is often measured by the facility with which he can use a paste-pot and scissors, or distribute different faced type attractively for cross-reference?"

Judge Dillon also scores the encyclopædic digests, asking: "*Who shall digest the digest?*" And asserts:—

"Many of these are not arranged on any system or principle, but empirically, under such unusual titles as appear below. . . ."

And of the thousands of volumes of reported cases and the impossibility of the practising Bar mastering them, he declares:—

"*This colossal body of case-law is wholly unorganized and even* unarranged, except so far as digests and elementary treatises may be considered as an arrangement, which, scientifically viewed, they are not. The infinite details of this mountainous mass in its existing shape —bear me witness, ye who hear me —*no industry can master and no memory retain.*"

So also the man considered by many the ablest Judge west of the Mississippi asserts:—

"*The whole analysis and arrangement* of the body of our law has fallen *into commercial and incompetent hands.* Head notes of cases are made by those who have *no capacity to understand the broader principles of law assumed in the cases decided,* and whatever the elaboration used in classifying these head-notes, the result must necessarily be unsatisfactory. Cyclopedias are made up to a large extent from these head notes, and the writers give much more prominence to the small points of detail which are usually represented in the particular decisions than they do to the broader principles which underlie the decisions, but are not amplified in them. It is *this broad foundation of the general rules, in accordance with which decisions are made and tested,* but not usually amplified in the decisions themselves, that *ought to be expounded in some connected and logical statement of the law.*"

Little wonder is it that Judge Dillon, far-sighted prophet of his time, pleads for a great institutional treatise—an institutional digest, declaring:—

"What is needed is the constructive genius and practical wisdom that can take these truly rich, invaluable, native but scattered materials, . . . and out of all these build *an Edifice of Law, primarily designed and adapted to daily use,* which shall be at once symmetrical, harmonious, simple and commodious."

Do not these citations of authority demonstrate the proposition that a great institutional digest, an expository digest, dealing with our law and the minutiæ of its various ramifications, a complete logically co-ordinated statement of the American *Corpus Juris*, is a vital necessity and that we must have it in order to prevent that ultimate chaos so rapidly approaching, to which reference has been made?

Is not the great practical question simply this: *How can the desired result be produced?* Americans have talked about it and dreamed about it now for more than a hundred years, but no one has "made the thing happen." We have been, as Wilson put it, "*fruitful of words, but barren of works.*" Can it be done? That is the issue and there can be but one answer: *It has got to be done.*

II

BY WHAT METHOD SHALL THE DESIRED RESULT BE PRACTICALLY ACHIEVED?

THIS involves consideration of two main points:

(a) *The plan for the actual creation of the work.*

(b) *The financing of the project.*

First (a). The Building of the Work.

The following conclusions, and the plan of operations in which those conclusions have taken form, are the result of long study and deliberation and many conferences between two men of wide experience and high standing in the profession and myself, and of numerous consultations, personally and by correspondence, with some of the ablest jurists in America. The two to whom I refer are James DeWitt Andrews, formerly of the Chicago, now of the New York Bar, and long the Chairman of the American Bar Association's Committee on Classification of the Law,* and Dean George W. Kirchwey, of the Columbia Law School. Dr. Andrews will be recognized as the learned author of Andrews' American Law† and the editor of Wilson's Works and of other publications, and Dean Kirchwey as a legal scholar and teacher of wide reputation.

In the *first* place, we believe it is only a superficial view which assumes that the work is so vast that from the practical standpoint it is impossible of achievement. In this connection, it is well to recall the words of Mr. Justice Holmes:

"The number of our precedents *when generalized and reduced to a system*, is not unmanageably large. *They present themselves as a finite body of dogma, which may be mastered within a reasonable time.*"

Furthermore, he declared:—

"*The reports of a given jurisdiction in the course of a generation take up pretty much the whole body of the law* and restate it from its present point of view. We could reconstruct the *Corpus Juris* from them if all that went before were burned. The use of the earlier reports is mainly historical."

So also Judge Dillon has said:—

"The number of cases is legion, but *the principles they establish are comparatively few, capable of being thoroughly mastered and capable also of direct and intelligent statement.*"

Then there are those who jump to the conclusion that by reason of the vast amount of statute law, the preparation of the text will be most difficult and virtually an impossibility, no matter how thoroughly the system of organization. This view is also based on a superficial and inadequate comprehension of our law as a whole. No man of our time probably had a better grasp of the entire field of law than the late James C. Carter, and he asserted:—

"It is scarcely an exaggeration to say that *nearly the whole of that body of law which really prescribes rules of civil conduct*, which is stamped with the moral quality of Justice, and which governs the private transactions of men with each other, *is substantially untouched by the statute book.*"

Second. Confident that the desired result may be attained within a reasonable time, we are positive that for various reasons, it cannot be achieved in a satisfactory manner by one person, and that its successful accomplishment requires the thorough organization of that portion of the brain-power of the country fitted to engage in such an undertaking.

*See 1902 report, xxv A. B. A. Reports, 425–475.
†See review of *second* edition in *Green Bag*, vol. xxi, pp. 104–110.

We believe that a large group of experts should be employed, but that in order properly to co-ordinate the activities of all those collaborating there should be highly centralized executive and editorial control, with sufficient power to enforce proper proportion, classification, system, method and style in every department of the work.

Dr. Andrews, Dean Kirchwey and I after numerous conferences have worked out a plan which we believe to be *practically* workable, an essential element of success,—a plan which in our judgment should bring to the profession in the near future that for which the call has gone out now at intervals for more than a century, but which has never been answered, yet the need of which is more apparent today than at any other period in our history.

The plan in outline is as follows:—

We propose to block out *with the ablest expert advice obtainable* the entire field of the law under a logical system of classification, so that when the work is published, the law on any particular point may readily be ascertained.

BOARD OF EDITORS. Our plan, stated more in detail, is to associate a Board of Editors not exceeding seven men—the ablest to be found in America, so situated that they can undertake the work (such as the late James Barr Ames of Cambridge and John H. Wigmore of Chicago, whom I mention merely as types). The criterion for selection must be that each is the best expert obtainable for the particular class of work to be represented and directed by him, and each must receive whatever compensation is necessary to command the best services in every field. Our plan involves vesting in this Board final and authoritative control over every editorial matter about which differences of opinion might by any possibility arise, such as in matters of classification, the space to be assigned particular subjects, the method of treatment of mooted points in the law, etc., etc.,—in fact, the making of this Board of Editors supreme in every editorial matter. As explained hereafter, they are to have the best expert advice and assistance obtainable, and we would expect at least three or four of this Board to devote their entire time to the work, and all to attend sessions whenever necessary.

ASSOCIATE BOARD OF EDITORS. We also propose to form with the aid of the central group of editors, an Associate Board of Editors, to consist of about twenty, each to represent the best the law-schools have in the way of experts in particular departments of the law. These men must also receive such compensation as will command the services of the ablest men in every department of the law.

The chief function of a member of this Associate Board of Editors would be the preparation of the text on the particular topic or branch of the law assigned him. It would no doubt also be feasible to form small advisory groups upon particular topics, the same to be composed of the ablest men in the profession, who either as practitioners, authors or teachers, have become recognized experts in particular branches. After the system of classification, etc., has been outlined by the Editors, and the Associate Board been formed, it would be called into session and the system of classification most thoroughly examined, and revised wherever necessary as a result of the deliberations of the combined editorial forces, aided by an Advisory Council, concerning which I shall speak in a few moments.

Our plan is not to ask the Associate Board of Editors to give up their law-

school work, except that it would be advisable for a majority of them to secure a leave of absence for at least one year of the period during which they will be engaged upon their part of the work, and in order that they may be attached during that year at the headquarters office of the publication, doing their work there during that time. Apart from this, however, we would expect a consultation conference of the entire editorial force to be held once a month of at least a full day in length. It is the judgment of Dean Kirchwey and others—speaking from the standpoint of the ablest law-professors—that such an expert Board to be composed of the very best law-teachers in the profession can readily be secured to work out this plan if convinced that the co-ordinated product of all will represent the best effort of the profession; indeed that under these circumstances all invited would view it as a great opportunity and that, if the financial reward were sufficient, their services could undoubtedly be depended upon.

The importance of having the ablest experts in the law-school element in the profession prominently represented in the editorial work, which is necessary in the production of a logically co-ordinated statement of the American *Corpus Juris*, has also been emphasized by that distinguished jurist of the Western States—Mr. Chief Justice McClain of the Supreme Court of Iowa, who says of our plan: "*It is a great project, and as it seems to me feasible.*" Then, after referring to the fact that the writers in the encyclopædias on law give "much more prominence to the small points of detail which are not usually represented in the particular decisions than they do to *the broader principles* which underlie the decisions, but are not amplified in them," he declares:—

"It is this broad foundation of the general rules *in accordance with which decisions are made and tested*, but not usually amplified in the decisions themselves, that ought to be expounded in some connected and logical statement of the law. Such a statement *can not be made by individual text writers*, and *it ought to be made by those who through experience in teaching have been driven to deduce principles from practical application.* The fact is that the only really intelligent notes of current cases and comments thereon are found in the law school journals which are not published as financial enterprises but *as the result of the labor of those connected with the schools.*"

So also James Barr Ames* declares:—

"We live in the era of specialization, and *the time has now come for the intensive cultivation of the field of law.* The enormous increase in the variety and complexity of human relations, the multiplication of law reports, and the modern spirit of historical research, demand *for the making of a first-class book on a single branch of the law*, an amount of time and thought that a Judge or lawyer in active practice can almost never give. *The professor, on the other hand, while dealing with his subject in the lecture room, is working in the direct line of his intended book.*"

And writing specifically concerning the present project, Dean Ames says:—

"The bulk of the work will have to be done, as the lion's share of preparing the German Civil Code was done, by the professors."

It is believed that writers on particular parts of the law, under our plan, would readily understand the necessity for their individual work being executed in such manner as to accord with the system determined upon, and that by

*We record with deep sorrow the passing on beyond on January 8, 1910, of that luminous star in the firmament of Anglo-Saxon jurisprudence—James Barr Ames. His death will prove a greater loss to the legal world, present and future, than perhaps that of any other one man who could be named; and to those who in this project had hoped for his continued advice and counsel, the loss is irreparable. (See p. 104 *infra.*)

reason of this and as a result of the frequent consultation conferences, each would have a pride and to a certain extent a feeling of authorship in every part of the entire work, in addition to the portion peculiarly representing his own individual effort. Of course in order to secure the essential "co-ordinated whole," the executive head of the enterprise must necessarily reserve the power to the Board of seven Editors to re-cast into the general style of English determined upon for this work any of the product of a member of the Associate Board; indeed, after consultation and careful consideration, to re-mold any part of the work in order to secure not only exactness, but as far as practicable perfect harmony, for in the last analysis the work of all must be completely co-ordinated, and those responsible for the plan and its execution must see to it that the finished product is in every sense all that is contemplated.

To prevent disorganization and chaos, to insure harmony and secure perspective, the authority to do this must necessarily be lodged somewhere where it can be practically and effectively exercised, though of course each writer would be fully consulted concerning changes. The point I wish to make is that the finished work should not and must not be a composite of disjointed branches of the law treated by particular individuals, but a co-ordinated whole—the product in a sense of all, but under final and authoritative centralized control.

The importance of the point brought out in this latter thought was made apparent by Mr. Justice Holmes when at one time discussing the subject of codification. He said:—

"We are inclined to believe that the most considerable advantage which might be reaped from a code is this: That being executed at the expense of the government and not at the risk of the writer, and *the whole being under the control of one head, it will make a philosophically arranged Corpus Juris possible.* If such a Code were achieved, its component parts would not have to be loaded with matter belonging elsewhere, as is necessarily the case with text books written to sell. Take a book on Sales, or one on Bills and Notes, or a more general treatise on Contracts, or one on the Domestic Relations or one on Real Property and in each you find chapters devoted to the general discussion of the incapacities of infants and married women. A Code would treat the subject once and in the right place. Even this argument does not go much further than to show *the advantage of a connected publication of the whole body of the law.* But the task, if executed *in extenso*, is perhaps beyond the power of one man and if more than one were employed upon it, *the proper subordination would more likely be secured* in a government work. We are speaking now of more serious labors than the little rudimentary text-books in short sentences which their authors by a happy artifice have called Codes instead of manuals. Indeed we are not aware that any of the existing attempts are remarkable for arrangement. *The importance of it if it could be obtained cannot be overrated.*

"In the first place it points out at once the leading analogy between groups. Of course cross divisions will be possible on other principles than the one adopted. . . . *A well-arranged body of law* would not only train the mind of the student to a sound habit of thought but *would remove the obstacles from his path which he now only overcomes after years of experience and reflection.*"

So also the necessity for a highly centralized control in the preparation and production of this work has been emphasized in a communication to Dean Kirchwey from Hon. William H. Staake, Chairman of the Executive Committee of the National Conference of State Commissioners appointed by the Governors on Uniform State Laws. Judge Staake writes:—

"I congratulate you and your collaborators upon *the invention of so practical a plan for the production of this work*, and also upon the personnel of the three men who propose to

devote their time and energy to the organization and achievement of the great undertaking, *for apart from securing the services of the ablest writers on law, it is essential in order to assure success that the enterprise should be subject to a highly centralized and authoritative direction and control.* Justice Holmes of the Supreme Court of the United States made clear that *most important of all points*, and the happy combination of yourself, Alexander and Andrews insures that *able executive control* of the undertaking, without which the desired result, *an adequately 'co-ordinated whole,'* could not be produced."

In addition to the Board of Editors and Associate Board, we contemplate having at work at the headquarters of the publication, a strong editorial force under the immediate direction of the Board of Editors, for there are several topics and much editorial work which could be more thoroughly and satisfactorily handled there by a competent force than in any other manner.

ADVISORY COUNCIL. We do not consider, however, that the office editorial staff or the Boards of Editors will supply all the advice and help which would be needed. We are of opinion that there should be an Advisory Council of twenty or twenty-five of the strongest men in the profession, both on the Bench and at the Bar, men who would not have the time to devote to the *actual work* of authorship or editorship. We would expect these men to be paid a sufficient sum to insure their giving the producers of the work their best advice on any point about which they or any member of the Associate Board should deem it important to consult them.

BOARD OF CRITICISM. Furthermore, we have planned a Board of Criticism, composed of at least one hundred and perhaps two hundred selected from among the ablest lawyers on the Bench and at the Bar, and in the law faculties, to whom we would submit proofs of particular parts and in a way that would insure every portion of the work beng read and criticized by a considerable number. Our idea is that this part of the system would be arranged so that each man in this group would read only the portions concerning which his opinion would be of particular value;—of course each would be paid for this advisory criticism. In addition to this, our aim would be as soon as possible to place the proposed treatment of mooted points in type in the periodicals of the profession, or in one which we would maintain, *with a universal invitation for criticism.*

TEXT—METHOD OF TREATMENT. I have purposely avoided any references herein to any particular methods of statement, citation or classification, for, while these subjects have been thoroughly considered, they are matters which it would be idle to discuss in detail in this Memorandum, as such points must be left to the determination of the proposed Board of Editors. For the purposes of this Memorandum, it is assumed that the able men, whom it is proposed to assemble on the various editorial Boards and Advisory Council, are competent to work out a scheme of classification and method of statement and citation which will be adequate to the needs of so vast a project, yet emphasis may be laid on a few main points.

1. *Condensation, clearness and precision are essential.* Austin Abbott has well said:—

"One great difficulty in learning what is the law is that its expounders use too many words. Open one of the portly compilations which are often put forth as treatises, and read. A thorough master of the English language could put three or four pages into one; could express all the ideas of several paragraphs in as many sentences; and *by this condensation,*

contradictions would be brought into contrast, inconsistencies exposed and the distinction between settled law and debatable questions forced upon the attention.

"The current legal language, as used, is as clumsy and burdensome as are the plows and harrows of two centuries ago compared to the implements of today. . . .

"*Conciseness is the great detector of fallacies.*"

That unreasonable and fallacious doctrines have been engrafted upon Anglo-Saxon law through the centuries of its growth no true lover of the profession can deny. More than a score of years ago that earnest student of our Common Law, Oliver Wendell Holmes, Jr., now Mr. Justice Holmes of the Supreme Court of the United States, with prophetic vision asserted: —

"We are only at the beginning of a philosophical reaction and of a reconsideration of the worth of doctrines which, for the most part, still are taken for granted without *any deliberate, conscious and systematic questioning* of their grounds."

While some things have been remedied the process has by no means been as rapid as it should, owing mainly to the hundreds of thousands of reported adjudicated cases constituting a mass unmanageably large, and lacking, except as to a few subjects, scientific arrangement and classification. *What the law actually is* can be ascertained only from a philosophical study of the decisions of the Courts after they have been logically classified. "By actual law," it has been well said, "we mean *the law in force today;* the law *now* applicable to transactions, and *now* controlling procedure." In the last analysis, precedents which are sound in law and logic must necessarily control, yet it is essential in the effort to ascertain the actual law to avoid being misled by the enormous percentage of ill-considered *obiter dicta* in the opinions of Judges and never to lose sight of the fact that a decision can never be an authoritative precedent except upon a point in issue before the Court.

Austin Abbott has forcefully called attention to the further fact that through the last century "by an almost imperceptible process" our point of view concerning precedents has been changed, —indeed, as he puts it, "reversed." He says: —

"Time was when the earliest precedent was of paramount authority; later decisions were tested by the earlier, and disregarded when found to depart from the earlier. *By an almost imperceptible process this rule has been reversed.* It is now the latest decision of the Court of last resort, which is regarded as the highest evidence of the law; and earlier decisions are valued chiefly as they throw light upon the intent and effect of the latter. *It is, therefore, actual law which is now of the first importance,* and historic law owes its main value to the better understanding it gives us of the law of today."

2. It follows that not only condensation, clearness and precision are essential in a statement of the *Corpus Juris*, but that *the overwhelming mass of authorities must be analyzed and all of importance marshalled.* The authorities fall naturally into three general classes, to wit:

(*a*) *Ruling Cases*, which establish rules, *show the actual law* and frequently overrule or modify leading cases;

(*b*) *Leading Cases*, which indicate the original reasons for rules and are valuable aids in the interpretation and application of principles; and

(*c*) *Illustrative Cases*, which when properly classified show the application of rules to different subjects and in different situations.

This has been clearly indicated by Dr. James DeWitt Andrews, who declares that an ideal system of citation embraces "(*a*) *all* the leading cases, (*b*) *all* the ruling cases, and (*c*) illustrative

cases classified as to subjects"; and he directs attention to the fundamental fact that "every case presents the possibility of four prime subjects: Substantive Law, Pleading, Practice and Evidence." And he asserts: —

"The science of citation is to present a diversified citation, showing the law in all jurisdictions, a classified illustrative citation showing the various applications."

Without elaborating this point further, it is apparent that problems will confront the Board of Editors which will demand the services thereon of men of the highest ability in the profession.

3. *Necessity for Adequate System of Classification.* Many great authorities have already been quoted upon this subject, and the importance of scientific analysis and classification has been forcefully emphasized, yet perhaps by no one better than by that luminous scholar, Austin Abbott, who asserted:—

"One of the chief defects in legal writings and compilations at the present day is imperfect classification. *The immense multiplicity of authorities require thorough analysis and classification*, lest we be lost in a labyrinth of contrasts. Imperfect classification is not merely a defect in the results of research—*it is a hindrance in the process of research.*"

Wilson (as may be seen by reference to the quotations from him in the forepart of this memorandum), insisted upon the necessity of an adequate logical system of classification.

Concerning the importance of systematic organized knowledge, one of the most learned jurists in America in a recent letter makes this interesting comment:—

"I quite agree that a man who has not some sort of systematic relation will not think philosophically, *i. e.*, profoundly, but will remain *like many successful practitioners* simply the carrier of a ragbag out of which by the index of his memory he can pull what he wants."

The late George W. Biddle many years ago referred to Chancellor Kent's *Commentaries* in a way to make this well-known treatise, on the authority of Mr. Biddle, an excellent illustration of the work of an able and brilliant writer failing to accomplish what it should, because "*compiled without system or logical sequence.*" A distinguished graduate of his law office relates:—

"We had been talking about Kent's *Commentaries*, and Mr. George W. Biddle stated they showed the ability of Chancellor Kent, and that there was much that was brilliant and masterly in the volumes, but that it was all *compiled without system or logical sequence:* and I have never forgotten that at the time there was upon the table a large kaleidoscope which some one had brought in, and as he was discussing the subject Mr. George W. Biddle picked up the kaleidoscope and said: 'This reminds me of Kent's *Commentaries*—a mass of brilliant things *thrown together.*'"

Lost as is the profession today in the labyrinth of reported cases, and sailing as it is over the vast sea of the law without adequate chart or compass, yet the task of stating our *Corpus Juris*, it has been made plain by some of the greatest minds which have adorned the profession during the last century, is by no means an impossible one—this task of erecting that great "Edifice of Law" described by Judge Dillon "primarily designed and adapted to daily use, which shall be at once symmetrical, harmonious, simple and commodious."

After all, in the last analysis, it is mainly a question of practically organizing the brain-power of the profession, under an effective plan, in order to make the production of this great work possible at an early date.

Executed in the way outlined above, *we believe that the American System of Law, embracing the Constitution and the*

laws of the nation and of all the states (including statutory modifications of the Common Law) *can be completely exhibited, as the product of the best thought of the entire profession.* If this plan has any one especial merit, it doubtless lies in the fact that it aims *to organize in an effective practical way* the best brain-power of the profession, without which no statement of the American *Corpus Juris* could ever be as exact and thorough as it should.

EXECUTIVE CONTROL. The importance of a strong executive control in the production of such a work was emphasized not only by Mr. Justice Holmes and Judge Staake (quoted *supra*) but has also been particularly referred to by Francis Rawle, Esq., former president of the American Bar Association and the actual as well at titular editor of the recent editions of *Bouvier's Law Dictionary*, the editing of which work well qualifies him to give an authoritative opinion of particular value as to whether centralized control is important in such a work as that contemplated.

Mr. Rawle writes, declaring the proposed work "*would be of inestimable value to the profession and the community*," and asserts:—

"*I thoroughly approve of that part of your plan which entrusts the ultimate headship to three, aided by a large advisory body.*"

Mr. Rawle inclines to the opinion that the advisory group should not be too large. On that point he says:—

"It certainly ought to be large. Perhaps fifty would be enough. It would be difficult to find one hundred men of equal, or anything like equal or average value, and the average ought to be high, both for good work and for the effect it would have on the profession."

Hon. J. M. Dickinson of Tennessee, the present Secretary of War and the President last year of the American Bar Association, examined our plan for the production of this work just before starting for Panama, and concerning it writes:—

"*There can be no question as to the importance and desirability of such a work.* Your plan as mapped out seems to me *to be practicable* and comprehensive."

Hon. Alton B. Parker says "It all seems workable."*

So also President Woodrow Wilson of Princeton, long a deep student and teacher of Jurisprudence as a science, writes that the enterprise "is *both desirable and feasible*," and adds: "I wish that there were some way in which I could be of assistance to you."

And Hon. Emlin McClain, Chief Justice of the Supreme Court of Iowa, than whom no one in the west is in a better position to speak with authority, declares:—

"I believe you have a great plan, and one the successful prosecution of which *would produce something monumental for the common law* and give it that satisfactory form of statement which it has lacked in its competition with the civil law as a subject of methodical study."

He also calls attention to the fact that Lord Halsbury's English work is "totally inadequate" for American use. On this point, he says:—

"I suppose '*The Laws of England*' which is being published under the supervision of Lord Halsbury is an attempt to do what you would like to do on a broader scale. That work *is totally inadequate as a statement of the common law as administered in this country*" (*i. e.*, in the United States).

Of our plan for the work Chief Justice McClain also asserts:—

"It is a great project, and as it seems to me, feasible. . . . I would say that *a logical*

*See a further expression of Judge Parker's views, p. 92 *infra*.

and philosophical statement of the common law is of importance not only, and perhaps not primarily, to the practising lawyer, but fundamentally to Courts, legislatures and law teachers; that *the plan which you propose seems to me to be the only one in accordance with which the work may be satisfactorily done.*'

And adds:—

"Some foundation provided for the purpose would be *in furtherance of one of the deepest interests of humanity and civilised government.* The work cannot, as you well say, be entrusted to commercial interests, and, as we know very well, it cannot be entrusted to legislation."

So also United States Circuit Judge Grosscup of Chicago writes:—

"I believe that the *Corpus Juris*, when published, will be *one of the greatest influences put forth by this generation of men. . . . We have come to a time* when, *for the sake of civilization*, as well as the practical administration of the law, the body of the law should be put into scientific form."

He further says that "its loss to the world would be a distinct loss, and perhaps an irremediable one," and adds:—

"Any word that I can say to anyone who is interested in a statement of the law, not as a commercial venture but *as one of the avenues through which civilization moves forward, I will be glad to say.*"

After this undertaking had been submitted to one of the ablest and best known teachers of law in America—Dean Kirchwey of Columbia, I received from him a letter in which he spoke of being "deeply interested in the project of giving to the world a complete systematic statement of the law of the land," and declared:—

"It would be difficult to exaggerate the importance of such a work to the bench and bar and, indeed, to our country and its institutions. The plan stirs my imagination as a contribution, *perhaps the greatest single contribution that could be made, to the great work of reducing the chaos of our complicated American jurisprudence to something like order and unity.* If, as your plan contemplates, the treatise shall represent the finest legal scholarship and the best professional experience of our country (and I can see no reason why you should not be able to command both for such a project) it will undoubtedly be eagerly welcomed by the profession and take its place as a notable achievement of the American bar. I shall be glad to contribute, in every way possible, to the success of the enterprise."

And it is peculiarly fortunate for the nation and the profession that Dean Kirchwey is now actively engaged as a prime factor in organizing the project and bringing it to its present state of development.

It is submitted that with an editorial force such as that planned, a *magnum opus* would be produced, exhibiting the *corpus* of American Law in an orderly and systematic manner and under a logical scheme of classification, which when once mastered by the Bench and Bar would make it possible for the fundamental principles and leading authorities governing any particular subject to be quickly found. A great institutional treatise produced under the plan outlined one can readily understand would be far superior to the encyclopædic digests published by the law book firms as commercial enterprises, and which in many instances employ second and third rate editors, in some cases securing (and mainly to attract buyers) a few well-known writers on particular subjects—men who sometimes permit the use of their names, after having done little more than read the manuscript prepared for their signatures. Such productions have been forcefully commented upon by Judge Dillon and others, *supra*, and are mere makeshifts unworthy of the name even of digests, with their masses of undigested and improperly digested materials.

SIZE OF THE WORK. Based on the most careful calculations, our belief is that the work (partly because an adequate system of classification will make possible *the avoidance of duplication of material in different parts*, on which point see views of Mr. Justice Holmes quoted *supra*) can be produced in about twenty volumes of one thousand pages each, including an index and table of cases.

Second (b). The Financing of the Project.

Planned on so gigantic a scale as that outlined, with an editorial staff such as we have in contemplation, the production of the work would cost seemingly an enormous sum of money, *yet in reality it is a trifling sum in comparison with the advantages to accrue to our juridical system and to the nation.*

Calculations, based on careful computation as to cost of material and all other expenses, including the probable amounts necessary to be paid the various Editorial Boards, members of the Advisory Council and Board of Criticism, total approximately six hundred thousand dollars, which according to the estimate would enable five thousand sets to be produced, bound ready for delivery. The figures mentioned could be considerably reduced, yet it would be at the sacrifice of the *quality* of the editorial writers and the extent of the system of criticism; on the other hand, a further elaboration of the extensive system of editorial work proposed would of course increase the cost. Our figures include the advertising necessary to sell four thousand five hundred sets at the rather moderate price, for a work of such character, of $7.50 per volume, or $150 a set. The large digests now on the market sell complete for considerably more than the sum named for our work, yet it is not a debatable point that they would in no sense be equal to or be as complete, as valuable or as well edited as this new work. It is said that they each average a sale of more than 2,000 sets per year. Our belief is that the proposed American *Corpus Juris*, within less than two years after it is placed on the market, at least the entire five thousand sets, will be sold, or rather forty-five hundred sets, five hundred being reserved for review and other special purposes. *If so, the work would have more than paid for itself and left a considerable credit balance.*

We believe that far in excess of 2,000 sets of the proposed work would be absorbed annually by the profession if produced as outlined above. And while the work is not a digest in the sense the word is now used and if thoroughly done would probably not require extensive changes in the text from time to time, (probably very few after the second edition) yet we believe it would be advisable to keep it up to date with a cumulative annual and with complete new editions at intervals of say every ten years.

On a purely commercial basis, the project is undoubtedly capable of being successfully financed. Indeed we believe our figures to be exceedingly conservative and that James C. Carter did not overstate the case when he said, "Fortune and fame sufficient to satisfy any measure of avarice or ambition would be the due reward of the man, or men, who would succeed in conferring such a boon." You will recall also that Carter declared it "*would be of priceless value*,"—that "such a work, well executed, would be the *vade mecum* of every lawyer and every Judge"; that "*It would be the one indispensable tool of his art.*"

Judge Staake has well said:—

"It is pitiable that the question of financing the project should have to be discussed."

But it must. There are two general

methods or plans under which the production of such a work could be brought about practically, to wit:—

I. The *Commercial Basis*, which means its publication *for profit;* and

II. A *Foundation of Jurisprudence*, which means its publication *pro publico bono.*

A third may occur to some, to wit, Governmental Action, but that will not be seriously presented, as it has been declared inexpedient and unwise by great authorities, as will appear from quotations from them here and there through preceding portions of this Memorandum. Furthermore at the present time it is clearly impracticable, in part owing to the antagonisms existing between the two great schools of political thought in our country in the matter of the powers which belong respectively to our dual governmental agencies—national and state. If such a work, as the exact statement of the American *Corpus Juris*, were to be a governmental production, it should be under the auspices of both the national and state authorities, but anyone who understands the trend of thought in America can realize the impracticability of securing joint action by Congress and any considerable number of State Legislatures. The two practicable plans—(1) the *Commercial*, and (2) that which I will call the *Foundation of Jurisprudence plan*, will be briefly considered.

I. Commercial Basis. This again subdivides into two possibilities, to wit: (*a*) The production of the work as a strictly commercial venture by one of the big law publishing firms or by a combination of them; or (*b*) its publication by some concern organized for the specific purpose.

The big law publishing firms could hardly be expected to aid in making such an undertaking financially possible, unless *they controlled* the work (which could hardly result other than in the cheapening of the class of editorial writers to be employed) for they have encyclopædic digests which would doubtless be displaced by the new publication. The most practicable thing, therefore, from a commercial standpoint would seem to be the organization of a stock company to float it, but such a great movement as this *ought to be saved from the bane of commercialism.*

Indeed, it would be difficult to express too strongly how important it is that so great an undertaking should be saved from its perils. While there can be no doubt but that the plan after a fashion may be floated on a purely commercial basis, the tendency to secure cheap talent could hardly be avoided.

This point is emphasized by Chief Justice McClain, who says:—

"*The work cannot*, as you well say, *be entrusted to commercial interests.*"

Judge Grosscup and others have spoken of the "practical difficulties in the way of finding a publisher" for so great a work. Judge Grosscup says as to this:—

"A great work like this does not always appeal to men with whom the first consideration is what profits can be reaped."

And of the proposed work itself, Judge Grosscup declares:—

"It will give to the law what Herbert Spencer gave to science—a synthetic structure large enough to cover every subject involved and so scientifically arranged that each detail will be found in its proper place and relationship."

Hon. Francis Lynde Stetson, resourceful leader of the New York Bar and the President for 1908-9 of the New York State Bar Association, writes:—

"No such work now exists, *nor is one possible of production purely as a commercial venture*, for a digest informed and restrained

by philosophy and logic cannot result from a mere quest for profits. The condition may justify the application of the homely expression of the humorist, Josh Billings, that 'Poetry writ for bread is apt to taste of the emptyings.' "

He also remarks:—

"Some such plan as you offer must without great delay be adopted and be consummated, *or the profession and the country alike will be lost* in the increasing and bewildering mazes of legal pronouncements.

" *Your plan certainly is ideal*, and I trust also that it is practical, *though for its realization it depends upon the provision of a very considerable foundation.* It cannot be imagined that years of service of the highest order can be obtained from professional men of the first rank without remuneration sufficient to induce their continued and undivided attention until the completion of the great work. Upon completion, *an authoritative and comprehensive work of such value to the public and the profession*, in my judgment, would command *a prompt and abundant return, sufficient to reimburse the most ample foundation.*"

And adds:—

"Lawyers as a class are poor, and it would be difficult, if not impracticable, within a reasonable period to raise from them the sum, at least $500,000, necessary for the achievement of this result, which, as I have observed, *is not more important to the profession than it is to the vastly greater public.*"

Again he says:—

"This work . . . is so sorely needed that *if adequately endowed* its preparation would enlist the services and support of students of the law whose pre-eminence would be conceded by all."

He further declares:—

"*It is inconceivable that any department of research can involve such beneficial consequences* as would the collection, the revision and the statement in logical and philosophical order of the whole body of the laws governing the rights of persons and property."

And Chief Justice McClain of Iowa asserts:—

"Some foundation provided for the purpose would be *in furtherance of one of the deepest interests of humanity and civilized government.*"

II. A Foundation for the Advancement of Jurisprudence. There is no plan whereby the "perils of commercialism" can be avoided but by the work being brought out on a *Foundation of Jurisprudence* established by some man of large means anxious and able to use part of his wealth in benefiting mankind; or by such a man advancing the necessary funds to proper trustees under an agreement to refund the same from the proceeds of sales, for unless the money is in hand to remunerate the right sort of writers, and to warrant contracts being entered into with them it will be impossible to secure and co-ordinate their services.

That this great and necessary work has never been accomplished, notwithstanding the fact that Bench and Bar alike have been and are floundering in the mazes of unorganized, unsystematized and often conflicting rules and decisions, is for the very simple reason that individual workers, acting independently, can make no appreciable impression upon the "mountainous mass," and no practicable plan for effective co-ordination of the best effort of the profession has ever before been presented.

The Call of the Future. There is so much that can be done and ought to be done in the field of jurisprudence in order to perfect and perpetuate our juridical system, *the great vital force in our civilization*, that it is almost inconceivable but that (if the situation could be presented to some wealthy philanthropist so that he would realize its full significance, the great need and far reaching and permanent effects upon the administration of Justice throughout the nation and the world) he would consider that *no greater opportunity could possibly present itself*, whereby *to do a lasting good to a nation*

and at the same time perpetuate his own fame. A million-dollar foundation or even half that sum to make possible such enterprises as this and *advance the science of Jurisprudence* could not but go on in its good work through the centuries and place the donor in a far more immortal position than Justinian. The workers—the men who produce "the Books of the Law" would rank only as did Tribonian; but the man who made such an undertaking possible, freeing it from the "perils of commercialism" would assuredly stand as the Justinian through all time, and would be instrumental in putting in motion forces which would influence the jurisprudence of the world throughout succeeding ages, just as has the work which Justinian made possible.

This thought has been well emphasized by a distinguished jurist, who, after a careful consideration of our plan, declares:—

"The importance of the preparation and publication of a great '*System of American Law*' should appeal to everyone who reveres Justice and has a right understanding of the practice of the two loves—love of God and love of man, the foundation on which all laws should be built. . . .

"Love of God, of Justice and righteousness, of country, of their fellow men may secure a founder for the needed foundation. *The fame which would forever attach to the name of the donor would be but a due and just reward.*

"What far-reaching an influence the work you contemplate will have upon the jurisprudence of our country and of the world, upon the administration of Justice and the development of civilization everywhere, no one can now justly estimate. Conditions in China and the entire Orient, teeming with its hundreds of millions, are but an illustration; there an earnest effort is being made to establish a System of Justice, which will embrace the best features of that represented by Anglo-Saxon and western civilization. Think of the influence only in that limited field of such a work as you, Andrews and Alexander have planned!"

The unfortunate condition in which the system for the administration of Justice now is, by reason of the unmanageable and rapidly increasing mass of authorities, is of course not known to the general public and perhaps never can be appreciated by them, for it manifests itself only in delays in the administration of Justice and unintentional injustice in decisions of Courts. The public realize the results but do not understand and perhaps never can understand the reasons. Hon. U. M. Rose of Arkansas, former President of the American Bar Association, and a representative of the United States government at the last Hague conference, writes:—

"I am in hearty sympathy with your plan; and *I approve it in all its details.* The gentlemen relied on to carry it into execution enjoy in the highest degree the respect and confidence of the profession; and I am of the opinion that the selection could not be improved on. *The work ought to have been done long ago. The state of the law at present is a disgrace to our profession.*"

There are several considerations, which it is believed, if properly presented, would cause a philanthropist of large means to view it as a most unusual privilege to make possible the production of such a work as this *on a non-commercial basis*, thereby insuring its being issued in the best possible manner. Among these the following may be mentioned:—

1. The proposed statement of the American *Corpus Juris* would tend to bring about uniformity between the different states in the administration of Justice.

2. The publication of this work will make the administration of Justice more exact and enable the average citizen to secure cheaper and more speedy Justice.

3. The publication of the American *Corpus Juris*, prepared in the way outlined, and representing as it would more than a century of not only the intellect and wisdom of the Federal Courts, but of the learned jurists expounding the law from the Benches of the

Appellate Courts of every state in the Union, could not but place America in the lead of the world in the field of Jurisprudence, and enable her to exercise a more potent influence in World Councils.

Each of these propositions will be briefly elaborated as follows:—

1. The proposed statement of the American *Corpus Juris* would tend to bring about uniformity between the different States in the administration of Justice.

This thought is brought out clearly by the Chairman of the Executive Committee of the National Conference of Commissioners on Uniform State Laws who, in commenting upon our project, says:—

"Apart from *the great practical influence it will have* upon the every-day practice of law and *in cheapening the cost of litigation to the average suitor*, there is no one thing which appeals to me more than *the effect it will necessarily have in bringing about the much needed uniformity between the laws of the several states.* As a Commissioner on Uniform State Laws of the Commonwealth of Pennsylvania since 1901 and as Chairman of the Executive Committee of the National Conference of Commissioners on Uniform State Laws, I am in a position to realize the influence of the proposed work in that direction. *I therefore want to commend this project in the strongest terms* as one which, *more than anything else I know, will tend to overcome the unfortunate conflict between the states in matters of commercial law and remedial Justice, and hasten that uniformity in both law and procedure so essential to our progress as a nation.*"

The same thought is emphasized by the former President of the American Bar Association, Francis Rawle, who declares:—

". . . *something must be done*, and *I have no doubt that the work if* done along the lines you indicate would be immensely better than anything that has heretofore been done, and *would be not only of great use to the profession and the country*, but *would surely tend to bring about an increased uniformity of law throughout the country.*

"The Supreme Court of the United States is now deciding a large number of the most important constitutional and general questions that affect the whole country. On most of these questions their rulings are controlling. This creates uniformity on those questions, but we may hope for more than that; it probably tends to impress upon the Bar and the Bench the vital importance of uniformity in all possible directions, and the further thought that this can be reached, to a certain degree, at least, if Courts, in deciding a question of first impression in any particular state, would follow the Supreme Court if it had decided the question, and not, as now, merely add another decision to one side or the other of a conflicting line of cases. *The work that you contemplate would emphasize this thought, and that alone would make it worth the doing.*"

A million-dollar foundation in the hands of a competent Board of Trustees would make possible not only the immediate production of such a work as this, but very shortly after its being placed on the market, *the return of the fund intact to the foundation.* This statement is based on a most careful calculation. The only possible flaw in this suggestion is the remote possibility that the work would not sell as rapidly as other works have and that in consequence the entire outlay would not be restored by the sales. All experience is to the contrary, for the two big law digest firms are getting rapidly rich with the accumulations of profits; but if there were a dead loss of two or three hundred thousand dollars, what would that amount to, to a philanthropist of the Carnegie type in comparison with the incomparable gain to the profession and the nation through having such a work? I submit that the question of some possible loss is wholly insignificant; but our investigations lead us to the conclusion that brought out under such auspices and in the way outlined, *the foundation fund would not only be intact within two years, but would be increasing rapidly from the profits.* In addition to that it would own the copy-

right and the plates from which the work was printed—most valuable assets.

On this point it is well to recall the words heretofore quoted, of Hon. Francis Lynde Stetson, concerning the proposed statement of the American *Corpus Juris:*

> " Upon completion, an authoritative and comprehensive work of such value to the public and the profession, in my judgment, *would command a prompt and abundant return, sufficient to reimburse the most ample foundation.*"

*Other Uses for the Foundation,** Furthermore, the proposed *Foundation for the Advancement of Jurisprudence would always be available*, not only to aid the production of future editions, but other great works so sorely needed, notably a series of reports which would be a counterpart of the great work under consideration, reprinting in a connected series all "*Ruling Cases, English and American.*" The latter would probably be the very next step to follow the production of the work on the American system of law, perhaps be simultaneous with it, the cases to be selected in very much the same way and perhaps by the same staffs by which the Institutional Treatise is to be edited. Such a series of reports kept up to date in connection with the statement of the American *Corpus Juris*, outlined herein, ought to go a long way toward solving the serious problem confronting the administration of Justice and remove the weight under which the profession is staggering—I refer to the never ending mass or reports which the practising lawyer should consult in order properly to prepare his cases. Our system of law would then be reduced to a science, and departures from declared principles would become more and more infrequent—and finally of no importance at all as authorities; they would be mere "judicial aberrations," as they have been aptly termed, and there would in consequence be no real necessity for the practising lawyer to keep track of them.

*See also p. 86 *infra*.

2. The publication of this work will make the administration of Justice more exact and enable the average citizen to secure cheaper and more speedy Justice.

As the situation now stands, it is impracticable for the average litigant always to get Justice in the average case, for the lawyer he employs often can not properly investigate all the law, that is *the multifarious and conflicting authorities*, and prepare his briefs without an expenditure of labor and of time out of all proportion to the real value of the services to the client. Often an astute lawyer, either by reason of his ability, his ingenuity or his good fortune, locates or stumbles across a line of authorities which, while not correct in principle, are sufficiently weighty to impress the trial Judge, and the lawyer on the other side is either not sufficiently learned or sufficiently industrious to get the correct decisions on the other side which conflict with and which, if used in argument, would overcome those presented by his opponent. This results in more mistakes and errors in Trial Courts than should occur, and often, indeed very generally, it is impossible, for financial reasons, for the loser to take an appeal. As a matter of fact it is well known in the profession that but a small percentage of cases are appealed.

This distressing situation referred to above has been developing rapidly *as in an arithmetical progression;* but it has only become startlingly manifest during the last twenty years. The growth of population, with corresponding increase of litigation and consequent *unavoidable accumulation of judicial decisions*, is the fundamental factor. It

cannot be eliminated, and although it may seem a trite subject—this question of population—to refer to in a memorandum of this sort, it nevertheless has so intimate a connection with and bearing upon the problem before us that it should be taken into contemplation, for if the administration of Justice requires the making of a clear statement of our system of jurisprudence in order to make Justice possible today, we can but imagine how much more serious conditions will be a few decades hence when our population is twice what it is now, if a complete, accurate and comprehensive statement of our *Corpus Juris* is not available.

Furthermore, the increase of population in America indicates how rapidly the profession will enlarge in numbers, and proves that the demand will rapidly increase for copies of such a work, and therefore indicates that *from the financial standpoint, there is no question but that the foundation which made its production possible will be restored*, no matter what the original cost may be.

Lincoln, when President, as the nation drifted into civil war, deemed this question of population of such vital importance as to cause him to discuss it *in extenso* in his second annual message. *See Messages and Papers of the Presidents*, Vol, VI. p. 136 *et seq.*

Lincoln there exhibited the increase by decades in the population of the nation as follows:

"*Year*	*Population*	*Ratio of Increase* (%)
"1790	3,929,827	——
"1800	5,305,937	35.02
"1810	7,239,814	36.45
"1820	9,628,131	33.13
"1830	12,866,020	33.49
"1840	17,069,453	32.67
"1850	23,191,876	35.87
"1860	31,443,790	35.58"

Among a number of other deductions, he made these:

"This shows *an average decennial increase of* 34.6 *per cent in population* through the seventy years from our first to our last census yet taken. It is seen that the ratio of increase *at no one* of these seven periods *is either two per cent below or* 2 *per cent above the average*, thus showing how inflexible and consequently how reliable the law of increase in our case is. Assuming that it will continue, it gives the following results:"

Lincoln then inserted a table of estimated decennial increases from the year 1870 to 1930 by decades and said:—

"These figures show that our country *may* be as populous as Europe is at some point between 1920 and 1930."

He had previously massed much in the way of statistics concerning density of population in various states and in Europe. He then made an extraordinary prediction as follows: —

"And we *will* reach this, too, if we do not ourselves relinquish the chance by the folly and evils of disunion or *by long and exhausting war springing from the only great element of national discord among us*."

This message was sent to Congress December 1, 1862. We did, however, decrease for the time being our ratio of increase by continuing the war and so Lincoln's estimate that in 1900, we would have a population of one hundred and three millions was somewhat higher than the fact, yet he had indicated that that would be the result if the war were continued.

Now, applying the Lincoln method and assuming that we have a population in 1910 of approximately one hundred millions (the estimate), *a mere twenty-five per cent decennial increase* (as against the more than 34% used by Lincoln in his calculation) will have the following startling results—I do not state the detail figures lower than tens of thousands

and for sake of brevity only at *twenty*-year intervals:

Estimated increase of population in the United States

Year	*Population*
1910	100,000,000
1930	156,250,000
1950	244,140,000
1970	381,470,000
1990	596,000,000

This represents the increase during only eighty years, *less than three generations*, and had not Abraham Lincoln used this method, I would hardly have ventured to put it in this memorandum. *These figures are enough to startle and stagger every thinking man in America*, even though we make reasonable deductions from the calculation by reason of the possible operation of the Malthusian doctrine.

These figures, or any figures that are warranted on any legitimate basis of calculation, are sufficient to make the point which I want to make, and that is that it is time our profession was ceasing to talk and dream (as it has been doing for a hundred years), about securing this great statement of our system of law, but that *it should get to work and produce it, no matter what it costs*. Nay more, I submit that in order to preserve the integrity of our judicial system, it is an absolute necessity. We ought not to delay until it is too late,—it is in many ways a far more difficult task now than it would have been a century ago.

Can any one aware of the situation doubt that a philanthropist of large means desirious of helping the masses of the people could more advantageously place an adequate fund in the hands of able trustees as a continuing foundation for the purpose of aiding the publication of the American *Corpus Juris*, while it is practically a possibility to do it, and providing for its perpetual republication at intervals of a decade—*a work that but needs this incentive to place it in the hands of Bench and Bar* within a reasonable time, and in a way that will cause it to return to the Foundation every dollar expended in its production?

In other words, this project is one which only needs to be helped to the extent of *creating* the work. The profession will then pay for it by purchasing it, and *in that way return the funds to the foundation which were necessary for its production*. In short, it is a method whereby the profession would be aided in helping itself, and which at the same time would directly affect and improve the administration of Justice not only in America but throughout the world. *Yet without such an initial aid it is not possible of being produced as it should be—if at all.* Does not the last century of inaction, despite the urgency of the need, make this clear?

Such a Foundation would also always be available to aid the production of whatever other works for the advancement of the Science of Jurisprudence, it would, in the judgment of the trustees, be important to have published. Such a Foundation would be a type of drag-net that would go out over the land and in its meshes would catch the man of genius, the man of great mental ability burning to give a work on jurisprudence to the world, but who otherwise, through lack of means and business acumen, could not escape the toils of the law-publisher producing books only for profit. The expert judgment of the able jurists who would constitute the Board of Trustees of the Foundation would always be available to determine what was worthy of publication. Some mistakes, it is true, might be made by the trustees, and a few books might get into print which would be mediocre,—the one class, however, would survive,

the other would go down to oblivion; but the creative work of those who through their insight found the Truth would live on and on, as does the immortal work of those who labored here in my town a century and a quarter back in the building of our Constitution.

3. The publication of the American Corpus Juris, prepared in the way outlined, and representing as it would more than a century of not only the intellect and wisdom of the Federal Courts but of the learned jurists expounding the law from the Benches of the Appellate Courts of every state in the Union, could not but place America in the lead of the world in the field of Jurisprudence, and enable her to exercise a more potent influence in World Councils.

The proposed work, in stating completely, thoroughly and accurately the American System of Law,—its *Corpus Juris*, all as the result of the painstaking labors of the ablest members of the profession in America, both on the Bench and at the Bar, but particularly of those in the faculties of the Law Schools, would not only tend to unify the judicial systems of the various American states, but it would strengthen *our influence upon* the Judicial systems of other nations *and more rapidly bring theirs and our own into that ultimate harmony which is so much to be desired.* At the present time it is well known that American jurisprudence, *by reason of there being no complete statement of it*, does not and can not receive the attention from the jurists of other nations, which its importance demands.*

Chief Justice Simeon E. Baldwin of Connecticut, former President of the American Bar Association and of the International Law Association, and Professor of Constitutional Law at Yale, has emphasized methods whereby "the moral support of the world (may) be fully gained," and in words which should impress every lover of his country. Of "*the indubitable principles of social Justice*," he says:—

"Those principles will in every case ultimately determine the judgment to be pronounced on any international dealings by that Court without appeal, unseen but not unfelt by men, that is always in session, truly named by Daniel Wesbter '*the great tribunal of modern civilization.*'"

He further declares:—

"Public opinion has taken on a new form in recent years. There has arisen *a public opinion of the world.* It has come into being as the result of the closer and quicker communication between all lands, which is due to modern uses of steam and electricity, and to the incidental extension of the power of the press.

"If all nations were equally sensitive to this new force of world opinion, the problem would be a simpler one. But it is strongest where, as respects the subject now under consideration, it is least needed. That Great Britain should fail to obey a judgment of the Hague Tribunal, or an award of arbitrators to which she was a party, is unthinkable."

There can be no question but that we have in America all the brain-power necessary to create the work, proposed from time to time through now more than a century of our existence; yet it is plain this brain-power could not be utilized effectively so as to produce *by the united effort of many*—of all who *should* have a part in it—a result which would be a "truly co-ordinated whole" unless organized in some such way as outlined herein. To make this possible, the thing that above all else would seem to be *absolutely essential*, a *sine qua non* of the work being executed on the broad lines it should, is an adequate *Foundation of Jurisprudence*. Only in that way may so great an enterprise in the realm of Jurisprudence be saved from the "perils of commercialism," with their ever present baneful influences. Without such support the work which has made

*See particularly views of Judge von Lewinski of Berlin, p. 96 *infra*.

Justinian's name immortal could not have heen produced.

As I have repeatedly endeavored to indicate in this Memorandum," the call to arms " has gone out over the profession now for more than a century, yet no one has responded and produced the work which circumstances demand, a complete and logical statement of our *Corpus Juris*. For the first time it is believed a practical plan is now presented and the question is, " *Shall it be availed of and in the most effective way*—or shall this great enterprise be slaughtered by commercial interests? " It is of course far better that " the plan " for its creation should be utilized commercially than not at all, yet it is hoped it may be saved from that and its production made possible in the best way absolutely freed from the bane of commercialism. The opportunity is at hand. The decision must be made, and if those who realize and know the need can so mass their influence as to secure the financial backing that is essential to save this great enterprise from the " perils of commercialism," they can insure the work being all it ought to be and can be.

Of course the really difficult thing is to impress a man, who knows nothing of law from the scientific philosophical side, that (*a*) a most serious condition actually exists (which he would naturally doubt)—a condition that *must* be remedied to prevent ultimate chaos in our judicial system, and (*b*) that *it can be remedied.*

How can such a man be brought to realize the situation?

The point which I would leave with you is that great as has been the need for such a work as that outlined, yet since Wilson's day (his plan having been forced into abeyance through his inability completely to execute it, owing to lack of time at his disposal and his untimely death at fifty-six), however many have seen the need, all have been appalled by the stupendous task and no man, neither Wilson, nor Dane, nor Carter, nor Dillon, nor Holmes, nor anyone has accomplished it. Yet the thing has got to be done eventually if for no other reason than to lighten the labors of the practising Bar and thereby make possible the administration of Justice at so low a cost as to enable the average citizen to secure cheap and speedy Justice.

It seems clear that if some powerful member of the " philanthropic phalanx" could only see the true situation, he would realize that a rare oppotunity presented itself to immortalize himself by having such a monumental work produced under his auspices, and under a plan too which *will insure the ultimate return of the funds to the foundation, making the same available always to aid other projects in the field of jurisprudence.* Indeed, would it not be the surest way such a man could possibly find to secure real immortality, but above all that *to do a lasting service to a nation?*

Some may think that the Carnegie Institution at Washington might finance this project, but its funds would not be available, for apart from the fact that its income is fully taken up, *only income is available* under that foundation, and it is not income but the temporary investment of principal that is needed to float this undertaking as it ought to be floated. Before it, *measured by its scope and possibilities*, the activities of even the Carnegie Institution in Washington pale into insignificance, spending as it does much of its income in the preparation and publication of laborious (and no doubt in the main *valuable*), scientific investigations which while they improve man's physical well-being, accomplish nothing in improving and

strengthening the great vital force in our civilization,—law and government, our system for administering Justice.

Contrast the importance of the preparation and publication of the American *Corpus Juris*, under some such plan as outlined in this Memorandum, with the preparation and publication of such literary and scientific works as the following, which I cull from the last bulletin of the Carnegie Institution of Washington, that of October 11, 1909, which recently drifted into my office:

"Heredity of Coat Characters in Guinea-pigs and Rabbits";
"Investigation of Inequalities in the Motion of the Moon produced by the Action of the Planets";
"Catalogue of Stars within Two Degrees of the North Pole";
"The Fossil Turtles of North America."
"The Pawnee Mythology";
"Egyptological Researches";
"Inheritance in Poultry";
"Heredity of Hair Length in Guinea-pigs and its Bearing on the Theory of Pure Gametes";
"Research in China";
"Rhythmical Pulsation in Scyphomedusæ";
"The Roman Comagmatic Region";
"A Revision of the Pelycosauria in North America";
"The Fauna of Mayfield's Cave";
"Distribution and Movement of Desert Plants";
"Coat Patterns in Rats and Guinea-pigs";
"Mythology of the Wichita";
"Inheritance in Canaries";
"Traditions of the Caddo";
"Bibliographic Index of North American Fungi";
"Explorations in Turkestan, with an Account of the Basin of Eastern Persia and Sistan";
"The Vulgate Version of the Arthurian Romances";
"Determinative Evolution in the Color Pattern of the Lady Beetles";
"Traditions of Arikara";
"Researches on North American Acridiidæ";
"The Origin of a Polydactylous Race of Guinea-pigs";
"American Fossil Cycads";
"Variation and Correlation in the Crayfish."

The above of course represent but a small proportion of the activities of the Carnegie Institution, which is doing so much along scientific and literary lines, yet they do represent a large expenditure of money now gone forever from the income of the Foundation, without expectation of return other than through the good which will result from the publications. Great as is the indebtedness of civilization to the patient and painstaking researches of science—so well exemplified by the above—both in their direct and indirect application to the comfort and culture of mankind, yet I reiterate that such activities as those enumerated in no way compare in importance with the preparation and publication of a great System of American Law, our *Corpus Juris*, that our system for administering Justice—" the great interest of Man on Earth " and the vital force in our civilization—may be made stronger and better,—a thing which *must be done* if real Justice is to continue to be administered in America through the decades and centuries soon to be upon us.

Chestnut Hill, Philadelphia.

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OUTLINE ANALYSIS OF MEMORANDUM *IN RE CORPUS JURIS*

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Opinions upon the American *Corpus Juris* Project

BY LEADERS OF BENCH AND BAR

"I wish the Memorandum and the letters which accompany it could be read by every lawyer and law student and thoughtful citizen in the land."—HON. JOHN F. DILLON.

"I wish tne opinions elicited could be read by every thoughtful man and woman in the country. Such reading would be the planting of seed, sure to yield a rich harvest in practical results. Heaven speed you and your two colleagues in this gigantic but blessed undertaking."—JUDGE STAAKE, Chairman of the Executive Committee of the National Conference of Commissioners on Uniform State Laws.

Many leaders of Bench and Bar have been consulted concerning the plans for a complete and philosophically co-ordinated statement of the American *Corpus Juris*, as outlined in the Memorandum at pp. 59-89 of this issue. We print the salient portions of their expressions of opinion, as they evidence a most careful consideration of the project, constitute an invaluable contribution to the cause, and carry the weight of the highest professional authority. Many of the italics are not in the originals, and have been inserted in order to make possible a rapid examination of the most important portions.

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Hon. John F. Dillon, *President of the American Bar Association, 1891–92; former United States Circuit Judge, author of "Laws and Jurisprudence of England and America," etc.:—*

The immeasurable importance of the subject has led me to read this paper and to consider the project, which it sets forth and unfolds, with eagerness and absorbing interest.

The pressing necessity for an American Corpus Juris *of the character proposed is universally felt and universally acknowledged by the legal profession, by statesmen and intelligent laymen.* The reasons for this urgent and now almost irresistible necessity I have, as this Memorandum shows,* elsewhere stated, and therefore I shall not here take the time or space to restate my views.

*See pp. 64, 69 and *passim*.

[*Hon. John F. Dillon—Continued.*]

As I grow older and my experience enlarges my conviction of the infinite superiority of what Bentham with unjust derision styled "judge-made law" over legislative law when dealing with the principles of right and justice, constantly increases and strengthens.

We have in this country in the decisions of the National and State tribunals the richest mines of judicial wisdom and legal principles as applied to transactions and conditions of modern life that exist in any country in the world. The priceless treasures of these mines are greatly diminished not only to the legal profession but to the people of the nation and states *for the want of such a work as this Memorandum proposes. I heartily endorse the spirit, purpose and scheme of this great project.* It has all the elements of a patriotic and philanthropic object of the highest national and public importance.

Its execution must not be put upon any lower basis than that it intimately concerns the public and general welfare, present and future, on matters of the supremest moment to every man, woman and child in the United States. And as such I venture earnestly to commend the necessary financing of the foundation for the work to the favorable regard of some one or more of our wealthy, philanthropic and generous fellow-citizens who can thus have at one and the same time the double *satisfaction of rendering an inestimable service to their fellow-men* and of connecting their own names in perpetuity in the interests of a perpetual body of men and the ever expanding interests of the American Republic and through it of the interests of mankind in the world at large.

Hon. John G. Milburn, *Member of the New York State Commission on Revision of the Code of Civil and Criminal Procedure and Consolidation of all Statute Law since* 1779; *the President of the Pan-American Exposition*, 1901:—

I have carefully studied your "Memorandum *in re Corpus Juris.*" *The subject of the Memorandum has often occupied my thoughts*, and I have wondered whether in my time there would be such a statement of the entire body of American law as you and your associates propose. I have never entertained a doubt as to *the necessity and vast influence for good in many directions of such a statement*, but the difficulties and obstacles in the way of it always seemed to me to be insuperable. But *the study of your Memorandum has convinced me that it is perfectly feasible with the aid of an adequate foundation.*

There should be a logically arranged statement of existing American law as a whole. *Until we have one the Bench and Bar will flounder along in a bewildering mass of conflicting rules and principles emanating from many different judicial sources, state and national*, and the great sufferers are the people, because it is their rights and duties which it is the function of the law to define and regulate. . . . I cannot but think that when it is appreciated by the liberal-minded men of our country who are seeking rational avenues for their philanthropy they will provide a sufficient endowment.

Hon. Elihu Root, *of the New York Bar; United States Senator; formerly Secretary of State:*—

I have examined very carefully the matter which you sent me in relation to the proposed *Corpus Juris* of American law and *I have no doubt whatever that such a work, if done in a manner adequate to the importance of the subject, would be of very great value.* . . . With best wishes for the prosperity of your very public-spirited and laudable plans.

Hon. Alton B. Parker, *former Chief Judge of the New York Court of Appeals and President American Bar Association*, 1906-07:—

A concise, logical and philosophical statement of the whole body of the Common Law, as applied and developed in each and every one of the many jurisdictions in the United States, is a *pressing public necessity.*

The reasons for it are so admirably stated in "Memorandum *in re Corpus Juris*," by Mr. Lucien Hugh Alexander, that nothing need be added. *They are not understood by the public generally, who are so vitally interested, for, if they were, the money necessary would be promptly forthcoming.* The Bench who administer the law, the lawyers who seek to advise their clients, and the teachers of the law who try to equip students for their life work, do appreciate these reaons, however, and therefore they know *the public need that this work be at once undertaken and pushed to completion.*

Their duty is clear. It requires them to contribute, each in his own way, toward the upbuilding of *a public sentiment that will*

support the execution of the plan which you, together with Mr. Andrews and Mr. Alexander, have formulated. If I can serve the cause at any time, command me.

Hon. Charles E. Hughes, *Governor of New York and Professor of Law in Cornell University,* 1891-3:—

The demands upon me have been so constant that I have been compelled again and again to postpone an examination of the papers you have sent me; and as we approach the new year the work increases and there is little opportunity for what I had wished to do.

However, I have looked into the matter sufficiently to feel justified in saying that *the project you outline is one of great importance, and if the work is performed with the skill and care contemplated, it would be difficult to overestimate its value.* To make such a comprehensive statement as is proposed of the American *Corpus Juris* would be *a public service of the highest character.* While the work would be a most difficult one, I think the plan is practicable. Its execution should be freed from the pressure of commercial demands, and I earnestly hope that you will secure the support for the undertaking which it deserves.

Hon. William R. Day, *Justice of the Supreme Court of the United States; formerly Secretary of State:*—

I have looked over your plan for the preparation of a work which shall embrace in compact form a statement of American Civil Law. *There can be no two opinions as to the desirability of such a work.* The confusing mass of precedents which now embody what may be called the American Common Law renders it often impossible for counsel to give legal advice competent to guide their clients in doing what the law sanctions and approves, and refraining from disobeying the law, which, if litigation follows, they are presumed to know.

An authoritative work clearly stating the general rules of law would be of inestimable service to the Bench and Bar of the country, as it would be to all who seek to know the law in order that they may conform to it. *Any feasible plan for the accomplishment of so great a purpose, and I think yours may be worked out, ought to receive hearty encouragement and support.* It will of course require ample time, great labor and no inconsiderable financial help. I wish you the success the project so amply deserves.

Hon. William H. Moody, *Justice of the Supreme Court of the United States, and formerly Attorney-General:*—

Every additional day of judicial duty brings to me a deeper conviction of *the absolute necessity of some system of orderly and scientific classification* of the great mass of confused precedents, so that they may become useful in developing rules which will be consistent and harmonious.

It seems to me that the plan you have in view, though I do not conceal from myself the difficulties of its execution, will tend greatly to that end.

Hon. David J. Brewer, *Justice of the Supreme Court of the United States; President,* 1904, *of the Universal Congress of Lawyers and Jurists:*—

Of the great blessing to the profession it would be to have such a work there can be no doubt. In a general way, *the plan suggested is satisfactory and is probably the most feasible.*

As to the financial backing, I fear it will be difficult. . . .

The work is large and delays may be looked for in several directions. Persons who start in on the work may give it up after a while, may be taken by death, and any hasty production would be most disastrous. The value of the work will depend largely on the accuracy and thoroughness with which it is done, the wisdom of the arrangement of the topics, and that will require much thought.

As to the personnel of the triumvirate, I know Dean Kirchwey very well and am sure he will be a valuable man as one of the three. I have no personal acquaintance with Dr. Andrews, but from my knowledge of his work I should think he would be very competent. As for yourself, it is enough to say that my knowledge of what you have been doing justifies me in regarding you as a suitable person for the third.

Of course, one essential element is a profound conviction of the value of the work and great enthusiasm, both of which I think Dean Kirchwey and yourself possess. One must also have much patience and persistence, for, with no thought of throwing cold water on the enterprise, I can but believe that time will be much greater than you at present

[*Hon. David J. Brewer—Continued.*]

imagine, so *they who undertake it will have need of the strength of purpose that does not tire.*

Hon. Walter Clark, *Chief Justice of North Carolina:—*

You are proposing to do for this country what Justinian did for Rome and Napoleon for Western Europe. It is, for many reasons a far greater work and more difficult. *Of its value and of its necessity, there can be no two opinions.* Fame and fortune will wait upon those who shall confer such a boon upon the present and future millions of our country.

Hon. Hampton L. Carson, *Attorney-General of Pennsylvania,* 1903-7; *Historian of the Supreme Court of the United States and of the Supreme Court of Pennsylvania; formerly Professor of Law in the University of Pennsylvania:—*

I have read with care the "Memorandum *in re Corpus Juris*" which you sent me, and also the letters of the distinguished lawyers commenting upon it. I can truly say that I have read nothing upon professional needs within the last ten years which appeals to me so strongly. You have briefly but forcibly expressed the difficulties of a situation confronting the profession in a manner which must challenge general attention; and *you have done what is of far greater importance solved the difficulty of meeting that situation by a rational and practicable plan.* I have adventured in legal studies upon three distinct lines, first, as an active practitioner; next, as a teacher of law students, through my professorship in the University Law Department, and then, too, in historic studies of the development of legal principles, and from all three lines of work there has been borne in upon me the conviction that the profession was in danger of being submerged, not only by the mass, but by the conflicting waves of decisions, and was in sore need of a general chart as the sole means of enabling latitude and longitude to be accurately taken.

The various efforts of the encyclopædias, important though they were, and in the main intelligently conducted, formed no satisfactory solution of the difficulty; for apart from the purely arbitrary and unphilosophical arrangement of matter, the text of the various articles themselves was built simply upon the plan of endeavoring to embody the most recent decisions, because of some peculiarity of fact and novelty of doctrine, and thus in the main drifted away from the statement of general principles, in order to aid a practitioner in finding citations which might fit particular cases.

The merit of your plan I conceive to be this: Imagine, if such a thing be conceivable, the non-existence in any manner, shape or form of a map of the United States, but the existence of numberless county maps of every state in the Union. Fancy the confusion of mind of a student of American geography, who would be compelled in order to ascertain the general relationships of states, territories, rivers and mountain ranges and lakes to each other, if he were obliged to attempt to construct for himself *ab origine* a general map by placing side by side the county maps of each distinct state, without having any guide whatever as to what lay north or south or east or west of each other. It would be a picture puzzle game in the extremest sense. You propose, however, that there shall be undertaken by competent experts the preparation of a general chart which will do this work for the general practitioner and student and thus extricate him from the maze. *Greater work than this cannot be attempted, and greater service to the profession and to the public cannot be done.* I heartily approve of the plan, and wish you all success in its accomplishment.

You are entirely right in pointing out the dangers and endeavoring to rise above the evils of commercialism. The plan could not succeed if undertaken from the commercial point of view. It would have too many competitors, and too many enemies, and would perish for lack of subsistence. No one, save he who has had some experience in such matters, can appreciate the difficulties and the delays of attempting to convince busy lawyers that the tools with which they are in the habit of working are uncouth and antiquated, that they should be thrown aside, and new methods adopted. The only way to supplant the old methods is to fashion a new instrument, and make it practicable, and place it, ready for use, in the hands of the profession. This can only be undertaken by those who would yield themselves entirely to the task of fashioning a new weapon, and *the capital necessary for such a method or establishment,* so to speak. *must be supplied in bulk at one time, and ready*

for immediate use, by one of ample means and of public spirit, whose brain has seized sympathetically upon the peculiarities of the situation, solved its difficulties at a glance, and then with a ready self-sacrifice, thrown himself into the breach, in order to become, in the truest sense, a public benefactor; for the benefits to be derived from the adoption of this plan will not be confined to the legal profession; will extend themselves to every citizen, rich or poor, high or low, and of every class and condition in life, who falls under the sway of legal institutions. The patron of such an enterprise—and unfortunately it is a sad truth that lawyers are not rich enough, either individually or collectively, to meet the emergency—has also an opportunity of benefiting the public which ought to satisfy the highest kind of altruism.

Hon. Amasa H. Eaton, *President of the National Conference of Commissioners on Uniform State Laws*, 1901-09:—

I am *deeply impressed with the importance of a statement of the whole body of American law in proper philosophic scientific form*, but have always been deterred from looking upon it as possible, being appalled by its magnitude and the apparent impossibility of any practical method of bringing it about.

You have now hit upon such a practical method and if any one will make it possible financially, his reputation will be made forever through centuries to come by the side of those who do the work.

The subject appeals to me further on account of my connection with the work of the Conference of Commissioners on Uniform State Laws, of which I have been President for eight years. With fifty-one different jurisdictions under one federal government, most of them being sovereign states and supreme within their respective spheres, *there is the greatest necessity for the work you contemplate and it will have an overpowering influence upon and favorable to the movement towards uniformity of state legislation* that is now making itself manifest all over the country.

Rt. Hon. James Bryce, *the American Bar Association's only honorary member; author of "The American Commonwealth," etc.; formerly Regius Professor of Civil Law at Oxford:*—

As to the desirability of having a concise, rational, well-ordered and lucid statement of what is actually the existing federal law and state law in this country there cannot be any difference of opinion.

I agree with all that your distinguished correspondents say upon that subject, and I agree also with the view, which some of them express that the undertaking is one of immense magnitude and difficulty, the completion of which in a satisfactory way would be not only *an honor* to those who carried it through and *to the age in which it was effected*, but also *a service of almost inestimable benefit to the people of this country*.

Those who have studied what has been done in the way of codification from the times of Theodosius II and Justinian downwards know how immensely difficult the work is. And although what you propose is not codification by legislative authority, but only a statement of the existing law by the combined action of skilled and learned jurists, their task could not but be in some ways as difficult as that of codifiers.

Sir Frederick Pollock, *Professor of Jurisprudence at Oxford* 1893–1903 *and Professor of Common Law in the Inns of Court, London*, 1884–1890; *author of many works on law and jurisprudence, and editor English Law Quarterly Review:*—

Even with our centralized law and judicature it is hard enough for a practising English lawyer to keep himself abreast of legal developments. The tendency is for busy practitioners to become mere specialists in one department. I have been asked by learned Continental friends to recommend a book giving a trustworthy general view of the law of England, and have told them with regret that there is none. Blackstone is too old to be patched up into a modern text-book—and so, I conceive, is Kent, though a later book and in some ways better.

On your side all these difficulties are intensified. *I have long wondered how you carry the load* of two score and more independent sources of reported (if not always properly reportable) case-law, with quite serious divergences between not only legislative changes but the judicial interpretation of the Common Law in the different states. *There is therefore no doubt in my mind as to the benefit of such a work as you contemplate*, and I agree with your correspondents thereon. In particular I would subscribe to everything Mr. Bryce says.

[*Sir Frederick Pollock—Continued.*]

The real questions are the practical ones. *Can you get an adequate number of leading American lawyers to agree on a systematic arrangement which shall be rational and also not too far removed from the familiar lines of practice? I do not see why not.* I have myself tried to sketch out such a conspectus in the General Introduction to the Encyclopædia of the Laws of England, 2d ed., 1906; and I do not doubt that other arrangements at least as good could be made.

Then, *having settled the outlines of your body of law, can you get them filled in by men whose standing in the profession is such that their exposition will command general confidence?* If not, the result will be only a systematized body of references to the more or less conflicting jurisprudence of the Federal Courts and of states or groups of states—better planned, may be, than existing digests, but of no more authority. . . . *I know no particular reason against a satisfactory solution,* but obviously it is a question to be solved in the United States and not elsewhere.

The last remark is still more manifestly applicable to the financial aspect of the matter. I will only say that the extensive publication over which Lord Halsbury presides (and which is frankly content with alphabetical order) is being issued by private enterprise, I presume with the expectation of profitable return.

As to one thing I feel rather doubtful. Is it intended to deal exclusively with the Common Law as administered in the United States? If so, is there not danger of exaggerating the differences between its interpretation in the United States and in other English-speaking jurisdictions? Are you not going even to disclose such facts as that in this country we cross our cheques and protect ancient lights and do not regard injunctions as a normal aid to criminal law? This, however, may be a merely speculative apprehension. Still, *you will work for posterity,* and Canada and Australia will have made considerable additions to the Common Law, as well as England, before our children are old.

Hon. Karl von Lewinski, *a Berlin jurist on leave of absence from the Bench by the German Government to prosecute legal research in America. Judge von Lewinski was the first German or Continental jurist to read a paper at a meeting of the American Bar Association:—*

You can hardly imagine how much a matter of regret it is to me that your plan has not been carried out long ago,—I certainly can certify that I have suffered greatly from the lack of such a work. Sent over to your country to investigate some topics of your law, especially important for the growing relations between our nations, I had to undertake first to acquire a general knowledge of the elements of your legal system, of your principles and your theories. The result was that very soon I found myself lost between hundreds and thousands of unsystematized decisions without any possibility of systematizing them myself, because there was and *there is up to the present day no system to the American law, and certainly no philosophical and logically co-ordinated treatment of it as a whole.* The existing encyclopædias are by no means apt to fill the crevice, neither your text-books, which generally treat their special subjects as separate ones without regard to their places in a logical system. The knowledge of the general principles of your law, which I had expected to acquire in a few weeks, has cost me months, and is still very incomplete. I have been forced to read numbers of perfectly unnecessary cases, spread all over the reports and quoted in digests and encyclopædias very often in a misleading way. I have found it necessary to study a great number of text-books, covering ever so little ground just to build a fundamental basis out of these small and numerous stones, before I could really begin on my special subjects. The American *Corpus Juris* would have saved me all this work and time.

It is clear enough that, *under the present circumstances, your law must seem a desert without an oasis to the foreign jurist,* who has not the time to devote months to the study of elementary principles. The impression which he necessarily receives whenever he comes in touch with it is that of an impenetrable chaos. This is the more a matter of regret to me, the better I come to know *the wonderful wisdom of your jurists stored in those now almost unapproachable masses of cases. These hidden treasures are too valuable to be the exclusive property of a few American lawyers.* The mines should be opened also to the English and to the European Conti-

nental jurist. That is *the only way to secure to them their proper place in the development not only of the Anglo-Saxon law but also in the progress of general law-principles of the international law and of the world's civilization.*

After almost two years' study I am thoroughly convinced, that the American *Corpus Juris*, while a gigantic task, *can be accomplished*, and I congratulate you upon being one of the men who will add this most brilliant ray to the glory of the American people.

M. Georges Barbey, *of the French Bar (Avocat à la Cour d'Appel), of Counsel for Dreyfus and member of the French Commission on Revision of the Code Napoléon:*—

No one will profit by this comprehensive creation so much as foreign lawyers who are now extremely embarrassed to study a question relating to American Law, in view of what appears to them to be a great confusion of the laws and of jurisprudence. A book on American Law planned after our analytic method would be quite a relief to us on this side.

His Excellency, Wu Ting-fang, *Minister of the Chinese Empire to America, a Barrister of Lincoln's Inn, London, and the first Oriental admitted to the English Bar:*—

Your project to have a complete codification of the laws in force in the United States is grand and worthy of support. If I am not mistaken, I do not think any nation has a complete set of codes embodying the laws of the state for the guidance of the public. If your scheme is carried out, I feel sure it will be a boon, not only to the legal profession but to the public in general.

Some years ago in Peking, when I was entrusted with the enormous task of codifying the laws of my country and putting them in proper shape, I could not get a comprehensive work giving me a general idea of the laws of the United States, so you see if the work contemplated by you is carried through, *it will not only be useful to your countrymen but to foreigners also.*

Professor Henry T. Terry,* *of the Law Faculty of the University of Tokyo, Japan:*—

It is needless to say that I heartily approve of the plan of making a *Corpus Juris*. I have wished it and advocated it for many years. *It will much reduce litigation, and be worth to the country many times what it will cost.* I am inclined to think that *your plan of a foundation is the only feasible one.* . . . As is said in your pamphlet on the *Corpus Juris*, the work cannot be done by volunteers. Competent men must be employed to give their whole time to it, probably for several years; and they must therefore be paid. . . . There should also be committees of supervision and revision, as you suggest, who, so far as I can see, must consent to act without pay, unless your foundation should turn out to be larger than seems to me likely. But *there are many eminent lawyers who would give a remarkable amount of time to such a work gratis.*

On the whole, I think your plan is a good one and quite feasible, if you can get the money. Of course many thousand cases would have to be read, practically the whole body of our case law. But that is a matter merely of time and labor. Of the cases contained in the reports nine-tenths can be at once put aside as unimportant, consisting merely of repetitions of well-settled principles, or of decisions on local statutes that need not go into the *Corpus Juris* or on states of fact so special that they are not likely to occur again. As is said in your pamphlet ruling and leading cases, and really important illustrative cases only should be used.* . . .

This brings me to the chief thing that I have to say, namely, *the paramount importance of analysis.* Analysis, analysis, and always analysis; and absolutely exhaustive. *Every legal conception must be analyzed down to its ultimate legal elements,*—that is, to the point where the nature and content of the elements discovered and the meaning of the terms used to denote them, cease to belong to the science of law. No smallest corner or crevice must be left dark or doubtful. And the results of that analysis must be expressed in a clear and accurate terminology. Nothing short of this will do. . . .

In the memorandum I have prepared and send you, I have set out the plan of arrangement that seems to me the best. It is the only one that I have been able to devise where I—I speak for myself—have heen able to find a place for every rule, every detail, every decided case. In a mere outline or sketch, such as I have given in my memorandum,

*See p. 64 *supra*, where Professor Terry is quoted in the Memorandum *in re Corpus Juris*, and reference made to his presentation of the subject to the American Bar Association in 1888.

*See p. 75, *supra*.

[*Professor Henry T. Terry—Continued.*]

it is impossible to explain the real reasons or what seems to me the real merits of the plan. If I can be of any assistance in furnishing more full statements on particular points, I shall be glad to do so.

Hon. L. S. Rowe, *President of the American Academy of Political and Social Science; member of the Commission of three appointed by President McKinley to codify and revise the Laws of Porto Rico; Chairman of the American Delegation to the last Pan-American Congress:—*

I find it difficult adequately to express my views as to the far-reaching importance of the plan that you have outlined for a *Corpus Juris*. Such a plan, if properly carried out, *would be a most important factor in securing more uniform legal standards throughout the United States*. It would not only give us a view of the existing jurisprudence but *would contribute immensely toward the further development of our legal system.*

From an educational point of view such a digest would also tend to broaden the training of the American lawyer in facilitating a ready comparison between foreign systems and our own. This is a matter of far more than theoretical interest. Its importance was drawn to my attention with great force when, as a member of the Commission to Revise the Laws of Porto Rico, we were confronted with the problem of bringing the Spanish legal system into closer harmony with the American. A work such as that which you propose would have greatly facilitated this task. With each year we are being drawn into closer touch, both commercially and intellectually, with the Far East and with the republics of Latin America, and we are beginning to appreciate the fact that their legal systems contain much that would be of value to us. Our greatest difficulty at the present time is to find the proper basis for fruitful comparisons. The work that you have outlined would furnish us what we sorely lack in this respect.

I sincerely hope that the means will be found to carry out this plan, as I feel certain that *it would mark an epoch in the history of American jurisprudence.*

The opportunity is presented of performing a great national service and I hope that the means will be found to have this service performed.

Hon. Alfred Hemenway, *President Bar Association of the City of Boston:—*

The expressed purpose of your great undertaking commands my unstinted approval. The fountains of the law are many, but its rivulets are innumerable. It is laborious for the practising lawyer to seek the fountains and impossible for him to follow all the rivulets. An individual can master a limited area of the vast domain of American law, but a practical command of the whole field is at present beyond individual mastery.

It can be satisfactorily accomplished only by combined efforts. *A sufficiency of competent men can make a harmonious whole of the* disjecta membra *of American law.* Were this accomplished all these fountains and rivulets would make *an accessible reservoir of learning of inestimable value to the lawyer and the layman.* It would realize the aspirations of Blackstone and of Kent. Your plan seems feasible. I have no other to suggest. Because ours is a government of laws and not of men, the pecuniary means necessary for this important work should be forthcoming from those who are able among the lovers of good government. I know of no worthier cause.

Hon. Joseph H. Choate, *former President American Bar Association:—*

I have not the slightest doubt that your project, if it could be carried to completion in the spirit in which you have planned it, would be of *incalculable benefit to the profession and to the community.*

General Thomas G. Jones, *twice Governor of Alabama, former President of the Alabama State Bar Association and now United States Judge for the Middle and Northern Districts of Alabama:—*

You and your collaborators have adopted *the only plan of finally surmounting the difficulties which have baffled the professional for more than a century* in its efforts to secure an adequate statement of the *Corpus Juris*. In their work of administering justice the Courts, unless a question is most commonplace, are always met with a mass of conflicting precedents, which it is impossible to reconcile and from which no governing principle can be extracted.

Public opinion makes and unmakes our laws, and finally interprets the meaning of the written constitution. The efforts which society makes, under the forms of law, to

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deal with the problems of government, are largely shaped and moulded by the views of great law writers, and their discussion of the principles which ought to dominate the administration of the law. Lawmakers, statesmen and judges are guided by their words, and so at last the philosophic and wise discussion of principles by law writers has as much to do with the making of laws as if these law writers exercised legislative power. In this way alone can we hope for the final solution of the difficulties which a proper statement of the *Corpus Juris* is intended to solve. . . . I have carefully examined your Memorandum *in re Corpus Juris*, and find in it the same earnest, intelligent and painstaking labor which you bestowed upon the Code of Ethics of the American Bar Association, when I had the honor to serve with you on the committee which formulated it. *The work you propose will be of inestimable value not only to the lawyer and the judge but to the whole body politic. I know of no greater task* than the one you propose to accomplish, and I feel quite sure that it is in the right hands and formulated upon the right plan.

Hon. Julian W. Mack, *Judge of the Circuit Court of Illinois sitting at Chicago:—*

Your plan for a *Corpus Juris* is excellent. . . . I am entirely certain that you must rely for your main workers upon the law school teachers. Their work, subjected to the proposed criticism of an advisory board representing Bench, Bar and academic men, will, I am sure, not only be a worthy contribution to the juridical literature of the world but will also be indispensable to the active lawyers and judges of the country.

When we see what a financial success has been made by the alphabetically arranged and, in great part, anonymously composed encyclopædias, it would seem that your proposed work must, with the aid of a thoroughly capable business man in charge of the marketing of it, yield not only its cost but large profits. I do not, therefore, despair of success even if the desired philanthropist cannot be found.

But I quite agree with you that such a work, *destined to be America's finest contribution to jurisprudence, ought to be lifted above the level of commercialism.* A foundation, as suggested by you, will attract the best men and *if, as I feel sure, the entire principle will be earned, the possibilities of future good to be derived from it are unbounded.*

Today we are overwhelmed with precedents, good and bad; the fundamental principles must again, for our generation, be restated by the ablest jurists of our times. Such a restatement will, more than anything else, bring about that degree of *uniformity of law* in our forty odd jurisdictions which is so essential to the prosperous development of our country.

Hon. William B. Hornblower, *former President of the New York State Bar Association and member of the Commission established by the New York Legislature to consolidate all the Statute Law of the State:—*

The importance and desirability of the preparation of such a work cannot be overstated. *The present condition of the law is little short of appalling.* The arguments in favor of codification, based upon the bewildering mass of conflicting authorities in the various states, are very weighty. Legislative codification, however, is for various reasons unwise and impracticable, in my opinion, and would produce evils greater than those which it is intended to remedy.

The general plan proposed by you seems to me to be *a feasible one.* I quite agree with your view that it is impossible and undesirable to work out the plan on a commercial basis, and I sincerely trust that some one or more of our very wealthy citizens may be induced to see that it would be an object worthy of their patriotism and philanthropy.

Hon. J. H. Reed, *of the Pennsylvania Bar, formerly partner of Secretary of State Knox and United States District Judge at Pittsburgh, resigned:—*

I heartily concur in regard to the importance of the work. *Nothing has contributed more to the general unrest, and to the growth of strange doctrines of government and increase of foolish and injurious legislation than the uncertainty of legal decisions.* And this uncertainty is largely due to the mass of reported cases, which are increasing by the thousands yearly, and which the practising lawyer and trial judge are compelled (in most cases hurriedly) to attempt to reconcile. In most cases, the best counsel can do in advising is to guess at the probabilities. The client suffers by this uncertainty, and *there can be no greater public service than is suggested by your Memorandum,* for every one, or rich poor, large business man or small

[*Judge J. H. Reed—Continued.*]

trader, even the proverbial widow and orphan are vitally interested in knowing to a practical certainty their respective rights and duties.

I sincerely hope means will be found to enable you and your proposed colleagues to carry out your plans in the dignified and comprehensive manner suggested in your memorandum.

Everett P. Wheeler, Esq., *of the New York Bar, Chairman of the American Bar Association's Committee on Remedies to Prevent Delay and Unnecessary Cost in Litigation:*—

Your plan for a complete and comprehensive statement of the entire body of American Law interests me greatly. It is hard for anyone who is not a practising lawyer to realize the great difficulty that is imposed upon lawyers in advising, and upon judges in deciding, by the enormous mass of legal decisions which now form the evidence of American law. *Such a work as you propose, if well executed, would be of the greatest importance to the community.* Lord Bacon well said, that a country in which the laws are indefinite and uncertain is subject to an iron servitude. Yet such is the condition, to a considerable degree at least, of the United States. *Many of the evils that public men and philanthropists bewail are due to this cause.*

Burke expressed his idea of what the legal status should be when he said that no man who was worthy to have the legal gown upon his shoulders would dare assert that it was impossible to know the law of England in any particular case until it should be decided by the Courts in that case.

Unfortunately, every intelligent lawyer must now admit that the condition Burke declared to be impossible is now frequently realized in America.

Hon. Charles F. Manderson, *former President of the American Bar Association, and for many years United States Senator from Nebraska, twice President pro tem. of the United States Senate:*—

Your proposition is to bring order out of chaos, for I cannot imagine anything more chaotic than the present condition of the law in this country.

With the conflict and variance in the laws of different states and the constant disturbances that arise because of this variance there seems to be an absolute necessity for some uniformity of legislation upon all subjects that affect the commercial welfare and domestic happiness of the people of the United States. Our empires within an empire make frequently disastrous and ruinous conflict, and there is no remedy for evils that increase as time goes on except an education not only of the legal profession, but of the masses, to the necessity of greater uniformity in legislation. The American Bar Association has had this in view for years, but, unfortunately, has been able to accomplish very little to bring about the much needed result.

Your project is worthy of all credit and aid, and I greatly hope that before much time elapses your effort will be crowned with full success. Anything that I can do at any time to forward this excellent work I will gladly do.

My own opinion has been so fully covered by those with whom you have had correspondence that I feel that nothing is needed from me except to endorse what has been so well put by my friend Everett P. Wheeler, Esq., when he quotes from Lord Bacon in saying: "That a country in which the laws are indefinite and uncertain is subject to an iron servitude." We can be rid of some of this servitude by uniformity of state legislation, and a definite and well settled doctrine firmly established showing the distinction between legislation that should be extended to the states and that that should come from the Congress of the United States.

Hon. Jacob M. Dickinson *of Tennessee, Secretary of War and President of the American Bar Association,* 1907–08:—

There can be no question as to the importance and desirability of such a work. Your plan as mapped out seems to me to be practicable and comprehensive.

Hon. George W. Wickersham, *Attorney-General of the United States:*—

I have carefully read the Memorandum.

There is no doubt that "a complete, correct statement of 'the whole body' of our law in scientific language" is a high professional ideal, and that, as Mr. Carter said in the paper from which you quote: "A statement of the whole body of the law in scientific language and in a concise and systematic form, at once full, precise and correct, would be of priceless value." . . . *The value of such work, if properly carried out, is beyond question;* the diffi-

culties in the way of its accomplishment are colossal. I quite agree with the views expressed by some of the eminent gentlemen, whose letters you send me, that a prime consideration to the attainment of this purpose is to dismiss all idea of commercial success from the outset. If the work is done, and done well, it undoubtedly will bring commercial success; but it should not be undertaken with any idea of commercial success, but with a distinct and entire disregard of any such consideration. Thus undertaken and carried out in the way prescribed in the Memorandum submitted, the work cannot fail to be of great value to the profession.

Hon. Lloyd W. Bowers, *Solicitor-General of the United States:—*

The proposed American *Corpus Juris* at once enlists my support, as it must that of any lawyer who has at heart the deepest interests of the law and his profession. To my mind, the great and increasing divergence of the law in the forty-six states, whose legislatures and courts independently establish their jurisprudence, is a very great misfortune; and that misfortune of course affects the public at large much more than it does the lawyers. Anything which will help towards greater uniformity of law throughout the United States deserves the highest commendation and encouragement. I can see no great influence for more uniformity of legislation or of decision except through the "potency of the better reason"; and *the great work which you and your associates have in mind would help all who have to do with law* toward the best ideals. I sincerely wish you all success.

Hon. John Sharp Williams, *United States Senator-elect from Mississippi and for many years leader of the Democratic Party in the National House of Representatives:—*

Your scheme is gigantic in its scope; but even if incompletely consummated will result in immeasurable benefit.

General P. W. Meldrim *of Savannah, State Commissioner of Georgia on Uniform State Laws and former President of the Georgia State Bar Association:—*

I am somewhat astonished by the immensity of your project, and yet, I am attracted by it. . . .

We have reached a condition from which there must come relief. We cannot continue at this rate. Neither courts nor lawyers can stand the strain. . . . The curse of this country, state and federal, is over-legislation, most of it slipshod, and nearly all of it unnecessary. I am not optimistic about this proposed work; but I am satisfied that, while it will probably not realize the highest anticipations, it will certainly mitigate the evil.

A great work could be used as the foundation source of law, a source which legislators and courts would respect. But it would have to be one of the world's monuments, broad, strong, lofty. How such a monument can be erected is the question? *If an American Mæcenas should appear, well and good;* but his appearance is doubtful.

Hon. Simeon E. Baldwin, *Chief Justice of the Supreme Court of Connecticut, retired, former President American Bar Association and of the International Law Association, Professor of Constitutional Law at Yale, and author of "The International Congresses and Conferences of the Last Century as Forces Working Toward the Solidarity of the World," etc.:—*

I am in entire sympathy with those who believe that a full and well-arranged statement of the rules of common law and equity, as they are or should be generally recognized in the United States, *can be prepared by competent men* and put in the compass of a few volumes. It would be a matter for serious examination whether these should be as numerous as constant reference to judicial authority and to standard text-books would require.

In deciding that or any other question incident to the proper execution of the work, *commercial considerations should have no weight.* It would, however, be impossible to exclude these unless the work were financed by those who would find their compensation in the satisfaction of having done good service to the country in helping to set its judicial institutions in order on a firm and common basis.

It seems to me not impossible that aid of that sort could be obtained from some of those who, under the inspiration of the movements of our time towards social betterment, are seeking to perform the trust which great wealth imposes on its possessors,—to devote a part of it to the public good.

Hon. Charles F. Libby, *the President for* 1909–10 *of the American Bar Association; former President of the Senate of the State of Maine:—*

At first I was appalled at the stupendous nature of the task, but on further consideration am inclined to think it is feasible, *provided it is free from the taint of commercialism*, and is undertaken by the best minds in our profession, who are fitted for the work. . . . Such a work, if properly done, would be of priceless value, and as Mr. Carter says, "could proudly dispense with any legislative sanction." It would be its own *raison d'etre*. . . .

My experience since 1895 in the work of the Conference of Commissioners on Uniform State Laws leads me to express an emphatic concurrence in the statement of Judge Staake* that the proposed work "will tend to overcome the unfortunate conflicts between the states in matters of commercial law and remedial justice, and hasten that uniformity in both law and procedure so essential to our progress as a nation."

The success of the plan demands, of course, ample financial resources; so large that you can only hope of success through appeal to some public-spirited and patriotic member of the "philanthropic phalanx," who can be made to see the great and permanent public value of such a work carried out on the plan you outline. Of the value and importance of the work I have no question, and would most earnestly join in the appeal for an adequate foundation for this practical step in the advancement of the Science of Jurisprudence.

Hon. James Hagerman, *of the Missouri Bar, President of the American Bar Association* 1903–4:—

I cannot state too strongly that I approve the plan and method of your proposed work, and hope that you will be able to accomplish it. *It is much needed*, and no doubt will be the basis for future works that will develop, simplify and bring within the reach of all who study jurisprudence and enforce its precepts the entire body of American Law. It will be better than a mere legislative code, and will rank among the great practical codes of civilized countries.

* See p. 83, *supra*.

Hon. U. M. Rose *of Arkansas, former President American Bar Association, and Representative of the United States at the last Hague Conference:—*

I am in hearty sympathy with your plan; and I approve it in all its details. The gentlemen relied on to carry it into execution enjoy in the highest degree the respect and confidence of the profession; and I am of the opinion that the selection could not be improved on. *The work ought to have been done long ago.* The state of the law at present is a disgrace to our profession.

Hon. Frederick W. Lehmann, *President for* 1908–9 *of the American Bar Association:—*

The desirability of such a work and its necessity to a proper administration of the law are obvious. You and Messrs. Kirchwey and Andrews can judge better than I whether the work can be done on a commercial basis. However this may be, it should nevertheless be undertaken, and *I know of nothing which will better justify financial aid on the part of some public-spirited citizens.*

Francis Rawle, Esq., *of the Philadelphia Bar, President American Bar Association* 1902–03*; editor Bouvier's Law Dictionary:—*

The subject is so vast that it is difficult to grasp it. That such a work, well done, would be of inestimable value to the profession and to the community, is clear. I confess that my experience has sometimes led me to doubt whether it can be done in an authoritative way. Whatever Justinian put into his compilation became law; and whatever he omitted ceased to be law. This simple and effective method would be lacking here.

We can, however, assume that something must be done, and I have no doubt that the work, if done along the lines you indicate, would be immensely better than anything that has heretofore been done, and would be not only of great use to the profession and the country, but *would surely tend to bring about an increased uniformity of law throughout the country.*

The Supreme Court of the United States is now deciding a large number of the most important constitutional and general questions that affect the whole country. On most of these questions their rulings are controlling. This creates uniformity on those questions, but we may hope for more than that; it probably tends to impress upon the Bar and the Bench the vital importance of uniformity

in all possible directions, and the further thought that this can be reached to a certain degree, at least, if courts, in deciding a question of first impression in any particular state, would follow the Supreme Court if it had decided the question, and not, as now, merely add another decision to one side or the other of a conflicting line of cases. The work that you contemplate would emphasize this thought, and that alone would make it worth the doing,

I thoroughly approve of that part of your plan which entrusts the ultimate headship to three, aided by a large advisory body. Whether the advisory body should be quite as large as you make it, I perhaps doubt; but it certainly ought to be large. Perhaps fifty would be enough. It would be difficult to find one hundred men of equal, or anything like equal or average value, and the average ought to be high, both for good work and for the effect it would have on the profession.

Hon. William N. Lanning, *Judge of the United States Circuit Court for Pennsylvania, New Jersey and Delaware:—*

I am greatly interested in the plan outlined by you for the preparation of a philosophical work on the whole of our American law. The spirit which prompts men like yourself, Dr. Andrews and Dean Kirchwey to join in an effort to carry out such a plan inspires the hope that even in our day *the country's greatest need in the science of the law* may be supplied.

The few philosophical treatises on law we now have deal only with isolated subjects. *We have nothing dealing with the whole of our law as a unitary structure.* Difficult of execution as may be the work of co-ordinating and systematizing the fundamental principles of our forty-six state governments and our federal government, the task can be approached with the certain knowledge that these principles are the timbers of a single great structure.

The work you have in mind is monumental, but I believe it to be practicable. The need of it, also, is becoming more and more imperative. One takes too narrow a view of such a work if he thinks of it as helpful only to the legal profession. All are interested in good government; good government is conditioned not only on good laws but on their intelligent administration; and intelligent administration of a country's laws is promoted by a clear philosophical statement of the principles on which those laws are based.

The man who will establish a sufficient financial basis for the execution of your plan will save the work from the "perils of commercialism," add to its value by his spirit of patriotism and philanthropy, *and materially aid in giving to the world what will be, if the work is done by such a force of experts as your plan contemplates, one of the most useful and helpful literary productions of modern times.*

Hon. George Gray, *Judge of the United States Circuit Court; formerly United States Senator from Delaware:—*

I can add nothing to the weight of commendation set forth in the Memorandum, as coming from the most distinguished men in our profession. I think *I can appreciate the importance of so stupendous an undertaking*, and I agree with the late James C. Carter, that fortune and fame sufficient to satisfy any measure of avarice or ambition would be the due reward of the man or men who should succeed in conferring such a boon. *It would seem that the fullness of time had come for such an institutional work as an expository codification of the body of our law, as distinguished from a legislative code.* I wish abundant success to the learned and courageous *entrepreneurs* of this great work.

Hon. Peter S. Grosscup, *Judge of the United States Circuit Court for Illinois, Wisconsin and Indiana:—*

A great work like this does not always appeal to men with whom the first consideration is, what profits can be reaped. The work is too great for immediate large profits, for in its very nature it could not be brought within the purchasing power of a large number of purchasers. . . .

I believe that the Corpus Juris, when published, will be one of the greatest influences put forth by this generation of men. We have come to a time when, for the sake of civilization, as well as the practical administration of the law, the body of the law should be put into scientific form. This work does that, and its loss to the world would be a distinct loss, and perhaps an irremediable one.

Any word that I can say to anyone who is interested in a statement of the law, *not as a commercial venture but as one of the avenues through which civilization moves forward*, I will be glad to say.

Hon. Clement B. Penrose *of Philadelphia, regarded by many as Pennsylvania's ablest Judge:—*

The idea of the American *Corpus Juris*, as set forth in your very instructive Memorandum, is magnificent, and if it can be carried out—though the task is more than Herculean, *the benefit would be incalculable.*

Mr. Carter's views, as you state them, express with the greatest clearness all that I could say on the subject.

Hon. George M. Dallas, *United States Circuit Judge, retired, and emeritus Professor of Law, University of Pennsylvania:—*

To give complete expression to my thoughts upon such a subject would be to write too much, and *I cannot briefly say what I would in any better way than by asking leave to adopt as my own the short but sufficient note of Judge Penrose.*

The work of Mr. Carter, quoted in your Memorandum, and referred to by Judge Penrose, has been *twice* read by me, and, throughout, is full of suggestive matter.

James Barr Ames*, *late Dean of the Harvard Law School:—*

The bulk of the work will have to be done, as the lion's share of the work of preparing the German Civil Code was done, by professors. Our law schools are too young to have developed yet a large class of professors making the scientific study of law their career.

Personally, I could give very little time to the development of a *Corpus Juris* such as you have in mind. I have not many years for work and have several jobs to do. I do not want to hold aloof, however, and if you get definite assurance of the necessary funds for the payment of the large staff of collaborators, and if the Board of Editors when chosen seem to me to be men of the right sort and likely to put the thing through, I should be willing to go on the Advisory Board, assuming that my strength permitted.

Professor George W. Kirchwey, *Dean of the Law School of Columbia University, Chairman of the Section of Legal Education of the American Bar Association,* 1902-03, *and former President of the Association of American Law Schools:—*

I am deeply interested in the project which you and Mr. Andrews have formed of giving to the world a complete systematic statement of the law of the land. *It would be difficult to exaggerate the importance of such a work to the Bench and Bar and, indeed, to our country and its institutions. The plan stirs my imagination as a contribution, perhaps the greatest single contribution that could be made, to the great work of reducing the chaos of our complicated American jurisprudence to something like order and unity.* If, as your plan contemplates, the treatise shall represent the finest legal scholarship and the best professional experience of our country (and I can see no reason why you should not be able to command both for such a project), it will undoubtedly be eagerly welcomed by the profession and take its place as a notable achievement of the American bar. I shall be glad to contribute, in every way possible, to the success of the enterprise.

Hon. Frank Irvine, *Dean of the Law School of Cornell University:—*

I have examined with some care your plan for a *Corpus Juris. There cannot be the slightest doubt that such a work well carried out would be the greatest contribution ever made to our law.* While of inestimable value to the profession, *its chief advantage would accrue to the people as a whole*, who suffer more than any except lawyers realize from the present enormous volume and confused state of the precedents from which the law in a given case must be developed.

The undertaking is colossal and beset by difficulties. On the one hand, the work must be authoritative. Comparatively little good would be accomplished by a mere comprehensive treatise on the law, which would relegate us to the same study of old cases as the only real authority. The work should solve the problem so long confronting us and arising out of the enormous and indeed appalling growth of the reports. We cannot hope for any work which would enable us to throw on the junk pile the thousands of accumulated volumes, but we may reasonably hope for a work which will render a resort to them rarely necessary, and when necessary at all chiefly for historical purposes. On the other hand, legislative codification leads us into a new and inner maze without getting us out of the old one. The authority must be derived not from legislative fiat but from the character of the work itself.

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* See also further quotations from the revered Dean Ames, at p. 72 of the Memorandum, *supra.*

These considerations point to *some such plan as that which you propose as the only one promising any degree of success. The undertaking must not be a commercial one.* It must be carried out by a large number of those men best fitted for such a task. Because it requires the co-operation of so many men, it requires a strong central organisation and competent direction by a few.

My conclusions therefore are that such a work is more to be desired than anything else in the way of legal development, that the task is enormous but not impossible of performance, and that your general plan is one promising success. There may some time be room for controversy as to details, but the time to consider details is not yet at hand.

Professor Henry Wade Rogers, *Dean of the Yale Law School, and Chairman of the Committee on Legal Education of the American Bar Association:—*

I fully concur in the opinion expressed in the letters you have already received that *this work you propose is one of the highest importance to the profession and to the public.* There certainly can be no difference of opinion on that point among those who are qualified by their learning and experience to pass judgment upon the question. It would be difficult to exaggerate the benefits which would follow from the satisfactory completion of the undertaking.

It would be equally difficult to overestimate the magnitude and difficulty of the task you propose. It will involve great labor and must command the services of the ablest minds in the profession. . . .

It is certainly possible that some wealthy, sagacious, far-seeing and public spirited individual or individuals will establish a Foundation which will make it possible to enter upon this splendid undertaking in the immediate future. The expense would be great because of the magnitude of the work and the necessity of employing the highest talent. And certainly the whole profession would applaud should any citizen or citizens of the Republic open the way by providing the necessary funds.

Hon. George D. Watrous, *President of the Connecticut State Bar Association and Professor of Law at Yale:—*

As to the desirability of such a work as you plan, *there can be but one opinion.* The difficulties in the way of achievement are tremendous, but I am sure they can be overcome by the triumvirate, in so far as in the nature of things they can be overcome.

Hon. Roscoe Pound, *former Supreme Court of Nebraska Judicial Commissioner, and Commissioner for Nebraska on Uniform State Laws; now Professor of Law in the University of Chicago Law School; Chairman in* 1907 *of the Section of Legal Education of the American Bar Association:—*

I do not doubt that such a work as you propose, though difficult of execution, because it would be a pioneer work in the system of our Anglo-American law, is entirely feasible. The utility of the work is beyond dispute, and, I might fairly say, beyond measure.

Our jurisprudence of rules is breaking down obviously, and in the process is injuring seriously public respect for law. A great deal of our law in books is not law in action, not only because the mass of legal detail is too cumbrous for actual administration, but often because, at the crisis of decision, judges can not but feel that they ought not to apply the mechanical details they find in the books in the hard and fast way that rules, as distinct from principles, are to be applied. But where are they to find the principles? There are suggestions here and there, and a powerful judge now and then draws a principle from the mass of rules. In general, however, the courts are too often forced to reach a conclusion on the large equities of the cause and forage in the books for cases to support it. This makes our written opinions a mere ritual. Sooner or later a system of our law must come.

Such a work must be done for its own sake. It must come from [*a*] the gradual, but extremely slow progress of academic research and publication, from [*b*] a state-appointed commission or [*c*] from some private foundation. Commercial enterprise will demand immediate profits — and *this work must be done thoroughly for ultimate not immediate results.* The work of the Commissioners on Uniform State Laws, for example, will not sell; but who shall estimate its value?

It has been said that the crimes of a Bonaparte and the bigotry of a Justinian will be forgotten because at their bidding the rough places in the way of justice were made smooth. The patron under whose auspices the way of American justice shall be made smooth will have done no less and will be the greater, in that he devoted his own while they commanded the resources of states.

Dean James P. Hall, *of the Law School of the University of Chicago; formerly Professor of Law in the Law School of Leland Stanford University, California:—*

As regards your general plan for a work upon American law in which the principal topics shall be thoroughly treated by men who are masters of their subjects, there can be no doubt that in most branches of the law such a work, if well executed, would afford a far better discussion of principles than is now to be found in any save a very few text-books. *Nor can it be doubted that such a work would gradually have a considerable influence in settling and unifying many legal rules that are now in a deplorable state of uncertainty and diversity.* If the plan can be carried out under capable direction and by competent hands it is well worth doing.

Dean William R. Vance, *of the Law School of George Washington University, Washington, D. C., Professor-elect in the Yale Law School, former Dean of the Law School of Washington and Lee University, Virginia:—*

The magnitude as well as the beneficence of your plan quite sweep one off his feet, so that it is difficult for him, in contemplating the brilliancy of the scheme, both in conception and in detail, to keep fast hold of his judgment. Now that the north pole has been discovered and the air is being navigated, it would seem foolish to say that even such a dream of poets-in-law as an American *Corpus Juris* is unattainable. Therefore, we will admit that the plan you have worked out is not intrinsically impossible from the standpoint of scholarship, although none of those who have dwelt upon the tremendous difficulty of the undertaking have in any respect exaggerated the case. I am, however, firmly of the opinion that it will become practicable only upon the basis of the philanthropic foundation which you urge so well. . . .

I need not assure you that my statement of the great obstacles to be overcome in the prosecution of this most praiseworthy enterprise does not indicate any lack of enthusiasm on my part over the plan itself, or that my belief in the need of such a work is any less vivid than that of the many lawyers who have written you letters of encouragement.

Professor H. B. Hutchins, *Acting President University of Michigan and Dean of its Law School; formerly Professor of Law at Cornell:—*

The necessity of a comprehensive and accurate statement of the whole body of our American law is certainly a pressing one. The plan that you propose seems to me to be a feasible one and I trust that it may be carried out. Be assured that I shall esteem it a privilege to do what I can to aid in this great work.

Hon. Henry H. Ingersoll, *Dean Department of Law, University of Tennessee, and formerly on the Bench of the Supreme Court of Tenneesee:—*

I have often wondered, during my first twenty-five years at the bar and on the bench, and during the past fifteen, while studying, teaching and writing for text-books and cyclopædia, when and how it would come about that we Americans should have, out of the vast mass of legal material, raw and digested, local and national, treatises and commentaries, decisions and *dicta*, an adequate production—"Pandects," if you please, setting forth the Common Law of America, "*Corpus Juris Americani*," and did not expect in my time any nearer approach to it. . . . I have today read your "Memorandum *in re Corpus Juris*," and on reviewing the progress of the past two decades towards uniformity through digesting, cyclopædizing and the altruistic labors of our American Bar Association, I cannot see that any greater rapidity is required to consummate your *opus maximum* in the next two, and possibly in view of improved modes of locomotion it may be accomplished in one. . . .

Your Memorandum gives me strong leaning to your scheme and I hope for a modern Justinian, large enough to shoulder the work and give opportunity to laudable ambition.

Hon. James G. Jenkins, *United States Circuit Judge for Illinois, Wisconsin and Indiana, resigned; and now Dean, College of Law, Marquette University:—*

For many years I have been impressed with the need of a "Code Justinian" of American Law, that the law might be made certain and the whilrwind of opinions avoided. I have feared, however, that this was but an idle dream; not that the work was impossible, but because it was so great and possibly unremunerative from a commercial standpoint, that the necessary pecuniary aid could not be obtained.

And yet the need for such a work is so urgent and of such consequence to the business interests

*of our country in producing uniformity and certainty of decision and in avoidance of the "law's delay" that it should appeal to all to aid in its accomplishment. I cannot better express my views than by adopting and referring to the cogent letter of Mr. Francis Lynde Stetson.**

It occurs to me to observe that the time seems ripe for the undertaking. The pendulum is swinging more and more towards centralization in the national Government, and however much one may from a constitutional standpoint regret this, it is certain that such change of necessity tends to uniformity of law throughout the length and breadth of our land, which is "a consummation devoutly to be desired."

I think your undertaking deserving of full success and of the aid of every broad-minded sagacious statesman, professional and business man. *To advance civilization, to render certain the law and its speedy enforcement, is surely appealing to every patriotic mind and to the self-interest of every owner of property.*

Chancellor S. B. McCormick, *of the University of Pittsburgh, who, prior to his entering the educational field, was a member of the Bar in active practice:—*

In the first place, the work proposed by you and your associates is not only desirable and important, but is becoming an absolute necessity. It is unthinkable that the legal profession, which includes in it men of the profoundest scholarship, most brilliant attainments, broadest culture, keenest analytic and discriminating judgment, should much longer permit *the almost impossible conditions now prevailing in the law. A remedy must be found, and it is to be found in the plan proposed by you and your associates.*

In the second place, *the plan is entirely feasible.* That it will involve great and exhausting labors, together with the most discriminating judgment and almost limitless knowledge of the law, is true. But you have the men who are able to carry even this gigantic work to a successful issue. You have in your Memorandum so completely outlined the proper method of going about the work as to convince even the skeptical person that it can be done.

In the matter of the practical question of the production of the work, there is, in my opinion, but one method and that is the second one set forth in your Memorandum, namely, a Foundation of Jurisprudence.

This great work must be kept from any appearance of commercialism to give it highest value. Fortunately we live in a time when there are many men of large wealth, who, once convinced that a cause is worthy and will bring good to the people, are willing to supply the money to make it successful. *Such a work will be of priceless value to the legal fraternity. It will be of equal value to the general public.* It will not be difficult to make this clear to men who, having large wealth, are conscientiously seeking to use their wealth for the highest good. I trust you will form your plans to issue your work on such a foundation.

It has always been a marvel to me that the legal profession has been willing to permit the complexity and confusion, which have prevailed because of the multiplication of enactments, decisions, etc. This has continued until it would seem almost a hopeless task for any one man to expect to master the subject of law. This is wholly unnecessary. The plan you have conceived is not only feasible but an absolute necessity.

In conclusion, permit me to congratulate you and your associates upon the conception of this plan, and to wish you, and those who may be selected to labor with you, an early and most successful completion of the undertaking.

President Woodrow Wilson, *of Princeton, a member of the American Bar Association, formerly in active practice at the Georgia Bar and for twelve years Professor of Jurisprudence in Princeton University:—*

The eminent judges and publicists who have already endorsed the idea are most of them men whose practical experience lies very much nearer the field of this matter than my own does, and I can only say that their opinion in the matter confirms my own, that *this project is not only feasible, but highly desirable,* that *its undertaking would be a great stimulation to legal scholarship in the United States and its accomplishment a great service to English-speaking lawyers everywhere.*

Dr. Lyman Abbott, *Editor of the Outlook, and who at one time was a member of the New York Bar in active practice:—*

The preparation and publication of an American *Corpus Juris,* as proposed in the Memorandum which you have forwarded to me, *would be, in my judgment, of very great*

*See pp. 67, 68, 80, 81 and 84, *supra.*

[*Dr. Lyman Abbott—Continued.*]

advantage both from the scientific and the practical point of view. I agree very heartily with the opinions expressed on this subject by the Hon. Alton B. Parker. [See page 92, *supra.*] I agree, too, that such a work could not probably be successfully published upon a purely commercial basis.

Walter George Smith, Esq., *of the Philadelphia Bar, State Commissioner of Pennsylvania on Uniform State Laws and President of the National Conference of Commissioners on Uniform State Laws:—*

Herewith I return the Memorandum *in re Corpus Juris* which you were kind enough to send me. I read it through with great care and with increasing appreciation of the scheme you and your associates are seeking to bring to perfection. Certainly it would be to the great advantage of our American civilization if it were possible to present in a reasonable compass a statement of the law on each of the vital subjects affecting the relations of men to men. Even if this were only approximately successful, *the results would well compensate for the toil necessary to accomplish them.* I like very much the plan you outline for the practical carrying out of the work, as it will unite the best trained intellects in the profession in producing an accurate, lucid and condensed statement of the vital principles of our jurisprudence.

I wish it were possible for you to enlist the patronage of some modern lover of his kind, who would be willing to take the risk involved in financing your plan. From my limited knowledge of the subject I think with you that the risk would be only nominal. If, however, this cannot be accomplished I think that even under a commercial direction the work would be most desirable.

Of course I realize that there is a great difference between the academic outlining of the plan of action and its being carried into successful practice. The limitations of our common nature must be heeded; but discounting all of these considerations I congratulate you upon your thoughtful and admirable scheme. If it does not come to fruition under the direction of yourself and your associates it is none the less sure to come in some form, for *our vast business interests, and the constantly increasing complexities and delays under our present system of jurisprudence, will not be borne by a progressive community.*

Hon. Frederick N. Judson, *President of the Missouri State Bar Association:—*

The thoughtful men of our profession are realizing more and more that the doctrine of judicial precedent must be profoundly affected in the not distant future by the enormous increase of case law, as set forth in the published reports of the forty-six states and the federal reports.

Is this multiplication of cases with these intolerable long judicial opinions to have any limit? *The great problem of the future is to determine how to use the adjudged cases in this enormous increasing volume,* so that the law may still be enriched by new applications, *while its fundamental principles are expressed with certainty, convenience and accessibility.*

Under our federal government it is obvious that the remedy of codification, that is, of statutory codification, is impracticable. The increasing distrust of our legislative bodies indicated by the popular demand for so-called direct legislation is another complication, and many are led to prefer judge-made law, however imperfect and uncertain, to statute law.

The plan suggested in your Memorandum impresses me as eminently practical and indeed the only remedy for the chaotic condition into which we are drifting. The very magnitude of the enterprise and the large expense involved in its successful prosecution make it clear that *it cannot depend on the ordinary incidents and hazards of a strictly commercial enterprise.*

David T. Watson, Esq., *of the Pittsburgh Bar:—*

I am much impressed with your scheme, and I do not doubt that, with the labor and ability that you will give to it, very favorable results will follow.

Hon. William U. Hensel, *Attorney-General of Pennsylvania under Governor Pattison and President of the Pennsylvania Bar Association* 1897-98:—

My attention has been arrested by your project of a great and much needed work,—the American *Corpus Juris.* To foreigners the jurisprudence of the United States, with its confusion of courts and labyrinth of law, must seem a most complex system. *The most profound lawyer of our own country* in the presence of the most guileless student, *is overwhelmed in its entire contemplation.*

Any ordinary scheme of relief proposed would meet with suspicion by those of the profession who have sadly realized that of making law books, of much cost and little value, "there is no end."

But when the eminent names of laborious students and conscientious workers which are identified with your project are regarded, it may confidently appeal alike to public-spirited men of means who are sincerely interested in great works of real usefulness to the general public, and to the profession whose libraries it will enrich and whose labors it will vastly aid.

The unceasing energy, the intense industry and the comprehensive knowledge which you and your proposed coadjutors will bring to this work are guarantees of its early and successful accomplishment.

In view of all this I can no more doubt that generous patronage will endow it than I could withhold my hearty commendation of your prospectus.

Frank P. Prichard, Esq., *of the Philadelphia Bar, law partner of John G. Johnson, Esq.:*—

That such a work, if well done, would be a benefit to the profession cannot be gainsaid. *The multiplicity of decisions tends to create confusion as to underlying principles. I am therefore heartily in sympathy with the general purpose of the work you suggest.*

I also agree with you that the work cannot be well done as a commercial scheme, and that if done at all it will be best done by a small executive body, preferably by the trained experts of the law schools and adequately paid by funds provided by an endowment in advance.

I have grave doubts, however, whether the first essay in this direction will produce a really great work, and whether it will return the money expended on it. A really great work of this kind, in my opinion, must be substantially the product of a single mind, and that mind of a special and peculiar ability. Such a man must be born, not made. No amount of intelligence or training can produce him. I do not mean to underrate the value of co-operative assistance or criticism, but any systematic, logical, clear statement of the law must be largely the work of one master mind. It does not follow that because you have put the work in the hands of a small executive committee of able men, it will be a success. The ability required is not only of a high order, but peculiar in character. I believe, therefore, that the chances are against the production, in the first instance, of a really great work. *This, however, is no argument against the undertaking.* The great Law Digests and Encyclopædias are, I think, but the first fruits of a *general demand for a systematic statement of the law*, and if an attempt adequately to supply the need in this respect will involve many failures *there is all the more reason for commencing the work at once.*

Ernest T. Florance, Esq., *of the New Orleans Bar, Commissioner on Uniform State Laws for the State of Louisiana:*—

Much of the criticism of the administration of law, particularly in the lines of its uncertainty and of the delays in reaching even its uncertain results, springs from *the confused condition in which the body of the law exists in this country.* Under the system of the Common Law, as administered in the forty-five states of the Union, there is to be found ample authority for nearly any proposition that can be advanced. In examining the precedents thus established, it is almost impossible for any Bench to gauge the value of a precedent by the ability of the Judges who may have created it. . . .

The number of courts, unless the majority is overwhelming, is no proper guide to the correctness of the principles determined. The consequence of all this is that the practitioner cannot anticipate what the opinion of the Court before which he is to appear may be as to the conclusion to be reached from the examination of these contradictory precedents. *The benefit of such a work as you propose is evidently, therefore, incalculable.* . . .

Of course this work will be much more difficult than the writing of a long text-book, because it would require in its confection the keenest acumen, the most concise and accurate use of language, the most intimate knowledge of the law as it is, and the broadest-minded appreciation of the real meaning of the law.

Take, for instance, the subject of the relations of Principal and Agent, known in Louisiana Code as the contract of "Mandate." The law on that subject is stated in seventy short paragraphs, and it is very difficult to think of any question arising from that relation that does not find its solution in one of those Articles. It would be impossible to

[*Ernest T. Florance, Esq.—Continued.*]

add fifty paragraphs without repeating principles, or entering into unnecessary details. The law of Suretyship is fairly well covered in thirty-five Articles; that of Partnership in ninety Articles. . . .

With the exception of certain Common Law matters, which naturally would not arise in a Civil Law State in the same form in which they would arise in a Common Law State, and which are really more in the line of adjective than substantive law, *nearly all the general questions governing Civil Conduct have been presented in the one hundred years of Louisiana's existence*, to our Court. . . .

The work as outlined by you is a necessity in the fullest sense of the word, and when completed its possession will become a necessity to every member of the Bar in general practice. Your method of raising the necessary funds is the best that could be suggested, and I agree with our brethren that there must be one or more of the public-spirited ultra rich who are willing to have their names go down to posterity as having rendered the greatest benefit to their fellow citizens that the use of money could confer.

No library, no art museum, no charitable institution, and no educational institution can compare in value to the people at large with the composition of a work that would bring about certainty and rapidity in the administration of the law, which enters as a determining factor into nearly every event of daily life.

General James A. Beaver, *former Governor of Pennsylvania and now Judge of the Superior Court of Pennsylvania:—*

The conception is fine. If in its evolution the practical development could reach your ideal, and the product be equal to the seed thought, *the benefits to the profession and to the country at large would be inestimable.* If you could secure a man or a body of men who could do for America what Blackstone did for England and you could make your *Corpus Juris* of equal authority with his Commentaries, it would immortalize anyone connected with the enterprise, intellectually, commercially or otherwise. *Oh, for a James Wilson,* whose tragic and untimely death prevented at least the initial work which would have furnished a foundation for what you propose. With his Scotch ken, keen analysis and comprehensive grasp, *he seems to those of us who hold him in grateful and honored memory to have been the one man of the generations past in this country who was equal to the demands of this enterprise.*

The task is Herculean, viewed from any of its varied aspects. I wish you well, I am sure, in the effort to carry the project to a successful conclusion.

The difficulties seem to me to be almost insurmountable. All the greater credit, therefore, to the man or men who will overcome them. When the great topics of the law, such as Carriers, Corporations, Evidence, Negligence, Railroads, etc., reach in their treatment from four to eight huge volumes, one smiles at the proposition to reduce to a harmonious whole the great *Corpus Juris* into twenty volumes, and *yet it is not difficult to see that these great dissertations on single subjects, to a very large extent, cover the same graund and can be reduced in their final analysis by a comprehensive and philosophical treatment which will cover but little more than the full discussion of any one of them. I believe the thing can be done* and, in the face of the great need of its being done, you may be sure that I wish you and your confreres abundant success in the doing of it.

Hon. Samuel W. Pennypacker, *Governor of Pennsylvania* 1903–1907; *former President Judge of the Court of Common Pleas, Philadelphia, and the President of the Historical Society of Pennsylvania:—*

The vast benefit such a work, if it can be successfully accomplished, will confer upon the judiciary, the profession and the public is beyond estimation.

The difficulties to be overcome before such a consummation can be reached are likewise very great, and its value will depend upon the energy, accuracy and care of those concerned in its preparation. Great tasks are however, sometimes accomplished, and *the plan you suggest appears to be feasible.*

Hon. G. A. Endlich, *President of the Pennsylvania Bar Association for* 1909–10:—

I have given your Memorandum on the subject of an American *Corpus Juris* very careful examination. In common with, I think, the larger part of the profession *I have long felt that such a work, properly done, would be of infinite service. Indeed, I am disposed to look upon it not only as one of the great desiderata from the standpoint of the judge and lawyer, but in a still broader*

sense as a necessity little short of imperative. The decisions in every section of our country are piling up at such a rate that in the endeavor to follow precedents courts and attorneys are obliged more and more to confine their search and references to the reports of their own states. This practice, becoming noticeable pretty much everywhere, must eventually tend to discourage and neutralize the efforts towards needful uniformity in our law, and to beget in the various jurisdictions a spirit of particularism which is the very opposite of what we ought to cultivate, and which may be fraught with dangers by no means trifling. A work of the character proposed, if commended by strict accuracy and the weight of competent authority, would probably go far towards turning the current in the right direction.

That the task, in spite of its magnitude, is not an impossible one cannot be doubted, and *the general plan outlined by you seems happily conceived and practicable.*

Charles Biddle, Esq., *of the Philadelphia Bar:*—

One who reads this Memorandum and discusses the question with you, cannot fail to be impressed *with the scope of the work and its great importance.* The field to be covered is so large and the ability to master it is so rare, one can hardly venture upon a prediction as to the ultimate successful accomplishment of all you desire; but if the man or the men can be found with the industry and brains to succeed, *there would seem to be no limit to the usefulness of such a work.* Few of those who help to administer our laws have had the opportunity, the inclination or the ability to become learned men. To this large majority this work would afford a means of following that which is best and most universally adopted. Such a book would give to the United States what Blackstone gave to England.

Hon. James M. Beck, *of the New York Bar, formerly Assistant Attorney-General of the United States:*—

Your Memorandum is deeply interesting. A New York lawyer, above every other, should sympathize with you in your laudable purpose of preparing a comprehensive statement of the entire body of the American aw, for *he is called upon from time to time, when consulted by local clients having interests throughout the entire country, to break a seemingly impossible way through a wilderness of precedents. The multiplication of judicial reports makes this task each year increasingly difficult.* For example, a large commercial enterprise, doing business in each state of the Union, and having its principal office in New York, will frequently ask counsel whether they violate, in the methods of their business, the Anti-Trust laws either of the nation or the various states. The difficulty of answering such a question without writing a treatise is obvious. I do not know how far your plan contemplates the effective grouping of statutory laws. I take it it rather refers to the great body of the law which depends upon judicial decision and the common law rather than express statutory enactments; but in either event, *the work, if done intelligently, would be of immense value.* It would certainly *be a great gain* if a body of men such as you have named, and of whom you are one, would undertake the careful and scientific statement of American law.

Hon. L. J. Nash, *President State Bar Association of Wisconsin:*—

Your "Memorandum *in re Corpus Juris*" lays in view of our professional husbandmen a *new field of rich soil and great potential productiveness.* . . .

Lawyers, and some courts, are now practically compelled to search for a "similar case" rather than a guiding principle, so great is the mass of precedents and so difficult is the task of generalizing from them. This condition promotes sporadic growths as hostile to sound reason as the "vogues" and "sports" of the horticulturist are to fruit-bearing plants.

The literature of the law ought to present a familiar face everywhere, to the public generally the same as to courts and lawyers. Indeed, *one of the most desirable results of a well executed national Corpus Juris is likely to be a wider familiarity of laymen with law.*

Hon. James H. Cartwright, *Chief Justice of the Supreme Court of Illinois:*—

If your plan is, as I infer from the letter before me, to prepare a statement of the whole body of the law in scientific language which will be accepted as authoritative, there can be no doubt *the successful accomplishment of such a work would be of priceless value to the courts and the profession.*

Hon. William P. Potter, *Justice of the Supreme Court of Pennsylvania:—*

I am very much interested in the outline which you gave me of your proposed publication of a complete system or body of American Law. I know of no one who would be better able to outline and carry to a successful finish such a monumental work than yourself, and the eminent gentlemen with whom you are associated. At first blush, the task you propose seemed to me discouraging in its proportions; but *as I reflect upon it, the possibility of reducing the problem to the statement of fundamental principles, grows upon me. . . . I have the fullest faith in the capacity and untiring patience of yourself, Mr. Andrews and Dean Kirchwey. Any plan of procedure upon which you may determine will be practicable and efficient. Of that, I am sure.* I wish you the fullest success in the great work which you have outlined.

Hon. Marcus P. Knowlton, *Chief Justice of Massachusetts:—*

The importance of the successful completion of such a work as you propose is unquestionable. Nothing that I could write could add to the weight of opinion contained in these letters.

Hon. D. B. Morgan, *Chief Justice of the Supreme Court of North Dakota:—*

I think your plan feasible and I have no doubt of its ultimate success. When perfected, and carried out, it will be a boon to lawyers and judges and materially reduce the perplexities now existing in the practice of law.

Hon. Micajah Woods, *President of the State Bar Association of Virginia:—*

I am greatly interested in and impressed by the plan and scheme suggested for the compilation of a great work, embodying the fundamental principles of the law, applicable to all the people, courts and states of the American Union. It will be a colossal undertaking, and I would indeed like to see its accomplishment in my day and generation.

The man or set of men who would furnish the means to engage the talent necessary for such an undertaking would be immortalized.

Hon. Joseph A. Breaux, *Chief Justice of the Supreme Court of Louisiana:—*

The Memorandum sets forth clearly the necessity of reconciling incongruous laws. . . .

There is unquestionably a decided demand for uniformity in our laws. Simple life—plain and precise laws, well within the understanding of all, are the *desiderata*. The expression is becoming frequent everywhere that there is a precedent for almost any proposition of law, however erroneous.

I am heartily in accord with the project clearly explained in the Memorandum.

The cost, whatever it may be, would be limited as compared to the value of the thorough analysis and classification. I am somewhat concerned in regard to the system of law which prevails here, to which our people are devoted. It is satisfactory to us as a system, although it also would be improved by some revision. . . .

There is no necessity of one system *supplementing* the other. *They can be reconciled in our state sufficiently to be considered with the laws of other states.*

Hon. John H. Stiness, *Chief Justice of Rhode Island:—*

Some treatise which will give a statement of the body of the law in this country is greatly to be desired and *it would be a boon to judges as well as to members of the bar.* This is one country and it should have one law. Every step which tends to that end is both valuable and patriotic. I have long felt that a general unification of our law is needed and to that end I spent considerable time as a member of the Commission on Uniform State Laws. . . . *A treatise on the entire body of American law would be the most valuable contribution to systematic and unified law that can be made.* It would compare in value with the Institutes of Justinian.

Hon. J. B. Whitfield, *Chief Justice of the Supreme Court of Florida:—*

As under our system of government every one is presumed to know the law, and as at present there is in fact no single publication containing a comprehensive and accurate statement of all the principles of law that are or should be applied to secure uniform justice in the administration of human affairs, *it is of the greatest importance that competent persons freed from all commercial spirit should*

undertake and prosecute to reasonable success the enormous task of embracing in one work of exact and simple language the whole body of the law applicable to American life.

Hon. Claudius B. Grant, *Chief Justice of Michigan:*—

Your "Memorandum *in re Corpus Juris*" was received. *I am thoroughly in accord with its contents.* My experience as a lawyer and upon the bench convinces me that *such a work would be of incalculable benefit to the entire people of the country.*

Such a work to be of the benefit desired must be performed in the manner suggested by a corps of our ablest lawyers and jurists. *It can only be accomplished, in my judgment, in the way set forth in the Memorandum. It will be a work of years of hard study, and must be kept entirely free from any taint of commercialism.* I trust some method can be devised by which a work so important to the jurisprudence of the country can be accomplished.

Hon. D. W. Simms, *President of the Indiana State Bar Association:*—

The clear, simple and scientific arrangement of the body of our laws reduced to their lowest terms is *the most urgent need of the nation. Its accomplishment would not only mark an epoch in the world's legal history but it would measure the longest stride yet taken by the race in the march of progress and civilization. . . .*

I am thoroughly convinced that if it can be financed, your plan can be worked out so as to bring this great enterprise to a successful issue.

It goes without saying that the work had better be left undone than to be poorly executed. To commit the work to the hands of those contemplated in your plan is to insure its being done as nearly perfect and correct as possible.

For opinions of —

General Thomas H. Hubbard, see p. 67.

Hon. Francis Lynde Stetson, see p. 67, 68, 80, 81, 84.

Hon. William H. Staake, see p. 73, 79, 82, 83.

Chief Justice McClain, see p. 63, 69, 77, 81.

Review of the *Corpus Juris* Project and Argument upon the Necessity for a Foundation*

By Charles A. Boston, Esq., of the New York Bar, a Member of the Firm of Hornblower, Miller and Potter

In Detroit I listened with much interest to your statement of the project to formulate a work to embody the American *Corpus Juris*, with the aid of philosophic writers and thinkers on the law, and without the impediment of the commercial spirit. My interest was increased when I read the Memorandum on the subject prepared by you and the commendatory letters from justly distinguished men, which you sent me.

It is difficult to say anything in support of the project which has not already been said as forcefully as possible in the letters which I have read. But it may not be amiss to say a few words in hearty approval of the design in all of its aspects. It seems to me that there is a necessity for such work from the minds of such workers and under the conditions that you propose, as calculated to make the work what it is designed to be, philosophic, comprehensive, logical, and having by common consent the force of law through *its own unquestioned merit*, without the sanction of legislative enactment.

Such a work, if possible, would be truly monumental. But *it would be the best of monuments, a public benefaction.* I would

*This review is in the form of a communication to the author of the Memorandum *in re Corpus Juris*, pp. 55-89 *supra*.

look to it, if properly undertaken and accomplished, *to diminish the volume of legislation and to curtail the length of judicial opinions; to tend to unify the law of our many commonwealths*, so far as the varying conditions of their people would reasonably permit; *to give a solider philosophic foundation to such laws; and to reduce the number and extent of published reports and text-books.* All of which, if they can be accomplished without the surrender of the spirit of constitutional liberty and the substitution of the idol of formalism, are much to be desired.

For such an undertaking, it seems to me that the time is now ripe. The people take an interest in their laws to an unprecedented extent; the educational standards of many of the law schools, and the tests for admission to the bar are higher than ever before; the methods of instruction are improving; the young men are better equipped with all, except native genius and singleness of purpose, than ever before (and in these it is fair to assume they are not inferior); and there is greater attention given than ever before, in this country at least, to the philosophic principles embodied in the reported decisions of the Courts. The philosophy of legislative enactments, embodying so much that is freakish and undoubtedly temporary, has not received so much attention. But *if that could receive the consideration of master minds, future legislation might be diminished in quantity and improved in quality, to the increase of general respect and observance and a corresponding public advantage.*

I have had occasion to collate and analyze the legislation of substantially all of the English-speaking countries, on a single subject, of common and universal interest, namely, the Practice of Medicine. They (the laws) all aim to effect a single purpose, the protection of the public health through the exercise of the police power. The diversity of provisions is astonishing, and their freakishness in some respects amusing, while in one instance that I call to mind, the results were tragic, in that a law designed to protect the community deprived it of the services of any physician.

Taking this single illustration as a type, I am satisfied that *it would improve the quality and simplicity and efficiency of legislation, if legislators were advised of the laws in other commonwealths on the same subject and of their underlying purposes and principles;* and I understand that your plan contemplates a consideration of statute law as well as the formulation of the principles of judicial opinions.

It should not be understood that your work is to be a codification of the law; for from practical experience I conclude that codification is an abomination accompanied as it is by the demon of construction.

It (the proposed American Corpus Juris) *is rather to be considered as an expression of the law in the words of master minds, from which all searchers may draw inspiration and knowledge*, with the resulting benefits that I have already mentioned.

In this I would not underrate encyclopædias of the law; they are useful present-day tools; but they are but steps in a progress toward a superior achievement, for which perhaps they laid a foundation. I have said *the time is ripe.* Those who are familiar with the instruction given in the greater law schools know how conscientiously and efficiently the greater minds among the teachers have pondered and expressed the philosophy of their subjects, so as to imbue their students with the philosophic conception of the law as an art, based on scientific principles, if not, as it is frequently called, a science. *The improved methods of general education have invaded the law schools, necessitating a scientific kind of work on the part of the instructors, who have thus become leaders,* occupying an enviable and useful position, which they have created, and fill with ability. Thus far their services have in the main been useful to the community only through the law students they have trained. But *there is every reason why their abilities should be made directly useful to the entire community.*

You will recall that Dean Ames, of Harvard University Law School, said at the recent session of the Association of American Law Schools at Detroit, that he looked forward to the day fast coming, when the best law books should be written in America. It is by reason of the very facts which I have mentioned that he entertains that expectation.

For the reasons above stated I think that the fulfilment of your project is desirable and that *now is a proper time to inaugurate it.*

But *no matter how desirable nor how pressing, two questions still confront me: First*, whether it is possible, and, *second*, the method of proceeding as a financial proposition.

The difficulty of achieving the desired result will readily appeal to any one in the slightest

degree acquainted with the problem. But I believe it is not impossible. Indeed *the codifications heretofore made, to my mind, demonstrate its possibility.* They were stupendous tasks, and are in the main, usually the work of one man. The fault, aside from any imperfections that may exist in their structure, lay in the expectation that they would be legislated into effect. What the legislature enacts it may change, and what it says, having the effect of law, gives rise to the fruitful necessity of "Construction." *The proposed work would be free from these defects; it would be a guide rather than a rule; and would be followed as a guide, where it might be subject to controversy or change as a rule.*

Another thing argues its possibility to me. *The subject matter for its analysis is all accessible in written books;* the principles of the analysis are discernible by clear thinkers, and they are capable of formulation by accurate writers. *The extent of the subject is not unlimited.* It can be, and in the encyclopædias and digests has been reduced within ascertained limits. *When I contrast this with other achievements of man, its apparent difficulty diminishes.* Take for instance geology. Its subject matter exists in every accessible part of the earth; its records are wholly unintelligible to the ordinary observer; they run back of all human records and back of all life itself; they are not the product of a finite mind, and they are presented to the eye only, and that in unintelligible characters; its mastery requires a thorough acquiantance with all of the physical sciences, physics, chemistry, biology including botany and zoölogy, and these not only of living forms, but of those that are dead and were dead before human life began. Yet its tale has been written so that a man of no extraordinary intelligence can read; and though the data have been collected by many men, it has not been beyond the power of single men in the scope of a few years to formulate for the intelligent reader, the conclusions to be deduced from these data, running back through all the discernible ages of the earth and over practically all of its accessible crust. So also of astronomy, which requires as well a comprehensive knowledge of the most abstruse mathematics. But *when we come to the expression of the law, we can see how much smaller a comprehension of difficult and abstruse subjects is required,* and, to my mind, it becomes merely *a question of competent men with opportunity and inducement,* and altogether free from insurmountable difficulties. *Nor does the effort invade a field into which other men have not gone, for there will be no field entered, into which other men have not previously shown the way,* for the work is merely the expression in words of what the physicist or mathematician might characterize as the curve of other men's published views on the laws of human conduct in American society.

The sole question that remains is the question of adequate financial arrangements. In my opinion this projected work should stand alone in prestige, if it is to be of the public advantage that is contemplated. *If it is undertaken as a commercial venture, it will be subject to the vicissitudes of such ventures* and will enter a competitive field, where its excellence will command a market, no doubt, but it will be essentially an undertaking dependent on its market for its prospects. It is possible that capital might be found for the venture, but, if capital went in on a commercial basis, it would be induced by the prospect of profit; and the necessity of profit would demand economy of preparation, that would be too apt to tempt or compel the management to abandon the most desirable part of the project, the co-operation of the elements necessary to characterize the work as the monument which it is designed to be. Then too, *if it could be characterised as a business venture, it is likely that it would be regarded merely as a commercial competitor of existing publications* whose salesmen and agents would be too apt to detract from its repute in their efforts to dispose of their own wares. In that case it would enter in competition a field already well nigh glutted; it would simply be one of several and the latest comer in a field substantially filled. It would command the attention of those who might wish the latest and best; but *to accomplish the desired results it should be widely distributed and in the hands of those who make or declare the law.* This, no third or fourth encyclopædia of law is likely to achieve. It seems to me that to stand alone as the accomplishment of its purpose *it must not only be pre-eminent as a product, but unique in its method of presentation.*

In our day and generation the unbiased results of conscientious investigation by competent specialists devoted to their studies as the representatives of endowed foundations, without regard to the pecuniary out-

come of their efforts, command a respect and enjoy a prestige that no commercial venture into the same field can attain. Whatever may be the truth, the public suspects a selfish motive where a work is undertaken for profit, which is not suspected where the work is undertaken pursuant to a predetermined purpose to accomplish a good result in which profit is not considered. Of this order are the various researches conducted by competent and earnest investigators upon foundations, endowed by men of wealth, who could not themselves otherwise contribute to the advance of knowledge, or the public benefit, which they thus bestow. Illustrations will readily occur to your mind. I instance only the investigations carried on under the auspices of the Rockefeller Medical Institute or the Carnegie Institution or those contemplated to come from the Phipps Psychiatric Clinic of the Johns Hopkins Hospital. Of a like nature are works done under the auspices of the Smithsonian Institute. They command a respect which commercial ventures of the same order of merit would not.

It seems to me therefore that *the commercial element must be wholly eliminated if the work is to achieve the commanding influence which its designers contemplate and which its advocates solicit for it and foresee. This element can only be eliminated in two ways, either by the voluntary co-operation of the best and most competent men, in a public benefaction and out of devotion to the cause, as a gratuity, and at their own expense*—to state this alternative is to show its impossiblity—*or to carry out the project by the co-operation as well of some person or persons of large accumulated wealth.* Unfortunately, the pursuit of these activities which best qualify men to do the work does not result in the accumulation of the wealth necessary to finance it. I conclude that in order to give the prestige which, more than anything else, will accomplish its design (assuming that the work will in any event be adequately done from the standpoint of workmanship), *an endowed foundation is an important and essential factor.* In my opinion *upon such a foundation, and for the reason stated, it will be a success*, which as a commercial venture with capital in abundance it could not achieve.

I note that one of the arguments which you use is that the work would be a commercial success even on an endowed foundation. I trust that your plans will contemplate putting a copy, *gratis* if necessary, into every public library and into the hands of every judge in the land, and that they will make it possible for every lawyer to obtain it at cost. *Its effectiveness in some of the respects which I mention will depend upon its wide distribution.* The cheaper it is made, the wider its influence will extend. It seems to be unnecessary to enlarge upon this suggestion. But I will call to your mind as a type to approximate the work of the Bible and Tract Societies, and the method of distributing government publications. . . . An approximation of this method of distribution would not of course improve the quality of the work, but in my opinion would extend its influence. In a commercial venture this would be impossible; on an endowed foundation it might perhaps be included in the plan.

My promised few words have exceeded the bounds that such a phrase implies, but I have felt that the reasons for my views might perhaps be more useful to you than a mere statement that I heartily approve your project.

HOLMES in 1886: "The law has got to be stated over again. And I venture to say that in fifty years we shall have it in a form of which no man could have dreamed fifty years ago."—Oration at Harvard.

DILLON in 1893: "Let me suggest and enforce the thought that a capital need of our law to-day is for some gifted expositor who shall perform upon it the same operation performed by Blackstone more than a hundred years ago; that is, an institutional work systematically arranging and expounding its great principles as they have been modified, expanded, and developed since Blackstone's day, so as to make it as faithful and complete a mirror of the law as it now exists, as Blackstone's work was of the law as it existed when his Commentaries were produced. And such is also the weighty opinion of Sir Frederick Pollock: 'A good book of Institutes of English Law would indeed be a boon for lawyers and students to welcome.' "—*Laws and Jurisprudence*, p. 311.

"This work, as important, as noble, as any that can engage the attention of men, will fall to the profession to do, since it cannot be done by others. *It rests, therefore, upon the profession as a duty.* It will not be performed by men whose sun, like mine, has passed the zenith, and whose faces are already turned to follow its setting."—*Id.*, p. 387.

A Lay Opinion — The Views of a Great Divine*

By Henry Collin Minton, D.D., LL.D.

Former Moderator of the Presbyterian Church in U. S. A.; Chairman of its Creed Revision Committee; Author *inter alia*, of *North American Review* Article (Aug., 1909) on "John Calvin, Lawyer"

THE conception of such a work seems to me to have been little less than an inspiration and *its achievement would be a distinct advance for civilization.*

To the lay mind, the field of jurisprudence often appears as a congeries of fragmentary statutes and isolated precedents, unrelated and unorganised by any great unifying principle; and this view is often confirmed by the remarks of the lawyers themselves. We hear them talk of "the science of the law" and the phrase is suggestive of a kind of unity, inherent and imputed; but the impression persists that many of these legislative fragments have been born of the caprice of legislators who were often crude and may have been either ignorant or selfishly interested, or of the judicial opinions of courts which, when psychologically analyzed, were often not much more than the personal "opinions" of average men.

Certainly, if there is a science of the law, it must have a basis and that basis must be a rational and comprehensive one. I presume this is what is meant when the legal profession speaks of the "Philosophy of Jurisprudence." Unless there is such a philosophy deeper down than the science, then the science itself is "falsely so called." I understand that your *Corpus Juris* presupposes such a philosophic *rationale* of the whole body of American law, constitutional and statutory, federal and state. This means that American law is a vital thing. The sap of the same life runs into and through it all. Any law which lacks that animating connection with the whole is dead, a *caput mortuum*, and is fit only to be burned. This judgment waits for no finding of a court but is inherent in the fact.

If your work is to bring out and set forth these vital and vitalising principles, as I understand it is, then I should say that, as a work of education, *it will be of inestimable value*, and that, both in interpreting the laws already made and in the counsels of those who will in the future make or construe or execute our law, *its advantages will be beyond measure.*

From this point of view, I believe that your work would extend its beneficent influences far beyond the restricted pale of the technical jurist. *All the people would share its blessings* in a number of ways, of which I do not believe it would be difficult to think. Nor is it hard to see that *the accomplishment of your work would be a vast gain, not only for an American jurisprudence but for the broader interests of our modern Christian civilization.*

No earthly interest surpasses that of justice among men, and that interest is uncertain and remote so long as it is not clear, not only to the legal profession but also to the intelligent fraction of the whole people, that it is firmly based upon certain great rational and ethical principles, by the fair and impartial application of which to the ever-changing exigencies of human society, the rights of justice are maintained and vindicated and its wrongs sternly and swiftly avenged.

Barring the distinctively religious, *I can hardly conceive of any enterprise which means more to men than this which you propose.* It is obvious that its highest accomplishment demands freedom from entanglements with what you truly call the "perils of commercialism." But *I should think that the idea would appeal strongly to the philanthropic impulses of men*—and of such there are happily not a few—who are both rich and desirous to help any really sane movement for the uplift of mankind.

This is no mere spasm of legislative or economic reform; it is no mere revolution of righteousness; it is no program of agitation or education based on a partisan or a sectional view; it is a great work which contemplates a clear and comprehensive statement—in

*This opinion is in the form of a communication to the author of the Memorandum *in re Corpus Juris*, pp. 59-89 *supra*.

perspective, and showing the reciprocal relations of its parts—of *the great permanent principles which underlie all sound legislation and which should control and inform all our social and civil life.* It will be, indeed, a *magnum opus;* but not more of yourself and the distinguished collaborators who are to be associated with you, than of that man or woman whom God has blessed with riches and who *with large vision and with larger heart, plans and thus gives for the welfare of humanity.*

If classic poets had their generous patrons in the past, how much more should you gentlemen, who do the work, have a generous backer who will make the doing of it possible? *It is a rare opportunity to serve the world, to win the gratitude of civilization, to achieve a worthy and laudable immortality.* Surely if able and competent men are ready to furnish the brains for the performance of this gigantic task, *there must be those who will count it a privilege and an honor to finance it.*

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*Review of Periodicals**

Articles on Topics of Legal Science and Related Subjects

Adjudication. See Judicial Interpretation, Stare Decisis.

Administrative Law. See Courts.

Aliens. "The Relation of the Citizen Domiciled in a Foreign Country to his Home Government." By Everett P. Wheeler. 3 *American Journal of International Law* 869 (Oct.).

"Protection and allegiance, it has been said, are reciprocal. The uniform practice of the United States and of Great Britain, as well as of other civilized countries, has been to extend a protecting arm over their citizens in foreign countries. This is indeed a necessary incident to the comity of nations. . . .

Appeals. "The Decision of Moot Cases by Courts of Law." By F. Granville Munson. 9 *Columbia Law Review* 667 (Dec.).

"What, in general, are the advantages or disadvantages of moot appeals? There is surprisingly little reasoning on this question. The advantages are patent—the promulgation of a rule by the highest court for the guidance of the inferior courts on questions which may never or rarely go to the highest court in a strictly judicial way, but which are constantly arising in the inferior courts. . . .

In an editorial based on this article, the *New York Law Journal* (v. 42, p. 1024, Dec. 10, 1909) comments:—

"There is of course, a certain force in the point that the court may not have the assistance of the argument of counsel, but, on the other hand, it should be remembered that the question is heard not by a single judge, but by a bench of judges, and it is improbable that any consideration of weight will escape the attention of all of them. . . .

"Of course the most efficacious remedy for the uncertainty of criminal law would be that provided by a clause of the Constitution of Wyoming, adopted in 1889, to the effect that if a judgment be reversed for error of law the accused shall not be deemed to have been in jeopardy. Mr. Munson shows in his article that the courts of Connecticut have accomplished the same end by interpretation and without constitutional amendment, it being held (*State* v. *Lee*, 65 Conn., 265, 273) that there may be a second trial after a verdict of not guilty. . . .

"It would seem that in every commonwealth, either the defence of 'second jeopardy' should be modified, as has been done by constitutional amendment in Wyoming, or a method of settling the principles of criminal law, as broad as that contemplated by section 935 of the Code of the District of Columbia, should be recognized."

Codification. "Uniformity of Commercial Law on the American Continent." By Professor Roscoe Pound. (Read before the Pan-American Scientific Congress at Santiago, Chile, December 30, 1909.) 8 *Michigan Law Review* 91 (Dec.)

"There is today more uniformity in commercial law than in any other field of the law. But the causes which have tended and are still tending to localize the civil law in every country have been operating powerfully upon commercial law. . . .

"The progression from law merchant to civil law and the incorporation of the former in the latter gives to the one the local, one might say the provincial character of the other. Just as the *jus gentium* became simply a source of what was distinctly *Roman* law, and the law merchant, when incorporated

*Periodicals issued later than the first day of the month in which this issue of the *Green Bag* went to press are not ordinarily covered in this department.

into the body of the common law of England under Lord Mansfield, became as thoroughly common law as the oldest branches of English law, the commercial law of continental European nations has been segregating into systems scarcely less distinct than the several systems of civil law. So, too, the new commercial law which is forming continually everywhere is forming under the influence of ideas of national or local law, under the influence of a legal philosophy which rejects the universal ideas and ideals of the eighteenth century jurists, and through the agency of the most localizing of all law-making agencies, legislation. On the whole, if commercial law is still the more universal of the two, we must say that it has been tending to become only less provincial than civil law. . . .

"Great as the progress has been in this direction, it is doubtful whether, even in Europe where the greatest advance has been made and is making, any general uniformity of commercial law is to be expected in the near future. . . .

"It is but eighteen years ago that the Conference of Commissioners on Uniform State Laws began its activities. As a result of its labors a uniform negotiable instruments law has been formulated, which has been adopted in thirty-one states and four territories, including the District of Columbia. That law, which was formulated many years since, remains to be enacted in fifteen states and four territories. It has drafted a uniform Warehouse Receipts Act which as yet has been adopted in but ten states. Its uniform Sales Act has, as yet, been adopted in but five states and one territory. Attempts to enact these statutes in many states have failed, and for a long time to come it will require vigorous exertion on the part of those interested in the movement to secure even this beginning of a uniform commercial law within the United States. A number of obstacles which will have to be encountered will operate specially in the United States. In the first place, the distinction between civil and commercial law has not been recognized in English-speaking jurisdictions since Lord Mansfield incorporated the law merchant into the English common law. Again, we must reckon, whenever legislation is contemplated with a settled and widespread belief on the part of common law lawyers, that Anglo-American legal conceptions inhere in nature. A striking instance of this is to be seen in the obstinacy with which American jurists adhere to the common-law notion that criminal jurisdiction must be limited to the *forum delicti commissi*.

"I need not say that jurists and law teachers are doing what they can to break down such feelings. Nevertheless, when practical legislation is in contemplation, they must be reckoned with. . . .

"Within the more limited field suggested, however, the sociological movement in politics and the sociological school in jurisprudence are laying a foundation upon which a project of uniformity may rest. The conception of adaptation of the law to human ends instead of deduction of rules from abstract legal conceptions, which is working a revolution in legal thought, must tend everywhere to mould the rules of commercial law to the demands of the practical course of business the world over. Even more than this, scientific discussions in congresses and conventions, bringing out the needs of trade in particular localities and by comparison enabling us to draw with assurance the line between the particular and the universal, will prepare the way rapidly for sound and practicable law-making. Out of such discussions there may well arise in the near future a Conference on Uniform Commercial Legislation composed of jurists, practising commercial lawyers and men of affairs in due proportion, to give us step by step a scheme of Pan-American legislation on commercial subjects which may be a model not only to American legislators but for the world. Nowhere else will the two rival legal systems of the world be so well balanced. Nowhere else will the analytical conceptions of the Anglo-American jurist and the universal or, if you will, the natural-law conceptions of the Latin jurist be so equally represented. With each to act as a check upon the other, with each system to throw light upon the other in the handling of concrete problems, we may not unreasonably expect great results."

Common Carriers. "Some Questions in Connection with State Rate Regulation." By Guy A. Miller. 8 *Michigan Law Review* 108 (Dec.).

"It is fairly obvious from this incomplete examination of the law that the subject of rate regulation is not free from difficulty. Now that the national government is about to assert the right to fix interstate rates, it will become of much greater importance. The effective exercise of the power must be preceded by the determination of several points at present in doubt. An equitable method of accounting must be devised, in order that the revenues of railroads and those engaged in the public services may be ascertained, and the presence or absence of a profit in each case be learned. The valuation of the property used in public service must be equitably fixed, and in the case of railroads, and eventually of others engaged in interstate service, be apportioned as between interstate and state jurisdictions. And the rate of return upon capital which is fair to the public and to the owner must be ascertained."

See Interstate Commerce.

Conflict of Laws. "What Law Governs the Validity of a Contract; II, The Present Condition of the Authorities." By Prof. Joseph H. Beale. 23 *Harvard Law Review* 194 (Jan.).

"It is to be noticed that courts who are uttering their instinctive views, the expression of their general knowledge of legal prin-

ciple uninfluenced by authority, invariably speak of the law of the place of contracting as the law that governs. So strong is this feeling, that the form of statement of a different rule often shows its influence. . . .

"A second point to be noticed is that the adoption of any other rule than that of the place of making is to be referred definitely to the authority of one man. The rule that the intention of the parties shall govern, either laid down in this simple form or coupled with some legal presumption as to the intention, may be directly traced back, through the early American cases or the English cases, to the *dictum* of Lord Mansfield in *Robinson* v. *Bland* (2 Burr. 1077) and, as has been seen, was derived by him from the doctrines of the civil law. The other rule, that the law of the place of performance governs, may be traced directly to the statement of Story in in his Conflict of Laws. . . .

"The present tendency, greatly stimulated by the late English and federal cases, is toward the adoption of the law intended by the parties. . . .

"So far as one can determine the prevailing rule, the grouping seems to be as follows:—

"States adopting the law of the place of making: Colorado, Indiana, Maryland (?), Massachusetts, Tennessee, West Virginia.

"States adopting the law of the place of performance: Alabama, Arkansas (?), California (?), Georgia, Iowa, Kansas, Kentucky, Louisiana (?), Maine (?), Mississippi, Michigan, New Hampshire (?), New Jersey, Ohio, Pennsylvania, South Dakota.

"States adopting the law intended by the parties: England and the English colonies, Connecticut, District of Columbia, Illinois, Nebraska, New York, North Carolina, North Dakota, South Carolina, Texas, Virginia, Washington, Wisconsin; and, in usury cases, also the Federal courts, Alabama, Georgia, Kansas, Missouri, Mississippi, Ohio and Tennessee."

Conservation of Natural Resources. "The Conservation of our Natural Resources and of Our National Strength and Virility." By Prof. Andrew Alexander Bruce. 58 *Univ. of Pa. Law Univ. Review* 125 (Dec.).

"When Mr. Tiedman, in his admirable work on the 'State and Federal Control of Persons and Property,' said:—'The police power of the Government cannot be brought into operation for the purpose of exacting obedience to the rules of morality and banishing vice and sin from the world. The moral laws can exact obedience only *in foro conscientiæ*. The municipal law has only to do with trespasses. It cannot be called into play in order to save one from the evil consequences of his own vices, for the violation of a right by the action of another must exist or be threatened in order to justify the interference of law,—he no doubt stated what, for a long time, was held to be an established rule. How opposed is the rule, however, to any healthy national growth, and how grounded in the fatuities of mediævalism. How opposed is it to the opinion of the Supreme Court of the United States itself that 'The State still retains an interest in one's welfare, however reckless one may be. The whole is no greater than the sum of all the parts, and when individual health, safety and welfare are sacrificed, or neglected, the state must suffer.' (*Holden* v. *Hardy*, 169 U. S. 366.) . . .

"It is, in fact, doubtful whether the ownership of land, or even the right to carry on business, was at any time in our legal history absolute and unrestricted. It was certainly not so under the feudal system and in feudal England, nor even in the Saxon and English England which came before. The constitutional provisions to the effect that 'no person shall be deprived of life, liberty or property without due process of law.' and that 'private property shall not be taken for a public use without just compensation being made therefor,' and which guarantee the 'equal protection of the laws,' could certainly have never been intended to authorize private uses which were unsocial in their nature. They were merely intended to prevent legislative action which was such. The doctrine of the *Spite Fence* cases (*Letts* v. *Kessler*, 54 Ohio St. 73, and cases cited in notes to this case in 40 L. R. A. 177),—indeed, and of the Pennsylvania Court, in the case of *Hague* v. *Wheeler* (157 Pa. St. 324, 27 Atl. Rep. 714), except in so far as the latter case concedes the right of the legislature to interfere on behalf of the consuming public, is socially wrong. It is based on an individualism which has no foundation in legal history and which this age will not tolerate."

"Water-Power Sites on the Public Domain." By Hon. Richard A. Ballinger, Secretary of the Interior. *American Review of Reviews*, v. 41, p. 47 (Jan.)

"We seem to be in a measure at the threshold of hydro-electric development on the public domain, and much depends upon the right solution of these problems, and especially upon the legislation governing the disposition of power sites on the public lands. . . .

"The essential features of such proposed legislation are not so much in time limitations and in the rates and charges imposed for the use or privilege as in preserving a reasonable control and supervision that will not retard the investment of capital, but will guard against the *abuse* of the privilege accorded by the Government."

"Water Powers of the South." By Henry A. Pressey. *American Review of Reviews*, v. 41, p. 68 (Jan.).

Consolidations of water power companies "will be to the advantage of the states concerned. . . . But the owners of the powers should be compelled to act under most careful legal regulations made and inforced by the general government or by the various states."

"New York's Conservation of Water Resources." *American Review of Reviews*, v. 41, p. 77 (Jan.).

"New York may safely say that she is in the forefront of the states in the conservatoin of her natural resources. The idea of state supervision and control is not untried, as several foreign countries have long since passed regulating acts concerning their rivers, and our neighbor, the Province of Ontario, has been most successful in like attempts."

"Billions of Treasure: Shall the Mineral Wealth of Alaska Enrich the Guggenheim Trust or the United States Treasury." By John E. Lathrop and George Kibbe Turner. *McClure's*, v. 34, p. 339 (Jan.).

"Our mineral and public land laws—these have been out of date for a generation; they are the ridicule of every other civilized country; and they are founded on entirely wrong principles. The coal, timber, stone, general minerals, and water powers upon the public lands belong to the United States. They must be worked, eventually, not by individuals but by corporations. There are only two essential parties to the transaction—the government and the corporation. The United States practically refuses to recognize the second party and will deal—because of laws adapted to conditions forty years old—only with the individual. In the meanwhile, sane and modern laws on this subject—such as exist to an extent in Australia and British Columbia—recognize the corporation, deal with it, and get what the government is entitled to from it. It is time the United States awoke to modern conditions, and did this."

Constitutional Law. See Government and other topics referred to thereunder.

Contract. "Offers Calling for a Consideration Other Than a Counter-Promise." By Clarence D. Ashley. 23 *Harvard Law Review* 159 (Jan.).

"No rule is more firmly embodied in our system of law than that involving the technical doctrine of consideration in contract. Yet the doctrine is crude and little adapted, in many respects, to our modern complex life. It should be modified and changed. In fact this is being done, as is shown by many judicial utterances. . . .

"It is by no means unusual for a party to place himself in a position where he is no longer free, although his offeree may be. This is practically the situation in cases of ineffectual revocation. The offeree is not yet bound, yet the offeror has changed his mind, and desires to escape the consequences of his offer. If he is unable to communicate a revocation he may become bound by a contract in spite of his wishes and attempts to escape. It is true that we are not accustomed to speak of an offeror as bound by his offer, but nevertheless he is responsible for its possible consequences, as he is for any action in his life.

"An estoppel simply prevents him from withdrawing such action when it will work injustice to permit him to do so. It merely limits the power of revocation, and why should not such power be limited in such cases? The limitation takes place only when it is required by strict justice and when both parties are fully protected. Certainly these cases do not fall strictly within the equitable doctrine of estoppel *in pais*, as that subject has heretofore been developed, but a doctrine somewhat analogous thereto and depending upon the same ideas would seem to be possible, even though there may be some more suitable nomenclature."

See Conflict of Laws, Debt.

Corporations. "A Question of Federal Criminal Procedure." By Nathaniel T. Guernsey. 19 *Yale Law Journal* 80 (Dec.).

"It would seem to be obvious that the Congress omitted to provide for the extradition of corporations; this provision the courts may not supply, and without such provision there is no method by which a foreign corporation can be required to make an involuntary appearance to an indictment found outside the district in which it is located, or has an agency or business.

"It should not be inferred that the foregoing conclusion involves failure or even substantial embarrassment in the prosecution of offenders against the federal laws. Danger of a miscarriage of justice may be averted by commencing the prosecution against the offending corporation in a district in which it has an agency, or in which its principal place of business is located."

"Bargains in Corporate Charters." By Hon. Alonzo Hoff, of the Springfield (Ill.) Bar. 9 *Phi Delta Phi Brief* 196 (Jan.).

A somewhat amusing satirical paper, reproducing some of the advertisements of competitive bidders for the patronage of the organizers of corporations.

"As a result of the rivalry for foreign patronage, one of the southern states, wishing to go one better than another of the states, revised and liberalized her corporation laws by magnanimously dispensing with a notarial certificate of acknowledgment, thereby saving twenty-five cents. 'Competition is the life of trade.' May we not yet be further edified by hearing of a sister state, in the interest of home pride and state's rights, offering trading-stamps to all who patronize her commonwealth and purchase a corporate charter?"

See Monopolies; for Federal Corporation Tax Act, see Taxation.

Courts. "The necessity for a Court of Appeals in Administrative Matters Arising Before the Departments of the Federal Government." By Clifford S. Walton. 19 *Yale Law Journal* 110 (Dec.).

"The necessity for the establishment of such an American court, on account of the

lack of proper judicial machinery to satisfactorily dispose of the various questions which are daily increasing before the executive branches of the government, is manifest. Such a court would no doubt relieve much embarrassment as well as the work of the Court of Claims and of the United States Supreme Court, which courts are becoming overtaxed by increasing business and would clearly define remedies which are now obscure and perplexing, even if they exist."

See Procedure.

Debt. "Imprisonment for Debt." By Libertas. *Westminster Review*, v. 172, p. 639 (Dec.).

"That the state of things has been becoming progressively worse since the Debtors' Act of 1869 is the general opinion, and I think there are strong grounds for it. The number of judgment-summonses and the number of imprisonments under these have been going up gradually, until they had attained startling proportions."

Ethics. "Darwin's Probable Place in Future Biology." By Professor William E. Ritter. *Popular Science Monthly*, v. 76, p. 32 (Jan.).

The writer, by conceiving natural selection as operating to further the growth of egoistic to the exclusion of altruistic qualities, lays himself open to the charge of attaching a false ethical interpretation to the Darwinian theory. He is careful, however, to distinguish between Darwinism and Neo-Darwinism, and to emphasize the consideration that—

"The scope and balance of Darwin's mind are seen nowhere to better advantage than in his efforts to prevent his own causal hypothesis from going beyond bounds. . . . He did not see that it must foster a sort of egoism that would make the golden rule as dead on the statute books of human relationship as a mastodon in a Siberian ice-bed."

Eugenics. "The Evolution of Man and Its Control." By Roswell H. Johnson. *Popular Science Monthly*, v. 76, p. 49 (Jan.).

This illustrates a current tendency to seek the improvement of the race directly and externally by artificial measures, rather indirectly and inwardly, through the ordinary agencies of morality and legislation. The writer says:—

"There is need for a direct appeal to make child production a matter of religion and ethics rather than of mere whim, though too much must not be expected from it. A plea such as Roosevelt's, however, for indiscriminate large families is certainly uncalled-for, and 'race progress' rather than 'race suicide' should be the cry. If the decline in the rate were evenly distributed, it might not even be regrettable, for the old rate could not have been maintained indefinitely without undue pressure on the productivity of the earth. The only logical excuse for the Roosevelt attitude is the military one, but the favorable geographical position and commercial supremacy of the United States may save us from anxiety on this score, and the disadvantage of a rapidly growing population in greater poverty, poorer education and a slower rate of social progress is a far more important consideration for us at present.

"The appeal for large families is of use only when directed especially to persons of superior ability, as from the innately inferior the fewer children the better. The average parents should replace themselves by bringing at least two children to maturity and marriage, four births in general being required for this result."

Fair Competition. "Patents, Trade Secrets and Trade Names as Factors in Industrial Development." By W. Hastings Swenarton. 19 *Yale Law Journal* 115 (Dec.).

"The ethics of the trade secret differ only in degree from that of the patented invention or the trade mark. Each has its own use, and consequently American industry, by the development and perfection achieved by virtue of these incentives, is expanded beyond the fondest dreams of avarice, the laborer benefits because of the higher wages which the manufacturer can well afford to pay him under these conditions, and the consumer receives his commodities and manufactured articles at greatly reduced prices."

Federal and State Powers. See Common Carriers.

Federal Corporation Tax Act. See Taxation.

Fifteenth Amendment. See Status.

Foreign Relations. "Fortification at Panama." By George W. Davis. 3 *American Journal of International Law* 885 (Oct.).

"1. It is the declared policy of the United States to control and defend the canal as a part of the coast-line of the United States.

"2. Neither public law nor moral obligations are in conflict with this policy.

"3. Fortifications at Panama are as essential to the protection of our national interests as they are on our coasts which by the canal are brought 8,400 miles nearer the one to the other."

Government. "The Failure of American Democracy." By Sydney Brooks. *Fortnightly Review*, v. 86, p. 1066 (Dec.).

"The whole history of municipal administration, not merely in New York, but throughout the United States, shows that while Americans can destroy they cannot construct. They can overthrow a bad government; they have yet to prove they can sustain a good one. Some too flagrant scandal may rouse them for a moment to wreck a 'machine' and to fill the air with good resolutions. But good resolutions are fleeting things, and the 'machine' in the long run and under present conditions is indestructible. I do not say those are wholly wrong who see in the recent election a sign that New Yorkers, like the

American people generally, are beginning to cut loose from the domination of the 'bosses' and to treat municipal government as primarily a business and not a political problem. But this movement will have to develop far more strength and constancy than it has done so far if it is to win more than a casual victory or to endanger Tammany's security at all permanently."

See Adjudication, Courts, Federal and State Powers, Property and Contract; for Fifteenth Amendment see Status.

Interstate Commerce. "Highways of Progress, III; A Lost Opportunity on the Pacific—How the United States Began to Capture the Trade of the Orient—How It was Lost—What Can be Done to Recapture It." By James J. Hill. *World's Work*, v. 19, p. 12482 (Jan.).

"Because this country can produce cotton, grain, iron ore, and coal cheaper than others, there are some things that, with low freight rates, we could lay down in Japan and China for less money than any other country can. . . .

"After this development was well under way, the future depended almost entirely upon the attitude of the government and the people . . . If exceptionally low rates had to be given on a line of business or a heavy consignment, to take it away from the British or German or Belgian competitor, they were given. . . .

"But the making of low rates to secure foreign business was stopped. It was decided that the portion of a through rate which applies to transportation within this country—that is, the portion covering the distance from the point of origin of foreign-bound freight to its port of shipment—is subject to regulation just the same as commerce wholly within the United States. The railroad and the steamship could no longer act as partners."

"Government Regulation of Wealth." By Reuben D. Silliman. *Outlook*, v. 93, p. 990 (Dec. 25).

"The recognition of the full legislative power of Congress over all commerce which is in fact national in character would tend to bring about more uniformity of law and greater simplicity in its inforcement. It would mean the unfettering of the power to deal directly with out industrial and transportation problems. It would mean the ability to stop abuses, the abridgment of subtlety, and the end of a reign of complicated negation. It would mean more certainty and expedition in the courts, and, what is of at least equal importance, the separation of legislative from judicial functions. We shall never reach the root of the trouble until we have a legislative body with full power to express the people's will in the field of National commerce. The *Dred Scott* decision forced the Civil War, and this country knew no peace until it had been done away with. Nor shall we be relieved of the bane of complicated iniquity until we have turned back to first principles. We are no longer thirteen separate communities. We have grown into one great nation. In commerce, industry, language, and literature we are one people. But in the eye of the law, save for certain limited purposes, we are forty-six foreign and independent sovereignties!"

See Common Carriers, Property and Contract.

Judicial Interpretation. "Judicial Evasion of Statutes." By George Bryan. 15 *Virginia Law Register* 577 (Dec.).

"The legislature of Pennsylvania in 1855 enacted a statute avoiding a devise or legacy 'to any person in trust for religious or charitable uses' if made within one calendar month of the testator's death and escheating to the commonwealth all property 'held contrary to the intent of this act.'

"What did the legislature of Pennsylvania intend to accomplish by its act of 1855? There can be but one answer to the question, which is too obvious to require statement. The condition of the law in that state today is that the Act of 1855 has gone to the large and constantly increasing cemetery of statutes which have been construed in whole or part out of existence. Peace to its ashes."

Medical Jurisprudence. See Privileged Communications.

Monopolies. "The Defects of the Sherman Anti-Trust Law." By Gilbert Holland Montague. 19 *Yale Law Journal* 88 (Dec.).

"This decision [in the *Northern Securities* case], which had been vaguely foreshadowed in the *Trans-Missouri Freight Association* case, produced widespread consternation. Its effect, to borrow a phrase of Edmund Burke, was to indict the whole American people. It outlawed almost every industrial concern of first importance. . . .

"Court dockets . . . are inadequate to portray the fury of this anti-trust crusade. Newspapers and magazine writers fed the popular imagination with sensational stories of industrial leaders and business enterprises The chief burden of the President's political utterances was the subject of trusts. . . . State legislatures, meanwhile, rivaled each other in harassing large corporations. . . .

"The purpose of the Sherman Anti-Trust Act was to further free competition. The defect in the Act consists in its sweeping prohibitions which stultify this purpose by preventing certain of the most normal agencies of competition. . . .

"Large business, and the temporary triumph over competition which it implies, is the crown of competition. The exclusive enjoyment which the successful competitor seizes for the moment is monopoly only in the sense that the fleeting ownership of the trophy winner is monopoly. Even though the skill of the successful competitor lengthens the span of enjoyment, it is at the cost of defending his prize and not in any true sense through monopoly. . . .

"If the Sherman Anti-Trust Act were amended, so as merely to forbid contracts and combinations which are made for the purpose of stifling competition, and to prevent the practices defined in one of more of the simple phrases above quoted, it would well nigh make illegal every improper method of competition, and make lawful every healthy agency of free competition."

Negligence. See Proximate Cause.

Patents. See Fair Competition.

Perpetuities. See Real Property.

Police Power. See Conservation of Natural Resources.

Privileged Communications. "Privileged Communications." By Alfred W. Herzog, Ph. B., A.M., M.D. *Eclectic Review* (New York), v. 12, p. 343 (Nov. 15).

This article is copied from the *Medical Brief*.

"The rule," says the author, "should be so modified, not only in courts but through the action of medical bodies, that a physician, instead of considering it his duty to keep the secrets of his patients under any circumstances, should rather consider it his duty to keep them always and under all circumstances, when they concern his patient only.

"He should consider it his duty to at once inform the authorities when he has acquired any information which if withheld would be likely to bring harm to the community. He should have the right, no, not have the right, but it should be his absolute duty to reveal any such information which he has acquired which might prevent crime."

Procedure. "A Comparative Study of the English and the Cook County Establishments." By Albert Martin Kales. (Read before the Law Club of Chicago, Oct. 1, 1909.) 4 *Illinois Law Review* 303 (Dec.).

"The actual performance in a single year of the English High Court is especially worthy of notice. . . . When it is remembered that the County Courts of England have jurisdiction up to fifteen hundred pounds and that the fifty-six hundred cases tried were the sifting of important contested cases from a total of eighty thousand disposed of, and that they were the most important tried in a great nation like England, the average of one each court day by each judge is a remarkable record indeed—without doubt one that could not be equaled anywhere in this country. . . . All the civil litigation of England and Wales, including appeals, is taken care of by fifty-eight county judges with jurisdiction up to fifteen hundred pounds, and thirty-four judges of the Supreme Court of Judicature—ninety-two judges in all. If we take down the English law list for 1908 we shall find in it the names of upward of ten thousand English barristers and between twenty-five and thirty thousand English solicitors. Thus, in England, we have ninety-two judges to ten thousand barristers, or ninety-two judges to from thirty-five to forty thousand lawyers in all. In Cook county we have twenty-eight Municipal Court judges; twenty-six Superior and Circuit Court judges; one Probate Court judge, and one County Court judge—fifty-six judges in all. The lawyers' directory shows upward of six thousand lawyers. No one knows how many of these would be barristers and how many would be solicitors if there were a division. If the ratio would be as ten to thirty, two thousand would be barristers and four thousand would be solicitors. In short, England has one judge to every four hundred lawyers at large, and one judge to every one hundred and eight barristers. In Cook county we have one judge to every one hundred lawyers at large, and one to every twenty-eight of estimated barristers. In a word, one judge in England keeps from three to four times as many lawyers busy as does one judge in Cook county. . . .

"The power to appoint judges of the Chancery Division, King's Bench Division and the Probate, Divorce and Admiralty Division is exclusively in the Lord Chancellor. The judges of the Court of Appeal, on the other hand, are selected by the Prime Minister, although it is known that he consults with the Lord Chancellor as a matter of course. In neither case are these appointments as a rule brought before the Cabinet at all. This is almost as unlike the power of appointment by an American Executive, with the consent of the Senate, as it is unlike election by the people, and yet it has some of the elements of both methods. . . .

"The barrister is not employed till the case is about to be reached for trial. Then his fees begin. No client wishes that daily 'refresher' of a barrister by the payment of a sum reckoned in guineas to continue any longer than is absolutely necessary. He is torn between the horror of losing the suit and that of having it drag out indefinitely. The barrister who cannot get through the trial of a simple case with dispatch must be looked upon very much as would be a slow and clumsy surgical operator. Thus, the division of the bar in England puts into operation the two strongest possible motives on the part of the barrister and client to try cases which are reached as expeditiously as possible."

"Defects in the Administration of Law." By W. W. Dixon, of the Montana bar. 2 *Lawyer and Banker* 191 (Dec.).

"In civil cases, I would reverse the present rule, and have all tried by the court, unless both parties desire a jury. Unanimity should not be required, the agreement of two-thirds, or at most three-fourths, in number of the jury, should stand as their verdict. . . .

"One of the chief causes of uncertainty in our law is hasty, careless and inconsiderate legislation. . . . Another cause of uncertainty in the law is the large number of independent courts we have in our country. . . . The most

effective remedy for uncertainty in the law is careful codification. . . . Take, for instance, the question of what the legal liability is of a person who, not being the payee or endorsee of a negotiable instrument, writes his name upon the back of it. It has been variously decided that such person is a joint maker, a guarantor, an endorser. It is not important practically which one of these conclusions is legally correct, nor which be adopted, so that one is established and understood and adhered to. . . .

"I think continuances of cases are too readily granted. Appeals should be limited more than they are. They should not be allowed, or at least should be confined to one appeal, in cases involving small values, unless some important question is in issue, and the judge for that reason allows an appeal.

"There is no reason why a party should have a year to appeal from a judgment of the district court to the supreme court, or two years to sue out a writ of error, or take an appeal to the Supreme Court of the United States (as under the federal statutes). . . . The law should be administered without unreasonable expense to parties who have to invoke its assistance. . . . The main cause of expense, however, is delay in the trial of cases, and in taking appeals, and having them heard. . . .

"It has become very common for wealthy individuals and corporations to threaten those who seek legal redress from them with delays and expense of litigation."

"A German Law Suit." By Chief Justice Simeon E. Baldwin. 19 *Yale Law Journal* 69 (Dec.).

"Here is a vital difference between our procedure and that of the Germans. They pick out what they deem the gist of what a witness has said, and after he has assented to their statement of it as correct, dismiss his other testimony from their recollection. There are no reams of stenographic notes.

"From this injustice may sometimes result. Matters that appear irrelevant or inconsequential when a witness is on the stand sometimes assume a new importance on a subsequent review of the whole case. It is, however, always in the power of the court to reopen the case and call him again before them, or on an appeal he can be heard *de novo*. Expense and delay also are certainly diminished.

"Another important difference from the general American practice on appeal is that the finding of facts, which every judgment must contain, is not conclusive in the higher court. Not only can it be shown to be erroneous by producing new proofs, but in certain things it can be attacked as unwarranted by the contents of the protocol."

See Appeals.

Professional Ethics. "The Altruistic Quality of the Lawyer Subjectively Considered." Paper read at the fourth annual meeting of the Mississippi State Bar Association, 1909. By Hon. George J. Leftwich. 7 *Law and Commerce* 343 (Nov.).

"The bright and promising lawyer at the beginning makes a sheer failure and drops steadily and quickly into gainful occupations, while he of unpromising beginnings, having hid away in his bosom the true subjective quality that I can only define as the altruistic quality, the power to transfer human endeavor from himself, from his personal ends, and fix it unselfishly upon the ends and aims of another, a quality found hid away in an unpromising exterior, the young man with failure stamped upon his initiative, astounds the bar and his friends by a large and ultimate success. There is no real apostasy among real lawyers, however it is in theology; when once the true fire burns in his bosom, there is no quenching it; when the true spirit of unselfish aid and vindication of his client's interests gets hold upon him and has satiated itself in personal aims and ends, it at once transfers itself from the individual to the state, to the nation, and to the human race."

"The Public Service of the Future Lawyer." By John G. Park. 8 *Michigan Law Review* 122 (Dec.).

"While it is true that the physical life of the working man is far better cared for than it was fifty or one hundred years ago, the difference in the financial situation of the rich man and the poor man is every year increasing. The richest man in America in 1810 was worth, perhaps, six millions of dollars. The richest man in America today is reported to be worth one hundred times that sum. The average daily earnings of the laborer have, probably, doubled in that time. Therefore prosperity for the richest individual has increased six hundred fold while it has only doubled for the poorest. At that rate of increase in financial power, the day of the commercial despot is not far removed. . . .

"Conditions call for a new type of lawyer, one not satisfied merely with the excitement and emoluments of private controversy, but one devoted in all his energies to the welfare of the commonwealth, not zealous for prominence nor clamorous for office, but eager to learn the facts which affect every human being in his country, and willing with hand and brain to forward the measures of true reform."

Proximate Cause. "Proximate Cause in the Law of Torts." By A. A. Boggs, of the Florida bar. 2 *Lawyer and Banker* 222 (Dec.).

"In the law of contracts, the doctrine of *Hadley* v. *Baxendale*, 9 Exch. 341, is generally recognized, viz., that liability extends in that field to such consequences as were or might by reasonable foresight have been anticipated as the result of the breach. 'For,' says the court, 'had the special circumstance been known, the party might have expressly provided for the breach of contract by special terms as to the damage in that case, and of this advantage it would be very unjust to deprive them.' . . .

"Proceeding from a false premise, that is, that the rule of *Hadley* v. *Baxendale* applies to actions *ex delicto*, the courts have found themselves confronted with the fact that in most cases its application would result in absurdity or flagrant injustice. But instead of testing the rule for possible error they have exercised their ingenuity in extending the scope of reasonable contemplation of injury, or in finding circumstances which could be tortured into ground for an exception, and having thus evaded the rule for the instant case and vindicated justice at the expense of logic, have hastened to square themselves with the assumedly orthodox authority by reiterating and asseverating the doctrine of *Hadley* v. *Baxendale* as a general proposition."

Property and Contract. "Impairment of the Obligation of Contract by State Judicial Decisions." By W. F. Dodd. 4 *Illinois Law Review* 327 (Dec.).

The second and final instalment of a learned and comprehensive analysis of the subject (see also 21 *Green Bag* 634).

"The accepted doctrine and the one uniformly acted upon for many years is, that the federal Supreme Court will not review by writ of error state decisions impairing the obligation of contracts, unless such decisions give effect to some legislation impairing contracts. Citizens of different states may bring their actions in the federal courts and obtain relief from state decisions impairing contracts, under the rules of *Gelpcke* v. *Dubuque* (1 Wall. 175) and *Hotel Company* v. *Jones* (193 U. S. 532); yet in precisely the same cases, if the parties are citizens of the same state they have no relief from such state decisions. . . .

"A . . . logical view would be for the court to hold a judicial decision to be a 'law' in the technical sense, but the present attitude is better for the court, because it permits the Supreme Court to take or refuse jurisdiction as it pleases, while the holding of a decision to be a 'law' would operate to give an appeal to the Supreme Court as a matter of right from state decisions impairing the obligation of contracts. . . .

"The question as to the extent to which the federal courts will protect contract and property rights from impairment by state judicial decisions is really in larger part a question as to how far the federal courts will protect rights acquired under a state law subsequently declared unconstitutional— that is, as to the effect given by the federal courts to state decisions declaring state statutes unconstitutional. As has already been indicated, state judicial decisions may impair property or contract rights either (1) by holding unconstitutional a state statute under which such rights have been acquired, or (2) by reversing a former decision upon the faith of which contract rights have accrued— and this reversal may be one changing common-law principles or altering the interpretation of a law admittedly valid, or one holding a law unconstitutional when similar laws had previously been held valid, and rights had been acquired upon the faith of the earlier decision. It may be said that most of the cases of the character under discussion, which have come into the federal courts, have involved rights claimed under state laws subsequently declared invalid by state courts."

"The Commodities Clauses: Are They Ordinances of Property, or Regulations of Commerce?" By Edward L. Andrews. 9 *Columbia Law Review* 677 (Dec.).

"Once Congress reaches out to conditions existing beyond the body of commerce, its legal difficulties begin. Congress cannot impinge upon the state *imperium* over property rights, or over the legal conditions of production. Such enactments really amount to legislative evasions of the duty to regulate commerce—in the constitutional meaning of regulation—by the legal administration of commerce in the concrete.

"The treatment of the ownership of goods transported as an element of regulation was a conception foreign to the minds of the framers of the Constitution. As such conception involves the inclusion of control over property rights, it is logically alien to regulation of commerce. By assigning *any* interference with the freedom of markets for property as the boundary between the interstate commerce power and the property power, the harmonious action of both powers is the necessary resultant. No trespass upon such property rights is admissible upon the theory that commerce may be ultimately benefited. Such a theory would render the state powers mere implements for the furtherance of federal economic theory and nullify the division of our governmental powers."

Race Discrimination. See Status.

Real Property. "Hints on Examination of Real Estate Titles." By William A. Gretzinger, of the Philadelphia bar. 2 *Lawyer and Banker* 199 (Dec.).

"These few hints will suffice to show how utterly insufficient and misleading are the ordinary abstracts of title upon which so many purchasers rely; how impossible it is that the records should give completely the information regarding the true state of titles; and how important that one who would examine titles should not only have some knowledge of law, but should make his investigations with his mind awake to all the numerous and diversified circumstances which may affect the title, even in the cases which, upon the surface, appear the simplest."

"The New York Test of Vested Remainders." By S. C. Huntington. 9 *Columbia Law Review* 687 (Dec.).

"If Bench and Bar concur in my construction of sections 13 and 29, two changes would seem to be proper. Section 41 of the

Consolidated Laws, Real Property Law, reads as follows:—

"'The existence of an unexecuted power of appointment does not prevent the vesting of a future estate, limited in default of the execution of the power.'

"This, I submit, is inconsistent with section 55 (which we have been considering as section 29 of the Revised Statutes). The first change, therefore, which I would suggest, is the repeal of section 41. I would further urge that 'is intended to take effect' replace 'takes effect' in the heading of section 55, as more accurately expressing the true meaning of the section. It would also be desirable to have a settled construction of section 40 (which we have been considering as section 13 of the Revised Statutes), if not by judicial decision, then by legislative amendment. None of these changes, it is needless to say, would cast any reflection upon judges who have felt themselves bound by the decisions."

Stare Decisis. "Law and Justice." By Dean George W. Kirchwey, LL.D., of Columbia Law School. 2 *Lawyer and Banker* 213 (Dec.).

"It is not easy to repel the charge that the conservative traditions of the courts and their reverence for the doctrine of *stare decisis* render them incapable of moving fast enough to meet the new demands of the new day. It is not so that I read the signs of the times and my brethren of the bar have not made the conservatism of the judges and their blind adherence to precedent the burden of complaint against the bench. Rather it is the innovating spirit of the courts and their disregard of precedent which have called down upon their devoted heads the criticism of the bar. But, beyond this I cannot see how any candid mind which surveys the course of judicial decision at the present time can fail to see in it a truly remarkable reflection of the tendencies which have recently come to prevail in the body politic."

Status. "Is the Fifteenth Amendment Void?" By Arthur W. Machen, Jr. 23 *Harvard Law Review* 169 (Jan.).

The validity of the Fifteenth Amendment is questioned in an extended argument. The author, after saying that "the power of three-fourths of the states to amend the Constitution of the United States would seem to be subject to two classes of limitations,—(1) inherent and (2) express," takes as his starting point the following exceedingly doubtful assumption:—

"The in herent limitation is that the so-called amendment must be a real amendment, and not the substitution of a new Constitution. It may alter many of the vital provisions of the original instrument; but so much of the old Constitution must be left that the new provisions may be regarded as merely engrafted on the old stock. A wholly new Constitution can be adopted only by the same authority that adopted the present Constitution, namely, 'the people of the United States,' represented by the concurrent action of conventions in all the several states within which the Constitution is to be operative."

The author's contention is that the Fifteenth Amendment changed the Constitution radically, compelling the states to alter their political institutions. This was something beyond the power of amendment to accomplish, for such power is subject, he argues, not only to the implied limitation above stated, but also to express restrictions, among them being that "that no state, without its consent, shall be deprived of its equal suffrage in the Senate." He says:—

"The words 'without its consent' necessarily imply that the state shall continue to exist as a body capable of consenting, or in other words as an autonomous political community. . . . The Constitution in all its features contemplates a federal union of self-governing states; and any abrogation of that feature would seem to be more than a mere amendment. But however this may be, the matter is made quite clear by the proviso that no state shall be deprived of its equal suffrage in the Senate without its own consent. . . .

"The same clause would seem necessarily to imply that the composition of a state cannot be altered without its own consent; for the guaranty of equal suffrage was in favor of the states as they existed in 1789 and as they might subsequently be changed by their own consent or in pursuance of their own laws. . . .

"The Fifteenth Amendment amounts to a compulsory annexation to each state that refused to ratify it of a black San Domingo within its borders. It is no less objectionable than the annexation of the San Domingo in the Spanish main.

"Before the Amendment, the white people of South Carolina had the right and power to elect two Senators of the United States—the same representation in the Senate as the White people of Vermont. After the Amendment, if it is valid, the white people of Vermont, a state which contains virtually no negroes and which therefore is virtually unaffected by the Amendment, continue to be entitled to elect two Senators; but the white people of South Carolina have none at all.

"The objection to the Fifteenth Amendment is not merely that it alters the technical citizenship or membership of the state, but also that it alters its political institutions and destroys its political autonomy. . . .

"The objections to the validity of the Fifteenth Amendment raised by this article might be obviated if its application within the states could be confined by construction to federal elections for members of the House of Representatives."

Tariff. "The Most-Favored-Nation Clause." By Stanley K. Hornbeck. 3 *American Journal of International Law* 797 (Oct.).

"All who discuss the clause agree that care should be taken in making future treaties, and that the interests of commerce and

international good-fellowship demand that nations come to an agreement as to means and methods for avoiding misinterpretation...

"The new German treaties, with the exception of that with Russia, provide for arbitration of difficulties over the interpretation or application of the tariff or of most-favored-nation treatment. Most of the others of the recent group of central European treaties contain similar provisions."

"The Abolition of the House of Lords." By President W. DeWitt Hyde. *Outlook*, v. 93, p. 866 (Dec. 18).

The author uses the phrase "House of Lords" as a metaphor for the "privileged" class of leaders of corporate industry, in the United States, and expresses his views on the tariff.

"The only way by which President Taft can hope to maintain his party in power is to take advantage of the popular support that such a movement would have and abolish once for all the method of tariff-making which has created and maintains our present House of Lords."

Taxation. "The Constitutionality of the United States Corporation Tax." By Prof. Frank J. Goodnow. 9 *Columbia Law Review* 649 (Dec.).

From an examination of the *Pollock* cases (157 U. S. 429; 158 U. S. 601), the writer reaches the conclusion that—

"The corporation tax law is . . . not unconstitutional as imposing an unapportioned direct tax, except in so far as it imposes a tax on income derived from property, and the unconstitutionality of this portion of the law will not have the result of causing the whole law to be unconstitutional."

On the question of uniformity, Prof. Goodnow's carefully reached conclusion is:—

"It may . . . safely be said that the corporation tax is not unconstitutional because violative of the uniformity clause and that, on that account and because not a direct tax, in so far as it imposes a tax on the income derived from business, it is not forbidden by the express provisions of the Constitution limiting the taxing powers of Congress."

As to the taxing powers of Congress in relation to the rights of the states, the author says:—

"The only reason for holding that the United States may not tax a corporate franchise granted by a state is to be found in the fact that because the power to tax is the power to destroy, the United States may in this way destroy one of the state's powers.

"In their determination as to the powers of the states to tax the effects or results of the exercise by the United States of its powers the state courts have been governed by this idea. They have therefore held that the states may not tax letters patent or copyrights issued by the United States. But the Supreme Court of the United States has not up to the present time been equally regardful of the powers of the states. It has in *Knowlton* v. *Moore* (178 U. S. 41), recognized the right of the United States to impose a tax on inheritances, which it has regarded as the effects of the exercise of the power of the state to regulate inheritances, while Congress has without opposition and for a long time, probably because of the decision in the *License Tax* Cases (5 Wall. 462), imposed a special excise tax on the holders of state licenses to sell liquor, notwithstanding the Supreme Court has denied the right of the states to tax steamboats licensed by the United States to use the navigable waters of the United States. Indeed, the only cases where the Supreme Court has interfered to protect the states against the exercise of the taxing power of Congress have been in the cases of the salaries of state officers, the evidences of indebtedness of the states and their local corporations, and the property of the states and their local corporations, where in its opinion that property is used for a necessary purpose of state government, and liquor license bonds required under a state liquor license law.

"The Supreme Court may not thus be said to have been active in the defense of the powers of the states against Congressional action. It is therefore very doubtful if it will regard the corporation tax law as unconstitutional because interfering with or hampering the exercise of one of the powers which by our system of federal government are recognized as belonging to the states.

"The answer to the question as to the constitutionality of the United States corporation tax would seem then to be that it is constitutional except in so far as it imposes a tax on income derived from property. Except as to that portion of it, it is not a direct tax and therefore need not be apportioned among the states. It is uniform throughout the United States, and it would appear not to violate the obligation of Congress, arising out of the theory of federal government, not to interfere with the powers of the states."

Title by Discovery. "Arctic Exploration and International Law." By Prof. James Brown Scott. 3 *American Journal of International Law* 928 (Oct.).

"There is great difficulty in applying the present theory and practice of discovery and occupation to the Arctic regions even supposing that the general principles can be considered as universally accepted, for Arctic expeditions are usually voyages of discovery in which there is no present or future intent to annex the territory actually discovered. They are undertaken with a scientific, not with a political intent, although it would be eminently proper for an expedition to be fitted out under the control of a state official for the express purpose of annexing any and all lands to be discovered. Supposing that Dr. Cook reached the North Pole, it is difficult to see how the United States acquires any

title to the polar regions, and even supposing that Commander Peary, an officer of the United States navy, had been specifically detailed to reach the Pole, his expedition was it would seem one of adventure and scientific discovery not undertaken for the purpose of extending the sovereignty of the United States to the polar regions."

Uniformity of Law. See Codification.

Wills and Administration. See Judicial Interpretation, Real Property.

Miscellaneous Articles of Interest to the Legal Profession

Congress. "The Insurgents *v.* Aldrich, Cannon *et al.*,"—II. By Henry Beach Needham. *Everybody's*, v. 22, p. 102 (Jan.).

"New England representatives may sneer at the Middle West and talk of the 'tail wagging the dog.' Unknown to the Eastern reactionaries, the animal may have shifted his position. If not today, undoubtedly by 1912 the head and heart of the 'dog' will be content with the landscape of the Mississippi Valley, while the tail, pitifully attenuated, is faintly tapping the hidebound coast of Maine."

Customs Frauds. "Robbing the United States; An Investigation of Systematic Fraud at the Port of New York." By Lyman Beecher Stowe. *Outlook*, v. 93, p. 811 (Dec. 11.)

"This pervasive System of fraud has been found to extend to every branch of weighable and gaugable importations. It had so honeycombed the Weighing Division of the Custom House with corruption that practically the only higher officials left unstained were too incompetent to be a menace to the corrupters or the corrupted."

Ferrer Trial. "The Ferrer Trial." By Percival Gibbon. *McClure's*, v. 34, p. 327 (Jan.).

"Everything was carried out according to arrangement. Ferrer was committed to take his trial before a court martial, and Captain Galceran . . . was appointed counsel for the defense. This is a post of no ordinary difficulty, for in such a case the officer must reconcile his duty to his client with a convention as to the lengths an officer of the army may go in defending a man accused of a military crime. . . . The officer . . . is to be brought before a court martial for playing too well his part as counsel for the defense."

Impostors. " 'Lord Gordon-Gordon': A Bogus Peer and His Distinguished Dupes." By W. A. Croffut. *Putnam's*, v. 7, p. 416 (Jan.).

"When these facts became known in Minneapolis, half a dozen sturdy citizens resolved to get even with the pseudo-lord who had so grossly imposed on their hospitality. . . . No time was lost. Fletcher and Burbank hired a team of fast horses with a light wagon. Hoy and Keegan jumped in, hastened to the cottage where Gordon was staying, seized him upon the front porch, kept him from making an uproar, dragged him to the wagon, and drove for the boundary as fast as the horses could go. They reached American soil with their prisoner and were a quarter of a mile south of the line when they were arrested by a pursuing party from Fort Garry. Gordon was released and the Minnesotans were heavily ironed and taken back. They were thrust into a dungeon and treated with great indignity. Fletcher telegraphed to Brackett, 'We're in a hell of a fix; come at once!' The greatest excitement prevailed in Minnesota and it was seriously proposed to raise a regiment at once and throw it across the border. But peaceful counsels prevailed. . . .

"Bancroft Davis, Assistant Secretary, boldly advised that the Minnesotans go up to the boundary and seize the custom-house officer and boundary police and hold them until redress was obtained. He offered to back up the movement. To avoid international trouble, however, Brackett and Governor Austin went to Canada and presented the case to Sir John MacDonald, the Prime Minister. He received the visitors very sympathetically, alleged that, while the attempt to capture and kidnap Lord Gordon-Gordon was irregular and wrong, yet there was no reason why his captors should not be admitted to bail. His decision was at once telegraphed to Manitoba and bail was obtained and accepted. The prisoners were released and went home. (September 15, 1873.) Three of the kidnappers were afterwards elected to Congress and two made governors of the state."

Juvenile Crime. "The Beast and the Jungle—IV." By Judge Ben B. Lindsey, of the Juvenile Court of Denver. *Everybody's*, v. 22, p. 41 (Jan.).

"These days of 1902, 1903, and 1904 were the heydays of our Juvenile Court, and I should like to dwell upon them fondly—as the song says—because of what ensued. Our campaigns against the wine-rooms, the jails, and the grafting commissioners had made the court as popular as a prizefighter, and the newspapers kept it constantly in the public eye."

Opium Traffic. "The International Opium Commission." By Hamilton Wright. 3 *American Journal of International Law* 828 (Oct.).

"The remission of the Boxer indemnity appealed to the official and educated classes as a generous act, but no more than was due; while the work of the International Opium Commission and the leadership of the United States in it has penetrated not alone the upper classes, but into the humblest hovel in China."

Russia. "The Story of Eugene Azeff." By David Soskice. *McClure's*, v. 34, p. 282 (Jan.).

An absorbing sketch of the spy.

"He was, so to say, born a traitor, ready furnished with the most precious and essential qualifications of a traitor."

Socialism. "My Business Life, II; A Factory without Strife—A Town without Crime—A Business that Pays Dividends to Stockholders, Workers, and Customers." By N. O. Nelson. *World's Work*, v. 19, p. 12504 (Jan.).

"Leclaire is fully established, because all the people in it want it. They would resist as treason any attempt to change it. . . . And its history and its present life prove that a business run under a co-operative system can support in peace, plenty, and comfort its employee-owners in competition with the capitalistic world around it."

Southern States. "The New South." *Annals of the American Academy of Political and Social Science*, v. 35, No. 1 (Jan.).

This number contains articles by specially informed writers on present economic, political, and social conditions in the South. The contributors include: Harvie Jordan, Alfred Holt Stone, Henry S. Reed, George T. Surface, Professor Ulrich B. Phillips, Clarence H. Poe, S. M. Tracy, G. Grosvenor Dawe, John H. Finney, Sledge Tatum, Frank S. Washburn, W. W. Finley, Joseph Hyde Pratt, J. F. Ellison, Thomas Purse, Booker T. Washington, Holland Thompson, Professor Enoch Marvin Banks, David Y. Thomas, Ph.D., A. J. McKelway, Professor William G. Glasson, and Professor James W. Garner.

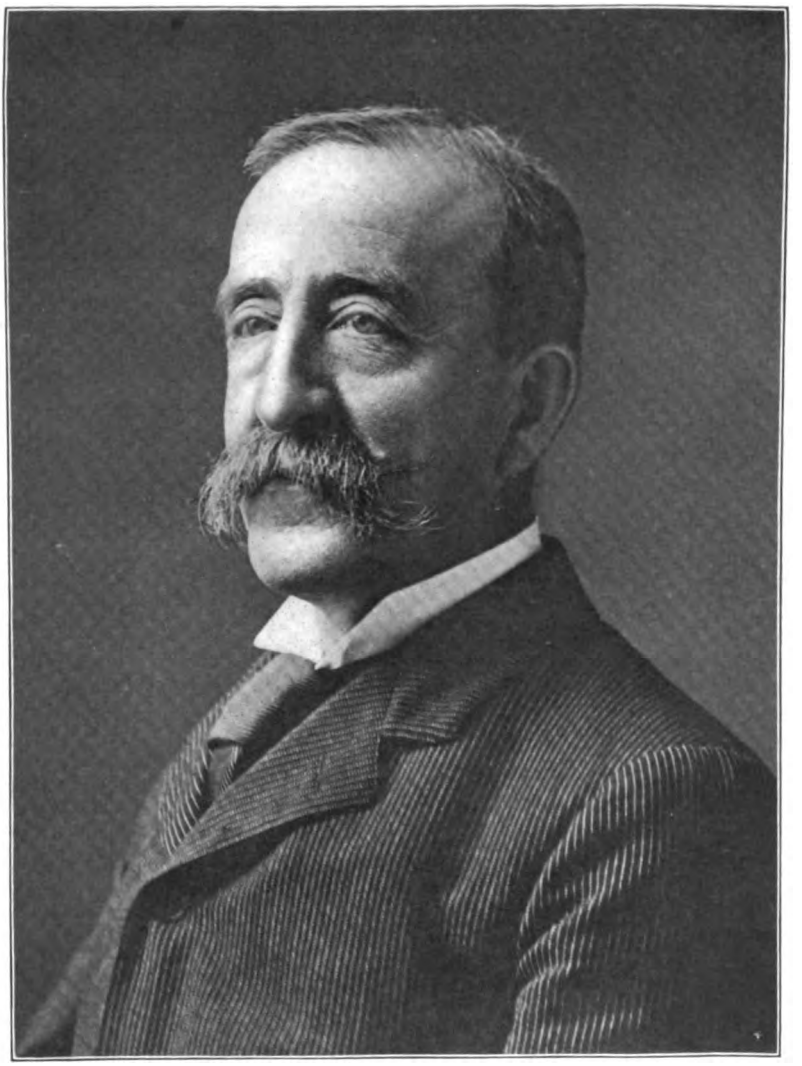
Steinheil Case. "Paris and Mme. Steinheil." By John F. Macdonald. *Fortnightly Review*, v. 86, p. 1103 (Dec.).

A vivid and animated account of what happened at the celebrated trial.

James Barr Ames

"The good Dean," beloved of all his students, sound in heart and in learning; virile, gentle, honorable; called by ex-President Eliot a "profound student and masterly teacher of court-made law"; historian of the common law whose writings will have enduring fame; first to achieve success for the method of legal education which Langdell founded; a maker not only of good lawyers but of good teachers of law; an inspiration to the legal profession in Anglo-Saxon lands.

[Dean Ames was born in Boston, June 22, 1846; was graduated from Harvard College in 1868, having been captain of one of the earliest Harvard baseball teams; graduated from Harvard Law School, 1872; tutor in French and German at Harvard, 1871–2; instructor in history, 1872–3; admitted to Massachusetts bar, 1873; Assistant Professor of Law in Harvard Law School, 1873–1877; Professor of Law, 1877–1910; Dean of Harvard Law School, 1895–1910; helped to organize Association of American Law Schools and the Commissioners on Uniform State Laws; died at Wilton, N. H., Jan. 8, 1910.]



THE LATE PROFESSOR JAMES BARR AMES

DEAN OF THE HARVARD LAW SCHOOL

Reviews of Books

WHO DRAFTED THE FEDERAL CONSTITUTION?

The Mystery of the Pinckney Draught. By Charles C. Nott, formerly Chief Justice of the U. S. Court of Claims. Century Company, New York. Pp. 292 + appendix 30 and index 10. ($2.00 *net.*)

CHARLES PINCKNEY of South Carolina presented a draught of a Constitution to the Constitutional Convention when it opened in 1787. This draught was referred to the Committee of the Whole and later to the Committee on Detail. No copy was found with the records of the Convention. In 1818 John Quincy Adams, then Secretary of State, requested Pinckney to supply a copy. Pinckney then furnished one, which he stated to be the one of several rough draughts in his possession, which he believed was the right one, all of them being substantially similar. After Pinckney's death Madison declared that the evidence against its authenticity was "irresistible," basing his position largely on the difference between it and the policies advocated by Pinckney before the convention. Story, in his Commentaries, did not regard it as worth notice. Bancroft asserted that "no part of it was used and no copy of it has been preserved." Rufus King, a member of the Convention, emphatically declared that the document was not genuine. The exhaustive research of historical students, particularly Professor J. F. Jameson (Report of American Historical Association, 1902, pages 111 to 132) have confirmed this conclusion.

Judge Nott, however, attempts to prove the genuineness of the Pinckney draught. He examines a great deal of testimony, which is presented in the dramatic form of a trial conducted in accordance with the usual rules of evidence. Madison is discredited, the supposition of fraud is overthrown, and the conclusions are reached that we owe the style of the Constitution to Pinckney, that but for his work a very different instrument would have been given to the world, and that no framer of the Constitution is more entitled to perpetual veneration.

Judge Nott has given a great deal of minute research to the preparation of his inquiry; textual matters particularly receive most painstaking and complete analysis. The author attempts to treat the whole problem judicially.

We are somewhat sceptical, however, as to whether a strong case in Pinckney's favor has been made out with success. It is difficult to believe that there is not weighty evidence to be found somewhere which would have thrown more light on the problem. The treatment might have been broader and might have shown more vividly the actual genesis of the Constitution regarded substantively as well as textually. A judicial estimate of the relative chares of Wilson, Randolph, Madison, Rutledge, and their associates, in the framing of the Constitution would have helped to define the actual service of Pinckney, whatever it way have been.

The question will long remain an open one for historical investigation, having failed to receive in Judge Nott's book a conclusive answer. The probability is that Professor Jameson was right in declaring that "Charles Pinckney deserves to stand higher than he has stood of late years, and that he would have a better chance of doing so if in his old age he had not claimed so much"; and that Judge Nott has gone much too far in claiming for Pinckney the distinction of having been the chief draughtsman of the Constitution.

HUBBELL'S LEGAL DIRECTORY

Hubbell's Legal Directory for Lawyers and Business Men. 40th year, 1910. Hubbell Publishing Co., New York. Pp. 472 + 408. ($5.35 delivered.)

THE new volume of this standard directory has been thoroughly revised and brought up to date, being larger by fifty or sixty pages than a year ago. A synopsis of the laws of Hawaii has been added. On account of numerous changes in the state laws, the synopses allotted to the several states have undergone considerable revision.

The work is as valuable as ever, because of its extensive information with regard to organization and calendars of federal and state courts for 1910, instructions for taking depositions, the execution and acknowledgment of deeds, synopses of the patent laws and the laws concerning the jusisdiction and practice in the federal courts, its list of leading attorneys in our four thousand cities and towns, its list of prominent banks and bankers throughout the United States, its list of United States Consuls, and other features.

NEW BOOKS RECEIVED.

RECEIPT of the following new books, which will be reviewed later, is acknowledged:—

"Historical Essays." By James Ford Rhodes, LL.D., D. Litt. Macmillan Company, New York. 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. Pp. 269, 269. ($2 *net.*)

"A Digest of the Law Relating to Private Trusts and Trustees." By Walter Gray Hart, LL.D., "Law Notes" Publishing Offices, London. Pp. xxiv, 413 appendix and index, 50.

"Report of the Thirty-Second Annual Meeting of the American Bar Association," held at Detroit, Michigan, August 24-27, 1909. v. xxxiv. Pp. 1170 +index 18. ($1.25.)

"A Pocket Code of the Rules of Evidence in Trials at Law." By John Henry Wigmore, Professor of the Law of Evidence in the Law School of Northwestern University. Little, Brown, & Company, Boston. Pp. liii, 485 (alternate pages blank and not numbered)+index 80. ($4 *net.*)

"Ant Communities and How They Are Governed; A Study in Natural Civics." By Henry Christopher McCook. Harper & Brothers, New York and London. Pp. xvii, 304+bibliography 9 and index 7. ($2 *net.*)

"Report of the Twenty-first Annual Meeting of the Virginia State Bar Association," held at Hot Springs, Va., August 10-12, 1909. v. xxii. Edited by John B. Minor, of the Richmond Bar. Pp. 358+index 14. ($2.)

"Selections from the Economic History of the United States, 1765-1860"; with Introductory Essays. By Guy Stevens Callender, Professor of Political Economy in the Sheffield Scientific School, Yale University. Ginn & Co., Boston, New York, Chicago and London. Pp.xviii, 819. ($2.75.)

"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.)

Latest Important Cases

Admiralty. *Jurisdiction of United States Courts—"High Seas" May Include French Territorial Waters—Res Adjudicata.* U. S.

The scope of the admiralty jurisdiction of United States Courts was exhibited in one of its broadest aspects in *Mary Steurer* v. *Steamship Kaiser Wilhelm der Grosse and Steamship Orinoco*, decided by the federal District Court for the southern district of New York Dec. 17 (*N. Y. Law Jour.*, Dec. 31).

The circumstances of the case are striking, in that the former steamship was a German vessel, the latter a British one, while the libellant was an Austrian subject, and the collision causing the personal injuries for which she sought to recover occurred near the harbor of Cherbourg, within three miles of the coast of France.

The Court (Hough, J.) held that the fact that the place of collision was within the territorial waters of France "does not prevent such waters being also a portion of the high seas." The following remarks made in *The Belgenland* (114 U. S. at 368) were quoted as applicable to the present case: "Where the parties are not only foreign, but belong to different nations, and the injury . . . takes place on the *high seas*, there seems to be no good reason why the party injured . . . should ever be denied justice in our courts."

Jurisdiction thus being claimed, the Court held the libellant entitled to recover, basing such right of recovery on the *prima facie* case of fault on the part of the vessels, made out by a judgment in an action growing out of the same collision tried before the English High Court of Justice, Admiralty Division, and affirmed by the Court of Appeal. This judgment, while not strictly *res adjudicata*, was held to constitute, by comity, conclusive and non-rebuttable evidence of fault. It was explained that in allowing a decree for the libellant against the *Kaiser Wilhelm der Grosse*, only a *prima facie* case was made out; the parties defendant were left to litigate between themselves as to ultimate liability.

On the point whether it was essential to the jurisdiction here assumed that libellant's right or cause of action should be *communis juris*, the Court said:—

"The libel sets forth the law of France, but no proof of that law has been offered. It also, however, avers pain and suffering caused by the fault of the steamships or one of them, and concludes with the usual jurisdictional assertion. This is sufficient averment of a marine tort, and if such tort be committed on the high seas it is *communis juris* among all courts possessing admiralty and maritime jurisdiction."

Common Carriers. *Duty to Carry Passenger without Delay to Destination—Valid Excuse for Delay May be Set Up by Act of God or Vis Major.* N. Y.

Liability for delay in transporting a passenger to his destination was considered by the New York Court of Appeals in *Cormack* v. *N. Y., N. H. & H. R. Co.*, decided Mar. 23 (reported *N. Y. Law Jour.* Dec. 21). The appellant had taken a train from Quincy, Mass., to Boston, his car being stalled by a blizzard so that it could not approach to less than about six or seven hundred feet of the terminal station, appellant being compelled to remain in the car for nine hours, on account of which he claimed $2,000 damages for the detention and his sufferings.

The Court (Willard Bartlett, J.) said in part:—

"Even in respect to goods, a common carrier is not an insurer as to time. While he is responsible for the safety and final delivery thereof, and nothing can exonerate him from that responsibility but the act of God or the public enemy, he is responsible only for the exercise of due diligence in regard to the *time* of delivery (*Parsons* v. *Hardy*, 14 Wend. 215). So in respect to passengers, a common carrier is not an insurer as to the time when passengers will reach their destination, in the absence of an express contract on the subject (*Gordon* v. *Railroad*, 52 N. H. 596, 599, and cases therein cited). If a railroad company negligently fails to keep the time it promises it will be liable in damages for injury thereby accruing to a passenger. 'But to entitle the plaintiff to recover there must be proof of negligence. Neither time table nor advertisement is a warranty of punctuality.' (Wharton on Negligence, sec. 662.) A railroad company which receives a person upon a train as a passenger to a specified destination is bound to carry the person to that destination with all reasonable diligence (*Weed* v. *Panama R. R.*, 17 N. Y. 362).... It is the duty of the carrier to exercise reasonable foresight in the anticipation of obstructions to travel, to use all available means for the removal of such obstructions, and to proceed with the transportation as soon as practicable after such removal (*Bowman* v. *Teall*, 23 Wend. 306). Where all this has been done the intervention of an act of God or *vis major* exonerates the carrier from legal liability for the delay."

Copyright. *Dramatizations of Novels whose Copyrights Have Expired—No Unfair Competition in Use of Same Title for Rival Plays, It being also the Title of the Novel.* U. S.

A novel entitled "St. Elmo," written by Augusta J. Evans, formerly had a large sale in the Southern states. The copyright was taken out in 1866 and expired in 1908. About a year before its expiration a dramatization of the book was copyrighted under the same title, "St. Elmo." After the copyright on the novel had expired a rival dramatization appeared under an identical name, and the owners of the first dramatization sued the proprietors of the second play for infringement of their own copyright. *Glaser and Holcomb* v. *St. Elmo Co., N. Y. Law Jour.* Dec. 31.

Judge Holt, giving judgment in December in the United States Circuit Court for the southern district of New York, dealt with two of the phases case, first the question whether the production of the second play was an infringement of copyright, second that whether the complainants had an exclusive right to the use of the title "St Elmo" as a distinguishing trade-mark. The ruling in the former question is less interesting than that on the latter. As regards the rights of the producers of the rival play, the Court held that there was nothing to indicate that the second play had been copied after or been imitated from the first or that the first play had been used in its construction, and there was no infringement.

On the question of unfair competition by use of the same title for the rival play:

"I think that the authorities, particularly the American cases, preponderate that the copyright of a book does not prevent other persons from taking the same title for another book, even in the case of an entirely unexpired copyright. . . . Still, other authorities take the view that the author or proprietor of a book has a right to exclude others from adopting the same title for another book on the ground that it constitutes a trade-mark or that its use by another constitutes unfair competition in trade.... But I doubt whether this doctrine applies in the case of plays made from novels the copyright of which has expired. Suppose that two plays were written, based on an old novel, for instance 'Don Quixote' or 'Clarissa Harlow' or 'Quentin Durward,' and that both such plays were given the title of the story from which they were taken. Would not the author of each

play have the right to give his play the name of the novel on which it was based, particularly if each made proper public announcement that he was the author of that play?

"The rule is well settled that, on the expiration of a patent for an article which has become identified by some particular name, as the name of the inventor, although it is open to the public to manufacture the patented article and to call it by the name by which it is commonly known, it is unfair competition to do so unless the person making the article affixes to it a plain notice that it is not made by the owner of the original patent, but by some one else (*Singer Mfg. Co.* v. *June Mfg. Co.*, 163 U. S. 169; *Merriam* v. *Famous Shoe, etc., Co.*, 47 Fed. 411). The same rule has been applied to copyrights (*Merriam Co.* v. *Ogilvie*, 159 Fed. 638). But in this case, upon all the advertisements and notice of their play put out by the defendants, they publish the fact that it was written by Neil Twomey, and I think that the proof shows that, if the principle announced in the case of the *Singer Mfg. Co.* v. *June Mfg. Co.* is applicable to the case of a copyright, the rule there laid down has been complied with by the defendants."

A preliminary injunction was therefore denied.

See Unfair Competition.

Insurance. *Direct Loss by Fire—Damage by Smoke from Mismanaged Furnace Included.* Wis.

In *O'Connor* v. *Queens Insurance Co.*, decided by the Supreme Court of Wisconsin, reported in 122 N. W. Rep. 1038, it appeared that the servant made a fire in the furnace out of soft coal and wood, which burned so freely that an excessive amount of heat and smoke escaped through the registers and injured the house and furniture. There was no ignition outside of the furnace, but this was nevertheless held to be a fire covered by a policy of insurance against direct loss by fire. This seems to be directly *contra* to the generally accepted notion; see Richards on Insurance, 3d edition at page 284. It is, however, approved by the *Columbia Law Review*, discussing the case in its January issue (10 *Col. L. Rev.* 58–60), as a proper application of a liberal rule which it advocates: "To say the parties intended no recovery for such a loss because the fire was never where not intended to be would seem to give undue force to a mere technicality."

Interstate Commerce. *Railway Terminals a Link in Chain of Interstate Transportation and Subject to Control of Interstate Commerce Commission—Hepburn Act.* U. S.

The United States Circuit Court for the southern district of Texas has lately affirmed the ruling of the Interstate Commerce Commission that the terminals of interstate common carriers are within the jurisdiction of the Commission. The decision was rendered in the case of *Southern Pacific R. Co.* v. *Eichenberg*, Judges McCormick and Shelby supporting the Commission and Judge Pardee dissenting. The case now goes to the United States Supreme Court for review.

The Commission had held that, as the railroad and steamship lines at Galveston were in one control, and as the terminal company was organized to furnish terminal facilities for the Southern Pacific at Galveston, it formed a necessary link in the chain of interstate commerce and was subject to the Hepburn act. The Court sustained this finding.

Landlord and Tenant. *Apartment House Leases to Families with Children—Right of the State to Safeguard Interests of Society by Compelling Such Leases.* Ill.

The decision of a lower court in Illinois, denying the right of landlords to exclude children from apartment houses, is of interest. The action was brought to test the validity of the new state law, by a person who claimed that he had been wrongfully denied a renewal of his lease on the ground that the landlord did not care to rent to families with children. The case, *Longenecker* v. *Boyleston*, came up before Judge Himes in the Municipal Court at Chicago Dec. 20. No official report is before us, but the decision seems to have proceeded upon the theory that the statute in question was a valid exercise of the police power of the state, though it remains to be seen whether the higher courts will sustain it as not interfering with freedom of contract. The Court said:—

"If a landlord can make a lease or contract such as is prohibited by this statute, might we not assume that many or perhaps all owners of desirable property would make the same kind of contracts and thus prevent children from living in desirable dwelling-houses, apartments or flats adjacent to schools and in desirable localities? If contracts of this kind were made by the

owners of desirable dwelling-houses, flats or apartments, would not the man of large family and small means and unable to build his own dwelling-house be seriously hampered in securing a place of abode for his family, and might it not become a menace to society?"

Legislative Officers. *Payment of Their Salaries by Private Interests Opposed to Public Policy.* England.

The House of Lords has lately, on Dec. 21, affirmed the decision of the English Court of Appeal in *Osborne* v. *Amalgamated Society of Railway Servants* (cf. 21 *Green Bag* 170), wherein it was held that no trade union may make it obligatory upon its members to subscribe to funds administered for the purpose of securing Parliamentary representation. The basis for the Court of Appeal's decision was that an agreement whereby any person may bind himself to vote in a certain manner "to be decided by considerations other than his own conscientious judgment at the time" is against public policy. The House of Lords sustains this position.

Naturalization. *"Free White Persons" Includes Armenians.* U. S.

One of the cases pending in federal courts of first instance, to settle the meaning of "free white persons" in the naturalization laws, has been decided by the United States Circuit Court at Boston favorably to the Armenians. The decision chances to have been rendered by Judge Francis C. Lowell on the day before Christmas and tends to emphasize the great principle of human brotherhood.

The United States had contended that "free white persons" in the naturalization statute (United States Revised Laws, sec. 2169) meant Europeans and persons of European descent, and that there is an Asiatic or yellow race to which belong substantially all Asiatics, including the petitioners who were ineligible for naturalization. The government admitted that Hebrews were not in the latter classification.

Judge Lowell's conclusions are that there is no European or white race as the United States contends, and no Asiatic or yellow race which includes substantially all the people of Asia; that the mixture of races in western Asia for the last twenty-five centuries raises doubt if its individual inhabitants can be classified by race; that if the ordinary classification is nevertheless followed, Armenians have always been reckoned as Caucasians and white persons; that the outlook of their civilization has been toward Europe; that the word "white" has generally been used in the federal and in the state statutes, in the publications of the United States, and in its classification of its inhabitants, to include all persons not otherwise classified; that Armenians, as well as Syrians and Turks, have been freely naturalized in this court until now, although the statutes in this respect have stood substantially unchanged since the first Congress; that the word "white" as used in the statutes, publications and classifications above referred to, though its meaning has been narrowed to exclude Chinese and Japanese in some instances, still includes Armenians.

The Court said in part:—

"To its classification by European and Asiatic race the United States makes an extraordinary exception, viz.: the Hebrews. Their history is known for a long period. While absolute purity of blood is out of the question, they have sought with unusual strictness to maintain that purity for two thousand years at the least. Notwithstanding the opinion of Prof. Ripley and others, both Hebrew history and an approximation to general type show that the Hebrews are a true race, if a true race can be found widely distributed for many centuries. Their origin is Asiatic. Yet the United States admits that they do not belong to the 'Asiatic or yellow race,' and that they should be admitted to citizenship. If the 'aboriginal peoples of Asia' are excluded from naturalization as urged by the United States, it is hard to find a loop-hole for admitting the Hebrew.

"Again, if Hindus are to be excluded from naturalization, as contended by the United States, because many Englishmen treat them with contempt and call them 'niggers,' a like argument applies to those who have suffered most cruelly among all men on the earth from European hatred and contempt. In the application of its classification, the United States thus contradicts the principles upon which the classification depends.

"It is misleading, therefore, to speak of a European race, of a European or white race, to which substantially all inhabitants of Europe belong, or of an Asiatic race, of an Asiatic or yellow race which includes substantially all Asiatics. Furthermore, the

present inhabitants of western Asia have their racial descent so mixed that there are many individuals who cannot safely be assigned by descent to any one race, however comprehensive. . . .

"If, however, notwithstanding these considerations, we are compelled by statute to classify for the purposes of American naturalization every man living on the earth as a member of some one race, we shall find that the Armenians have always been classified in the white or Caucasian race, and not in the yellow or Mongolian. . . .

"In so far as the test is affected by 'ideals, standards and aspirations,' the result is the same. . . . If the court should inquire, as the United States suggests, concerning Hebrews: May Armenians 'become westernized and readily adaptable to European standards?' the answer is, yes.

"For all these reasons the Armenians are not to be excluded from naturalization by reason of their race. So far as the test by race is applicable, they are to be classed as Caucasian or white, while the Finns, by ethnological theory, and the Magyars, by their known history, are deemed to belong to the Mongolian or yellow race."

Public Service Corporations. *Issue of Stocks and Bonds to Meet Lawful Obligations —Limited Power of Public Service Commission to Supervise Such Issues.* N. Y.

An important decision affecting the powers of the New York Public Service Commission with regard to the supervision of stock and bond issues of public service corporations was rendered by the New York Court of Appeals Dec. 7, in *People ex rel. Delaware & Hudson Co.* v. *Stevens* (*N. Y. Law Jour.* Dec. 16), a case arising on an appeal of the Public Service Commission of the second district.

The facts briefly stated are that the Delaware Hudson Company was indebted to the Hudson Valley Company and other persons for the lawful purchase of an electric railway line and coal lands situated in another state, the purchases having been made before the passage of the New York Public Service Commission Law. To meet these obligations it had issued short time notes renewable on their expiration. These notes it desired to convert into long time securities at a lower rate of interest. The Commission refused to authorize the issue of bonds for this purpose, as in its judgment the price paid for the electric line was excessive and the notes given therefor, as well as for the coal lands, should be secured by mortgages on the respective properties. The Delaware & Hudson Company thereupon obtained a writ of *certiorari*, which brought up for review by the Court of Appeals the proceedings of the Commission.

Haight, J., who delivered the opinion, said:—

"We understand that the paramount purpose of the enactment of the Public Service Commissions Law was the protection and enforcement of the rights of the public. Public service corporations have been granted valuable franchises to enable them to serve the public, and they are deemed to have undertaken to render to the public the service for which they were incorporated upon receiving a proper and reasonable compensation therefor. It is the duty of railroad corporations not only to maintain their equipment, tracks and roadbed in good order, but also to operate their railroads with safety to the public and afford such service as will supply the reasonable demands of the public. For a generation or more the public has been frequently imposed upon by the issues of stocks and bonds of public service corporations for improper purposes, without actual consideration therefor, by company officers seeking to enrich themselves at the expense of innocent and confiding investors. One of the legislative purposes in the enactment of this statute was to correct this evil by enabling the commission to prevent the issue of such stock and bonds, if upon an investigation of the facts it is found that they were not for the purposes of the corporation enumerated by the statute and reasonably required therefor.

"We do not think the legislation alluded to was designed to make the commissioners the financial managers of the corporation, or that it empowered them to substitute their judgment for that of the board of directors or stockholders of the corporation as to the wisdom of a transaction, but that it was designed to make the commissioners the guardians of the public by enabling them to prevent the issue of stock and bonds for other than the statutory purposes. . . .

"While, as we have stated, the ownership of property ordinarily carries with it the right of management, the duty devolves upon the owner to so manage as not to have it become

a nuisance or unnecessarily infringe upon the rights of others. It was, therefore, evidently the legislative intent in the enactment of this provision that the commissioners should have supervision over the issuing of long-time bonds to the extent of determining whether they were issued under and in conformity with the provisions of the statute for the purposes mentioned therein, or whether they were issued for the discharge of the actual and not the fictitious debts of the company, or whether they were issued for the refunding of its actual obligations and not for the inflation of its stocks or bonds. Beyond this it appears to us that the power of the commissioners does not extend, unless it may pertain to the power to determine whether an obligation should be classified as operating expenses and as to whether such expenses should be paid by obligations running beyond a year. We therefore conclude that as to the Hudson Valley securities, so called, the application of the relator company should have been granted."

Unfair Competition. *Equity will Enjoin Use of Same Title for a Rival Dramatic Production—Exclusive Rights Connected with though not Based on Copyright.* N. Y.

A cartoonist designed a series of "Buster Brown" sketches, which he sold to the *New York Herald*, reserving the dramatic rights. They were copyrighted by the *Herald*, and the artist dramatized them and produced a play under the title of "Buster Brown." Under a license from the *Herald*, other persons produced a rival dramatization under the same name. The cartoonist sued the proprietors of the second play, but was not allowed to recover. The case came before the Appellate Division of the New York Supreme Court, which reversed the judgment of the court below and ordered a new trial. *Outcault* v. *Lamar and Weigel*, *N. Y. Law Jour.* Dec. 24.

The Court (Laughlin, J.), said:—

"The holder of a copyright will undoubtedly be protected in the copyright name, as well as in the literary production, where there is an infringement in whole or in part of the literary production which is the subject of the copyright, but the name alone is not protected by the copyright (Drone on Copyrights, p. 145 and note; *Corbett* v. *Purdy*, 80 Fed. Rep. 901; *Donnelley* v. *Ivers*, 18 Fed. Rep. 592). The theory of the complaint is that the cartoonist invented this title and these names, and that he and his associates were the first to use them in connection with a public play, and that a court of equity should protect them in that use upon the principles upon which trade names and trademarks are protected by the courts, notwithstanding the fact that they are used in connection with a copyright or a patent (*Monroe* v. *Tousey*, 129 N. Y. 38; *Waterman* v. *Shipman*, 130 N. Y. 301; *Potter* v. *McPherson*, 31 Hun. 559). It seems quite clear, therefore, that the complaint presented a case of which the courts of this state have jurisdiction."

See Copyright.

Wills and Administration. *Probate of Seaman's Nuncupative Will—Necessary Conditions to be Fulfilled.* N. Y.

An interesting instance of the probate of an oral or nuncupative will occurred in the Surrogate's Court of King's county, New York, in December *Matter of O'Connor* (reported in *N. Y. Law Jour.* Dec. 27, also editorially discussed). The testator was the chief engineer of a steamship, who fearing the fatal outcome of one of the attacks incidental to a chronic malady from which he suffered, expressed to the master and first officer the wish that all his property might belong to his daughter, whom he named. The Court (Ketcham, S.), remarking that this was the first case in the history of the court of an application for the probate of a nuncupative will, and citing the few modern cases on the subject, declared that in spite of the infrequency of the proceeding the rules are plain. The opinion is summarized in the headnote as follows:—

"A mariner at sea or a soldier while in actual military service may make an oral or nuncupative will if he possess testamentary capacity and intent and is free from restraint and shall utter the words constituting the will with sufficient explicitness and intelligibility to permit a finding of its purport and scope. The same must be witnessed and proved by at least two witnesses, and it is not necessary that such will should be made either in the last sickness of the testator or in prospect of his death.

"A description of the will in the petition for its probate is sufficient without alleging the exact words and phrases intended to be proved as the will of decedent."

The Editor's Bag

A GREAT NEED—A MILLION-DOLLAR FOUNDATION OF JURISPRUDENCE

THE project outlined in the opening pages of this issue, and endorsed with practical unanimity by the great leaders of thought in the American legal profession, scarcely needs any recommendation from the *Green Bag*. No one who reads these opinions can entertain any doubt of the feasibility of the plan, of the skill with which every practical detail involved in its realization has been measured, or of the fitness of Messrs. Alexander, Kirchwey, and Andrews for the great responsibility of a task demanding ability of the highest order. The tremendous force of these opinions is derived not from their authority or persuasiveness so much as from clear, flawless logic, and no intellect can succeed in offering resistance to the pressure of so potent a force. These powerful arguments will appeal not only to the lawyer, bent on elevating his profession to the highest level of usefulness and worth, but with equal certainty to every one deeply concerned for the welfare and progress of society.

However, brushing all these enthusiastic and convincing endorsements aside, and considering the question on its own merits, one can have only one opinion. The consummation of the plan for the statement of our body of law is necessary not alone in the interest of lawyers and judges, that the law may be more easily ascertained, more fully understood, more intelligently expounded, more readily adjusted to new conditions, and more reasonably developed into a compact and uniform system. It is also needed for the good of the business community. Mr. Francis Lynde Stetson of New York quotes a banker as saying, "The greatest risk in business is the legal risk." As a matter of fact, the general public knows little of the unfortunate condition of our jurisprudence, confused and uncertain as it is, requiring the services of skilled advisers to expound, and then likely as not to be misinterpreted. A succinct statement of our system of law, in a form which would satisfy every requirement of orderliness and precision, would be of inestimable value to the commercial community. It would expedite the determination of every legal question, both in and out of court; the necessity for much litigation would undoubtedly be abolished; and the delays and expenses arising from the labor entailed on counsel in the preparation of cases would be materially reduced. It is curious that in the continual stream of criticism of the law's delays which is poured forth by the daily press, that important factor in unfortunate prevailing conditions, the chaos and uncertainty of the law, should usually be overlooked.

It may be that the layman will ask, Then why is it that all this has never been done before, if it is so urgent? The answer is simple. It has not been done because laymen, by quick discernment and ready co-operation, have never yet made possible the execution of what cannot be looked for from the concerted action of forty odd governments, or from the munificence of a profession not addicted to the accumulation of large fortunes. Should some philanthropist now come forward to prove that all laymen are not indifferent to the needs of the situation, or blind to an opportunity for memorable public service, the only obstacle to the achievement of a glorious enterprise—the financial obstacle—will have been overcome, and the donor will be gratefully remembered by posterity as the sponsor of the first complete and authoritative statement of American jurisprudence.

A more happy combination than that of the three men who are planning this great undertaking could not have been found. Mr. Alexander unites with the physique of

an athlete the clear mind of a scholarly thinker and the executive ability of a magnetic and indefatigable organizer. His notable capacity was shown when, in the face of criticism that the scheme was impracticable, he drafted for the American Bar Association a Code of Ethics which has been adopted in many states and can be stated, on the best of authority, to cover in some one of its canons every professional duty. The second member of the group, Dr. Andrews, is a jurist of remarkable powers of analysis, classification, and exposition, a master of the science of jurisprudence, to the study of which he has devoted himself with great industry, having proved himself one of the great constructive legal minds of the age. The third, Dean Kirchwey of Columbia Law School, enjoys a national reputation as a teacher and writer, is a former President of the Association of American Law Schools, and is admirably qualified for editorial duties requiring extensive knowledge of the work of the country's ablest law professors and writers, as well as of unquestioned ability in the teaching and exposition of the law. The undertaking could not be in safer hands.

The failure which this plan would inevitably encounter were its realization to be made dependent upon commercial enterprise alone cannot be too strongly emphasized. On this point, such considerations as those brought out in Mr. Charles A. Boston's letter (see pp. 115–116 *supra*) deserve particular attention. "The commercial element," as he observes, "must be wholly eliminated if the work is to achieve the commanding influence which its designers contemplate and which its advocates solicit for it and foresee." Had Wilson, with his keen Scotch intellect and excellent Scotch education—he was educated at the Universities of St. Andrews, Glasgow, and Edinburgh—been commissioned by a publisher to draft the great code which absorbed his profound and earnest thoughts, could an intellect of such lofty standards have found in such a commission anything but a hindrance to the achievement of its ambition? Commercialism never yet founded great art or science, a great university, or a great state. Our future law-makers and statesmen will owe every honorable achievement to something higher than mere astuteness in forecasting a profit and loss account. From a commercialized system of law, one left wholly to the mercy of matter-of-fact business demands, God save the state! Legal progress cannot come about automatically. Progressive legal development calls for patriotic and liberal benefactions even more truly than charity, science, and education. Here, in the proposed endowment of a Foundation of Jurisprudence, is an opportunity for the highest order of philanthropy, that which is constructive rather than simply remedial, which seeks by positive rather than by negative means to advance human happiness and welfare.

SEWARD'S DEFENSE OF FREEMAN

E. W. CAPRON, writing recently in the *New York Tribune*, from Asheville, N. C., recalls the interesting Freeman case:—

"This man Freeman in the night murdered a whole family and sought a second family by the name of Godfrey. Excitement ran high; the cry for vengeance was strong. The late W. H. Seward, then a young man, satisfied that the man was insane, volunteered to conduct the defense. It was a brave act, for he was threatened with personal violence. The noted John Van Buren, sometimes called 'Prince John,' then Attorney-General of the state, assisted the District Attorney in the prosecution.

"The defense showed that the murder was without provocation or motive. It also called the superintendent of the Utica Insane Asylum, who declared on the stand that the negro was clearly insane. Van Buren in his cross-examination asked how he formed his opinion of insanity. He replied from conversation and from the eyes and general features.

"When asked if he could pick out an insane person in that audience the superintendent replied that he could if there were any. Being requested to do so, the superintendent, while breathless silence reigned, surveyed the large audience, and at length singled out an individual who, he said, was insane. The person indicated at once responded in oaths and frantic yells, clearly showing that the superintendent had made no mistake.

"Notwithstanding the strong defense, the verdict was guilty and the sentence hanging. As the time for execution drew near Seward induced the Governor to grant a respite, but before this period expired the negro died in prison. An autopsy revealed an extensively diseased brain."

SUPREME COURT CHANGES

THE seating arrangement of the Justices of the United States Supreme Court has been changed because of the death of Justice Peckham. The Justices are seated in the order of seniority, with the exception of the Chief Justice, who always occupies the centre of the bench. The senior in point of service is seated at the Chief Justice's right, the next oldest at his left, and so on alternately, the youngest sitting at the Chief Justice's extreme left. The old seating arrangement was as follows:—

o Mr. Justice Day
o Mr. Justice McKenna
o Mr. Justice White
o Mr. Justice Harlan
O Mr. Chief Justice Fuller
o Mr. Justice Brewer
o Mr. Justice Peckham
o Mr. Justice Holmes
o Mr. Justice Moody

The Justices are now seated thus:—

o Mr. Justice Moody
o Mr. Justice Holmes
o Mr. Justice White
o Mr. Justice Harlan
O Mr. Chief Justice Fuller
o Mr. Justice Brewer
o Mr. Justice McKenna
o Mr. Justice Day
o Mr. Justice Lurton

HE MISSED THE POINT

A DENVER lawyer writes to the *Green Bag* about an occurrence at the 1909 Bar Association banquet in Denver. Justice White, of the Supreme Bench, was speaking on the subject of "Humor" *à la* Eli Perkins, and in course of his remarks said, "Humor has in it the element of the unexpected. Now, for instance, if I should say that a man went from Denver to Colorado Springs, a distance of one hundred and twenty-seven miles, and—"

A Voice.—"seventy-five miles, Judge." (The mouse is in the trap.)

Justice W.—"What is that, sir?"

W.—"The distance is seventy-five miles, not one hundred and twenty-seven, from Denver to Colorado Springs."

Justice W.—"Now, my dear sir, if you know more about this story than I do, please tell it yourself." (Loud laughter.)

The Justice went on with his speech and when he concluded W. apologized for making the interruption, to which the Justice replied: "No apology necessary—I thank you very much for the interruption." (More laughter.)

The next morning D., who graduated from the same law office as W., called on him and said, "W., you got in bad with Justice White last night with your ill-timed interruption."

"I know I did, but I apologized to the Judge."

"You certainly did, but you rattled the Judge so he couldn't go on with his story and never did finish it."

Then both looked sad. It is said that neither W. nor D. have even yet found out what was the reason for the laughter at the illustration evoked by the Justice.

ROUNDING UP BIBLES

"THERE have been some wonderful and odd substitutes for Bibles in justice courts," said one of a group of Kansas men recently, says the *Kansas City Journal*.

"There was a funny incident in Linn county, I think it was in '57—at any rate it was just after the great influx of free state men into Kansas. Many who had left their claims to avoid trouble the year before returned, but found their claims taken up and occupied by the pro-slavery element from Missouri and other states.

"A squatters' court had been organized. After the court had assembled the officers discovered that, although they were well supplied with navy revolvers and Sharp's rifles, there was lacking one thing which was deemed necessary. The judge requested the marshal to go and hunt up a Bible for the purpose of swearing the witnesses. After visiting numerous houses he returned and reported that there was not a copy to be found.

"'Make another trip; round up every house and bring a book,' ordered the judge.

"Again the marshal went forth. He scurried around a long time, but finally returned, with a big volume, old and worn. The court looked at it. Large letters in the back proved it to be 'Gunn's Domestic Medicine.'

"The court surveyed the volume critically for a moment. 'That will have to answer

the purpose,' he remarked serenely. 'We must follow the rules of court procedure.'

"It was placed on the table before the court, and as each witness was sworn he was ordered to kiss the book, believing, of course, that it was a true copy of King James' Oxford edition of the Bible."

AN UNUSUAL DEATH SENTENCE

PROBABLY the best anecdote of Judge Benedict of New Mexico is that told with regard to his sentence of death pronounced upon one José Maria Martin—who was convicted of murder in the District Court of Taos county, under a state of facts showing great brutality, and with absolutely no mitigating circumstances. Judge Benedict said:—

"José Maria Martin, stand up. José Maria Martin, you have been indicted, tried and convicted by a jury of your countrymen of the crime of murder, and the court is now about to pass upon you the dread sentence of the law. As a usual thing, José Maria Martin, it is a painful duty for the judge of a court of justice to pronounce upon a human being the sentence of death. There is something horrible about it and the mind of the court naturally revolts from the performance of such a duty. Happily, however, your case is relieved of all such unpleasant features and the court takes positive delight in sentencing you to death.

"You are a young man, José Maria Martin; apparently of good physical constitution and robust health. Ordinarily you might have looked forward to many years of life, and the court has no doubt you have, and have expected to die at a green old age; but you are about to be cut off on account of your own act. José Maria Martin, it is now the spring time; in a little while the grass will be springing up green in these beautiful valleys, and on these broad mesas and mountain sides flowers will be blooming; birds will be singing their sweet carols and nature will be putting on her most gorgeous and her most attractive robes, and life will be pleasant and men will want to stay; but none of this for you, José Maria Martin, the flowers will not bloom for you, José Maria Martin; the birds will not carol for you, José Maria Martin; when these things come to gladden the senses of men, you will be occupying a space about six by two beneath the sod, and the green grass and those beautiful flowers will be growing above your lowly head.

"The sentence of the court is that you be taken from this place to the county jail; that you be kept there safely and securely confined, in the custody of the sheriff, until the day appointed for your execution. Be very careful, Mr. Sheriff, that he have no opportunity to escape and that you have him at the appointed place at the appointed time. That you be so kept, José Maria Martin, until,—Mr. Clerk, on what day of the month does Friday, about two weeks from this time, come? March 22d, Your Honor,— very well, until Friday, the 22d day of March, when you will be taken by the Sheriff from your place of confinement to some safe and convenient spot within the county,—that is in your discretion, Mr. Sheriff, you are only confined to the limits of the county,—and that you there be hanged by the neck until you are dead and—the court was about to add, José Maria Martin, may God have mercy on your soul,' but the court will not assume the responsibility of asking an All-Wise Providence to do that which a jury of your peers has refused to do. The Lord couldn't have mercy on your soul. However, if you affect any religious belief, or are connected with any religious organization, it might be well enough for you to send for your priest or your minister and get from him—well, such consolation as you can, but the court advises you to place no reliance upon anything of that kind. Mr. Sheriff, remove the prisoner."

CURIOUS CHARGE IN A BREACH OF PROMISE SUIT

THE following charge was delivered by a Georgia judge, in the case of *Durand* v. *Moore*:—

"The plaintiff, Lillian Eloise Durand, sues the defendant, L. L. Moore, for the sum of five thousand dollars, for the breach of a contract of marriage. The defendant, Moore, denies the contract of marriage. This makes up the issue you are to try. . . .

"The Court takes judicial cognizance of the fact that a young man easily falls in love with a maid, and this is especially true of a young "Hill Billy" like the defendant, who is fresh from the classic precincts of the pumpkins and turnips on the farm.

"I charge you that the exercise of plowing into a yellow jacket's nest is conducive to a sentimental mood, and that most of our celebrated poets have in their early lives performed such stunts as holding off the calves while the milking was going on.

"Now, gentlemen of the jury, the plaintiff alleges that the defendant Moore, did, knowingly, feloniously and with malice aforethought, crawl around her, on various and divers occasions, on his bended knees, for hours at a time, using every art and science known to ardent wooers of the male sex, since the time of Anthony and Cleopatra, quoting alleged poetry *ad infinitum*, of which she sets out the following example:—

"Alas for the wail of the whanglewane
And the snore of the snark in the twilight pale,
As the crawl krale up the window pane,
Love me, love, in the gruesome gale."

"After twenty-two stanzas of about the same size winding up with the following;—

"Gone is the whanglewane weird and wold:
Down to the gates of the nether land,
Where the horn toads glide and the musty mold
Eats the lily in my lost love's hand." . . .

"Now, gentlemen, the great question before you to consider is, whether the doctrine of *qui facit per alium facit per se* shall prevail, or whether the maxim handed to us from Solomon, *Jacobus habeat filios duodecim interquos Josephus*, shall rule the country. It might be that the safer rule of *sic semper tyrannis* would apply.

"Gentlemen, this Court, as well as the whole body of society, rests confident of your ability to fitly discharge your duty and to interpret the law I have given you in charge and to assimilate it with the evidence, returning a true verdict after you have thoroughly prognosticated same.

"You may exit and frame your verdict."

IN THE GOOD OLD DAYS

YOUNG men who desire to practise law must sigh for the good old times when the requirements for entering the profession were very simple. Gen. Roger A. Pryor, the Confederate general, who afterward became a distinguished lawyer, was turned over to Hon. John B. Haskins to be interrogated as to his knowledge of law. The two repaired to a restaurant, and the first question asked of Gen. Pryor was as to what constituted the essentials of the negotiability of a note.

This was answered satisfactorily, as was also the next and last, "What will you take?"

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

USELESS BUT ENTERTAINING

The Reading Railway's lawyer was cross-examining a negro woman who had sworn that she saw the train hit a milk wagon whose bandaged driver had just testified. No, she had not heard the engineer blow any whistle.

"How near were you to the train?" the lawyer asked her, sharply.

She didn't know exactly.

"But how far?" the lawyer persisted. "A mile or a square or what? How long would it have taken you to walk the distance?"

"Suh," the witness replied, haughtily, "dat would depend entirely on ma speed!"

—*Philadelphia Times.*

A Durham farmer was traveling to London to consult a lawyer when the fear struck him that he had left certain important papers behind. He made a hurried search of his bag. "If I did leave those papers," he remarked, "I'm a fool!" Just as he was examining the last bundle of papers he exclaimed: "Well, I'll bet I'm a fool." A man on the other side of the compartment lowered his newspaper for a moment and said slowly and deliberately: "Oblige me, sir, by laying a little money that same way for me."

Richard A. Ballinger, Secretary of the Interior, tells of his first law case which he had at Kankakee, Ill. "I had hung out my shingle a good while before any client arrived," he said. "Finally, one came. He was a weak, meek being whom three determined women had wedded in rapid succession, and he was being tried for bigamy. As all of the wives appeared against him we lost the case, and he got a term of two years, but this did not seem to worry him—in fact, he seemed anxious for more. He was taken to the penitentiary, and just before his term ended I got a letter from him. 'Do you think,' the bigamist asked anxiously, 'it will be safe for me to come out?'"

The Legal World

Important Legislation

At the request of the United States Government, the date for the hearing at The Hague of the case in regard to the rights of United States fishermen, in Newfoundland waters, has been postponed until next June. The whole dispute hinges on the important question whether the three-mile territorial limit shall be measured out from a straight line connecting the various headlands, or whether it shall follow the sinuosities of the coast.

Attorney-General Wickersham and his special assistant, J. C. McReynolds, presented to the Supreme Court of the United States Dec. 30 the brief of the government in the famous cases against the American Tobacco Company. After showing that in 1890 competition was free, the various coalitions are traced, resulting in a situation wherein, it is alleged, the very existence of certain defendants is criminal, and "certainly they cannot rightfully complain because restrained from carrying out the unlawful purposes of their creation; they are wilfully in positions where every act is a transgression." Putting aside, for the time being, the effect of the Sherman anti-trust law, under which the suit was brought, it is contended that the combination was illegal when it was entered into in 1890, because contrary to the common law.

Among the assignments of error set out in the appeal of the Standard Oil Company of New Jersey, filed in the United States Circuit Court at St. Louis Dec. 17, are the following: that there was error in the decision that many of the nineteen corporations, a majority of the stock of which was in 1899 owned by the stockholders of the Standard Company of New Jersey, were naturally competitive; in finding that the Standard Oil Company of New Jersey has since 1899 prevented competition; in finding that if the necessary effect of a contract is to restrict free competition it is a violation of the Sherman act; in finding that the exchange of stock of competitive corporations, the effect of which is to restrict competition, constitutes a combination in restraint of commerce; in finding that the so-called subsidiary companies were managed as the business of a single person, the fact being that each company was separately managed by its officers and directors; in finding that the Standard Oil Company of New Jersey has acquired a commanding volume of trade by means of a trust.

That certain editors believe that there is a strong popular hatred of great combinations of capital is shown by the numerous muck-raking articles which have been and are now appearing in many popular magazines. Not long since, one of the corporation magnates who had been thus maligned secured a verdict for $15,000 damages in a suit brought against *McClure's Magazine* (see 21 *Green Bag* 590), and there are other libel actions of like character pending against other magazines. Thus the *Cosmopolitan*, which has been giving many pages to the affairs of the sugar trust, has been sued by Thomas B. Harned, who asks $75,000 damages for the alleged injury due to the publication of an article on "Tragedies of the Sugar Trust," in which it is said, referring to himself: "He sold out his client to the trust." And Judge Ben. B. Lindsey of the Denver Juvenile Court and Harvey O'Higgins have both been sued by W. G. Smith, former speaker of the Colorado house of representatives, for the joint series of articles being published in *Everybody's Magazine*. Mr. Smith asks for $50,000 damages from each, and that the publication of the articles entitled "The Beast and the Jungle" be discontinued.

Important Litigation

The legislative board of the American Automobile Association, which first advocated the policy of uniformity in automobile laws, is about to bring the matter more prominently before the country by a national legislative convention, which will be held in Washington, D. C., Feb. 15, 16 and 17.

Hon. Curtis Guild, Jr., former Governor of Massachusetts, favored federal laws covering divorce and corporations before the New England Society of Cincinnati Dec. 23. "Abraham Lincoln," he said, "was obliged to violate the Constitution of the United States in order to wipe out the crime of human slavery. The nationalization of law thus inaugurated has not yet been fully carried out. We have national laws regulating the distilling of intoxicants, regulating all banks of issue, regulating the operation of the so-called trusts, and regulating the settlement of bankrupts; and we have national law, insufficient and too feebly enforced, that is supposed to secure pure food. Why should not the development of community of law be carried further in all matters of national moment? Why should we shrink from living in peace under one common national law? It is indecent that the safeguarding of common morality in all the states can today be broken down by a state law in any state."

The first bill to bring about reforms of procedure introduced in the present session of

Congress is the American Bar Association's bill which was introduced Dec. 14 by Chairman Parker of the House Judiciary Committee. The amendments provide that no new trial of a cause shall be granted and no judgment be set aside because of the admission of improper evidence or the misdirection of the jury, unless the court is clearly of the opinion that there has been a miscarriage of justice. The practice is changed so that a judge may submit an issue of fact to the jury, reserving his charge on the law and asking for a verdict on the facts involved. No writ of error in a criminal case is to be issued unless a Justice of the Supreme Court of the United States certifies that he has cause for belief that the defendant was unjustly convicted. No writ of *habeas corpus* shall go to the Supreme Court unless a Justice certifies that he has probable cause to believe that the petitioner is being unjustly deprived of his liberty.

President Taft early reached the conclusion that the present form of government in Porto Rico is not suitable to that island and he was impressed also with the idea that the means by which Alaska is governed do not give the best results and tend to retard the development of the territory. He has formulated a plan to be introduced in Congress by Senator Beveridge, under which the government of Alaska will be placed in a Governor and council, to consist of an Attorney-General, a Commissioner of the Interior, a Commissioner of Mines and a Commissioner of Education and Health. A limited degree of popular representation will be provided in the election of four representatives, one from each judicial district of the territory, to sit with the executive council for sixty days every year for the purpose of making territorial laws. Each member of the executive council and each legislator will have a vote. The plan is somewhat along the lines of the government administration in the Philippines under the Taft commission.

Vigorous recommendations for changes in the interstate commerce law are contained in the twenty-third annual report of the Interstate Commerce Commission, transmitted to Congress Dec. 21. It is proposed that a physical valuation be made of the interstate railroads of the country. The Commission again suggests that it be given power to prevent advances in rates or changes to the disadvantage of the shipper, pending an investigation into the reasonableness of the proposed change. It also recommends that it be empowered to establish a through route wherever, upon investigation, it is found that the public necessity and convenience require it. A further recommendation is to the effect that in certain instances the shipper be permitted to direct the intermediate routing of his traffic. It is also requested that the law be so amended as to give the Commission undoubted authority to enter a corrective order as the result of an investigation instituted by the Commission upon its own motion. The Commission again calls attention to the increasing importance of some form of federal control over railway capitalization.

"Present-Day Legislation

In his second and final lecture on "Present-Day Legislation," delivered at Princeton University Dec. 16, Hon. George B. McClellan of New York discussed interstate commerce regulation, paternalism, the initiative and referendum and other subjects.

"The referendum is still in its trial stage," he said. "It may prove utterly impracticable and fail. It may prove itself to be the instrument of radical collectivism. Or, on the other hand, the hard-headed common sense of the American people may assert itself, and the referendum, by checking extravagance, opposing centralization, and discouraging violent innovation, may prove itself to be the best friend conservatism has ever had.

"The American people are slowly, very slowly, awakening to a realization of the truth that they cannot eat their cake and keep it at the same time. If they wish paternalism in government they can only have it by paying the price, and the price is a very long one. The people themselves are far more conservative than are their representatives, far more apt to think twice before deciding, far less apt to be deceived.

"One of the marked characteristics of our period has been the enormous increase in the number of statutes enacted. The popular belief in the efficacy of legislation has resulted in an industry on the part of legislators that would be admirable were it not usually futile and often mischievous. In these days no party ever goes before the people with a purely administrative program. Platforms are nothing more than elaborate schemes of legislation, which if the proponents obtain power they may or may not be able to carry out. Parties usually spend a good part of their time in office in undoing and repealing the acts of their predecessors."

The Interstate Commerce act and the Sherman anti-trust law ex-Mayor McClellan characterized as merely re-enactments of the common law, probably necessary because there is not in existence any federal common law affecting civil matters. But the enactment of similar statutes by the states he condemned as unnecessary, adding that one-half of all the state laws enacted for the regulation of trusts have been declared unconstitutional by the United States Supreme Court. The Hepburn Pure Food act was branded as the extreme of paternalism.

In leading up to the part of his lecture dealing with present-day legislation, Mayor McClellan spoke of the era during which the early political ideals in this country were being shaped. French thought of the eighteenth century, he said, dominated our early statesmen. Jefferson after leaving Washington's Cabinet became an "almost fanatical Jacobin,"

"preached the vaporings of the French Revolution," and "practised the principles of a hard-headed man of the world, not too scrupulous in his methods, but devoted to his country and anxious to serve her to the best of his ability."

Personal—The Bench

Judge M. B. Abercrombie of Tuskegee, Ala., gave a dinner December 22 in honor of the bar and the officials of Macon county.

United States Circuit Judge Peter S. Grosscup delivered a lecture on "Corporations and the Sherman Anti-Trust Law" Dec. 10, before the college of law of Marquette University.

Judge M. M. Brooks of San Antonio, Tex., has resigned from the bench of the Court of Criminal Appeals of that state. He is succeeded by Judge Felix J. McCord, who had served three years as Assistant Attorney-General.

Justice Lewis J. Conlan, who retired from service in the New York City Court, where he had served for sixteen years, on January 1, was presented with a gold-headed cane by the Justices, officers and employees of the court on Dec. 21.

Former Judge Alton B. Parker presided and delivered the principal eulogy of the late Justice Peckham, at a special memorial meeting of its bar of the United States Supreme Court, held in the Supreme Court rooms in Washington Dec. 18.

Governor Hughes of New York has appointed Randall J. Le Bœuf of Albany as Supreme Court Justice of the third judicial district, to succeed the late Justice George H. Fitts of Cohoes. Mr. Le Bœuf was born in Cohoes, N. Y., in 1870.

Judge Andrew Wilson, of the Juvenile Court of New Orleans has been called by Dr. A. S. Orne of Chicago, one of the best juvenile court judges in the country. Dr. Orne is also highly pleased with the Louisiana juvenile laws, as they are practised and enforced in New Orleans.

Tribute was paid to the memory of the late Judge Robert R. Bishop of the Superior Court of Massachusetts, Dec. 18, by lawyers and judges. Resolutions were adopted, after which Chief Justice Aiken spoke, recalling the affection inspired by Judge Bishop, as well as the honor and respect in which he was held.

President Taft has nominated George H. Carpenter of Illinois for district judge for the northern district of Illinois, to succeed the late Judge Bethea. Judge Carpenter has been a circuit judge of Cook county for three or four years. He is forty-two years old, and a graduate of Harvard College and Harvard Law School.

Mayor-Elect William J. Gaynor of New York City was given a dinner Dec. 20 by the bench and bar of New York City. Judge Alton B. Parker acted as toastmaster, and other past and present members of the judiciary expressed warm appreciation of the character and ability of the guest of the evening. Judge Gaynor earnestly asked for the good will and support of the bar in the great task upon which he was about to enter.

In an opinion which reduced the salaries of commissioners in charge of condemnation proceedings in connection with the construction of the Ashokan reservoir in Ulster county, to furnish a water supply for New York City, Justice Howard of the New York Supreme Court made the striking assertion Dec. 28 that at least forty per cent of all the money appropriated for public use is lost in graft. "It is greatly to be regretted," he said, "that no public enterprise can be projected and consummated without this appalling loss called 'graft.' Graft is not necessarily an illegal expenditure of money; but it is that unnecessary wasteful use which characterizes the construction of every public venture."

Federal Judge Peter S. Grosscup appeared as a defender of trusts and combinations in an address given Dec. 17 at the annual dinner of the Illinois Manufacturers' Association at Chicago. He declared that efforts to prevent corporations from combining are as useless and as contrary to the laws of nature as statutes against the fundamental principles that control the solar system. The jurist said the great combinations must be curbed by some sort of government regulations, but he sharply criticized the present laws tending to this end. Discussing in detail the question of railroad regulation, he asserted that neither the Interstate Commerce Commission nor the federal courts are as well qualified to fix rates as the railroad men themselves. He unfolded a scheme which would guarantee the railroads a fixed dividend and allow them to fix their rates accordingly. If their profits exceeded this figure he would provide that the excess should go into the public treasury. His system of reform included industrial insurance and pension funds and a provision by which railroad employees could benefit by some sort of profit sharing arrangement.

Personal—The Bar

Charles A. Colley of Waterbury, Conn., is to retire from the practice of law to manage his real estate interests.

The Senate has confirmed the appointment of Abram M. Tillman as United States Attorney for the middle district of Tennessee.

Albert F. Barker of Brockton, Mass., formerly representative and state senator in Massachusetts, has succeeded Thomas E. Grover as District Attorney for the southeastern district of Massachusetts.

George W. Woodruff, who was appointed United States District Judge for the territory of Hawaii by the President, cabled his resignation Dec. 8, stating that he had accepted a position with the Pocahontas Coal and Coke Company of Virginia.

James M. Beck of New York has been appointed general counsel for the American Sugar Refining Company, succeeding Director John E. Parsons. Mr. Beck is an attorney of the highest reputation and skill, and by common consent is rated as one of the ablest lawyers in the country.

Bar Associations

The Pennsylvania Bar Association will hold its next annual meeting at Cape May on June 28–30.

A portrait of the late Chief Justice James McSherry was formally presented to the Court of Appeals, by the State Bar Association of Maryland Dec. 9.

The Louisville (Ky.) Bar Association put itself on record at its annual meeting on Dec. 28 as favoring an increase in the salaries of Kentucky circuit judges and judges of the Kentucky Court of Appeals and the federal Judges of the United States.

Speakers at the meeting of the Kansas City Bar Association held Dec. 4 were Perry Porter, on "Motor Car Decisions"; Fred Wood, on "Amendments to the Interstate Commerce Law," and Prof. Thomas A. Street of the University of Missouri, on "American Case Law."

The Des Moines Bar Association and similar associations throughout the state of Iowa passed resolutions Dec. 4 recommending the appointment of Horace Emerson Deemer, of the Supreme Court of Iowa, to fill the vacancy caused by the death of Justice Peckham in the Supreme Court.

George D. Van Dyke, former vice-president, was elected president of the Milwaukee County Bar Association in its annual meeting Dec. 11, succeeding Joseph G. Donnelly. Other officers elected were: vice-president, Christian Doerfler; secretary, Carl F. Geilfuss; treasurer, Assistant City Attorney Clinton G. Price. C. H. Van Alstine, W. H. Bender and Edgar L. Wood were elected to the executive committee. In making his annual address, Mr. Donnelly made a strong plea for non-partisan election of judges.

The Kansas Bar Association will hold its annual meeting Jan. 27–28 in Topeka. Professor Roscoe Pound will deliver an address on "Puritanism and the Common Law," and other speakers will be W. S. Fitzpatrick of Independence, Paul Brown of Wichita, R. M. Anderson of Beloit, M. Alden of Kansas City and President Green of Lawrence.

The American Bar Association Code of Ethics was adopted, with two changes, by the Nebraska State Bar Association at its annual meeting at Omaha late in December. The Association rejected the recommendations of the national organization providing against reversals on technical appeals where substantial justice had been done, and did not approve of the suggestions aimed at preventing the abuses of the right of appeal, with its consequent delays.

Joint Meeting of the American Historical and American Economic Associations

To celebrate the quarter-centennial of the American Historical Association and of the American Economic Association, the two bodies held a joint convention in New York Dec. 28–9. Opening the meeting, Professor Davis R. Dewey of the Massachusetts Institute of Technology, president of the American Economic Association, emphasized the importance of accurate observation. "Records are conflicting at to what really happened in the panic of 1907," he said. "It is futile to attempt reform in the currency until there is greater agreement as to what are the actual conditions the repetition of which we seek to avoid."

President Albert Bushnell Hart of the American Historical Association treated a similar subject in his paper on "Imagination in History," declaring that "the pressing danger of the republic is inaccuracy."

Hon. Joseph H. Choate defended New York City from the charge of being mercenary, enumerating Columbia, City College, the Normal College for Women, the public schools and the museums as instances of the advance of the city. He pointed out also that New York had given freely to the outside universities, such as Harvard, Princeton and Chicago. "The whole thing is reciprocal," he said. "New York is the heart of the nation, and it sends it life blood through all the arteries of the land."

Ex-Mayor McClellan entered on a defense of such writers as Prescott, Dumas and Ferrero as being able to make his story live again till even the perusal of Hallam's "Middle Ages" may become a joy.

President Nicholas Murray Butler of Columbia said that he regretted the absence of the psychologists, who were holding their annual meeting in Boston with the American Association for the Advancement of Science, as they could throw great light on the questions of political science and public law.

Governor Hughes declared that the Ameri-

can people may justly criticize the executives of our day for their mistakes, but they will pardon them, if they believe that there is a sincere endeavor to ascertain the facts, to deal with problems in the light of the facts, with the sole object to be of service to the community, and that must be the test to be applied to all essays of administration.

President Lowell of Harvard University talked on "Physiology in Politics," and said: "How much do statesmen turn to professors of political science for advice? Surely students of politics do not lead public thought so much as they ought to do; and is this not largely because they are regarded as theoretical; because, in other words, they do not study enough the actual workings of Government? Politics is an observational, not an experimental, science; and hence the greater need of careful observation of those phenomena which we can use. For example, what are the classes of voters who change sides, or abstain from voting, at different elections, and in what way is this affected by the Australian ballot, and by direct primaries or other methods of nomination?"

Professor Farnham discussed "Labor Legislation and Economic Progress," and Professor E. M. Parker of Harvard presented a paper on "Administrative Courts for the United States." The latter speaker said: "Our system of submitting questions between government and citizens to the ordinary courts is not in all things advantageous to the citizen."

On the second day, Professor Frank W. Taussig of Harvard University deplored the lack of exact methods of formulating a theory of wages that would hold good under all conditions.

Professor G. M. Wrong of the University of Toronto declared Canada to be to all intents and purposes a free country, which could break its ties with the mother country without a struggle, with the people of Canada hardly knowing that a change had been taking place.

Ambassador Bryce's address on "Recent English History in its Constitutional Aspects" was largely devoted to a tribute to Gladstone's knowledge of the British Constitution and his notable work in helping to mould it to fit modern conditions.

Many other equally important addresses were delivered, which there is not room to notice.

Miscellaneous

Professor George W. Kirchwey, Dean of the Columbia Law School, spoke Dec. 19 in Trinity Church, Boston, on the legal aspects of the peace movement in its relation to the Christian church. He expressed the belief that the Hague plan is about to be consummated.

There has been a deal of agitation in years past for a Supreme Court building on Capitol Hill, Washington, as a companion building to the Library of Congress. The new customs court will be organized late in the autumn ranking next to the Supreme Court of the United States, and if the new interstate commerce court is authorized it will make another tribunal of co-ordinate judicial power. There will probably be need, therefore, of such a building.

Speaking to the Civic Forum at Carnegie Hall in New York City on Dec. 28, on the centenary of Gladstone's birth, Ambassador James Bryce said that Gladstone's leadership was marked by his work for peace and good will among the nations. He was helped in all his public life by his deep religious faith and earnest piety. This moral courage, Mr. Bryce said, was rare among politicians. Gladstone's mind was open to the call of any good cause, which was the finest test of any leadership.

The twelfth General Convention of the Legal Fraternity of Phi Delta Phi was held in New York City, Dec. 28 and 29. Forty out of forty-one active Chapters were represented. Six applications from Law schools were considered, and charters were granted to the Pittsburgh Law School and the Alcalde Law Club of the University of Texas. The following were elected members of the Executive Council:—Earl G. Rice, Seattle, Wash.; Louis D. Barr, Mansfield, Ohio; Emmett A. Donnelly, Madison, Wis.; Herbert M. Peck, Oklahoma City, Okla.; Geo. A. Katzenberger, Greenville, Ohio.

Necrology—The Bench

Bryant, Judge Edgar E.—At Coffeeville, Miss., Dec. 11, aged 48. Orator and jurist; a popular but unsuccessful candidate for Governor of Askansas; a brilliant man of high literary attainments.

Castor, Judge Lyman G.—At Vienna, Ill., Dec. 9. For the past three years county judge.

Cope, Walter Burton.—At San Francisco, Cal., Dec. 6, aged 48. Served two terms on the superior bench of California; formerly president of the San Francisco Bar Association.

Devine, Judge James B.—At Sacramento, Cal., Dec. 16, aged 48. One of the ablest lawyers in California; formerly Justice of the Peace in Sacramento, also Court Commissioner.

Fahrion, George.—At Kiowa, Col., Dec. 6, aged 73. Judge of Kiowa county for thirty-seven years; never had one of his decisions reversed; one of the best known lawyers in the state.

Fitts, Justice George H.—At Kingston, N. Y., Dec. 17, aged 58. Served as city attorney of Cohoes, N. Y., and Surrogate of Albany county; elected Supreme Court Justice for the Third Judicial Department in 1905; term would have ended in 1918.

Green, Judge A. B.—At Livingston, Tex., Dec. 18. Served in Confederate army in the Civil War.

Jenkins, Judge William Frank.—At Eatonton, Ga., Dec. 17. Judge of the Ocmulgee circuit for a number of years; served in both the house of representatives and the senate of Georgia.

Jones, Leonard Augustus.—At Boston, Dec. 9, aged 77. Editor *American Law Review* for nineteen years; first presiding justice of Land Court of Massachusetts; Commissioner on Uniform State Laws from Massachusetts from 1891 to 1902.

Liddon, Judge Benjamin S.—At New Orleans, La., Dec. 23, aged 55. Appointed to fill the vacancy caused by Chief Justice Raney of the Florida Supreme Court in 1894; elected that same year for a term of six years; served less than a year and retired in 1897.

Sutphen, Judge Silas T.—At Defiance, O., Dec. 11, aged 71. Prosecuting attorney of Defiance county; an influential Democrat; for many years Common Pleas judge; president of the board of trustees of Defiance College.

Zollars, Judge Allen.—At Fort Wayne, Ind., Dec. 20, aged 70. Former judge of the Indiana Supreme Court; for many years attorney for the Pennsylvania Railroad.

Necrology—The Bar

Ainney, Isaac.—At New York City, Dec. 14, aged 38. Practised in Bay City, Mich., where he was high in Masonic circles.

Andrews, George L.—At Hamden, Conn., Dec. 22, aged 50. Formerly Prosecuting Attorney of Hamden; for six years town clerk, and later clerk of the court at Hamden.

Biggs, Charles G.—At Sharpsburg, Md., Dec. 9, aged 59. Twice elected to Maryland legislature, large fruitgrower and prominent in Washington county, Md.

Burnes, C. Herbert.—At Richmond Hill, N. Y., Dec. 18, aged 43. Formerly secretary to Supreme Court Justice Garretson of Flushing, L. I.

Chittenden, Horace H.—At Burlington, Vt., Dec. 26, aged 55. Was graduated from Yale in 1874, and from Columbia Law School; practised in New York and Burlington.

Coon, George C.—At Elizabeth, N. J., Dec. 10. Lawyer and inventor.

Daniels, Charles E.—At Scranton, Pa., Dec. 14. Popular and successful member of Lackawanna Bar Association.

Daveis, Edward H.—At Portland, Me., Dec. 12, aged 91. Admitted to the bar in 1841; withdrew from practice in 1860; head of Portland Gaslight Company for fifty years; author of Daveis' Reports of Federal Cases.

Gontrum, John F.—At Gardenville, Md., Dec. 27, aged 54. Senior counsel for the Board of County and Highway Commissioners, Baltimore, county, Md.

Haines, Lewis Marshall.—At Elkton, Md., Dec. 5, aged 62. Counsel for the Pennsylvania railroad; one of the leading lawyers of Maryland.

Hamlin, Howland J.—At Shelbyville, Ill., Dec. 12, aged 59. Former Attorney-General of Illinois; born on a farm in New York, taught school and read law at the same time, was admitted to the bar in 1875; attorney for the Railroad and Warehouse Commission during the Altgeld and Tanner administrations.

Hart, William M.—At Flatbush, N. Y., Dec. 31, aged 40. A graduate of New York University Law School; practised in Brooklyn.

Johnson, Henry A.—At Boston, Mass., Dec. 23, aged 85. Had practised law in Boston since 1850; member Harvard Class of 1844.

Lees, Edward M.—At Bridgeport, Conn., Dec. 19, aged 76. Practised in Westport, Conn.; a veteran of the Civil War.

McLaurin, Anselm J.—At Brandon, Miss., Dec. 22, aged 61. United States Senator from Missouri; served through Civil War in Confederate army; began the practice of law in 1868; elected district attorney in 1870; went to Legislature in 1879; became Governor of Mississippi in 1895; elected to United States Senate in 1900; elected for another term of six years in 1907; always a champion of the South in the Senate.

Moses, Raphael J.—At New York City, Dec. 15, aged 66. Fought in Confederate navy in the Civil War.

Newman, William H.—At New York City, Dec. 30, aged 75. Won several famous insurance cases in the seventies; formerly a partner of Judge Smith of Brooklyn.

Nye, Norman M.—At Brookline, Mass., Dec. 19, aged 36. For twelve years in the law office of Horace G. Allen in Boston.

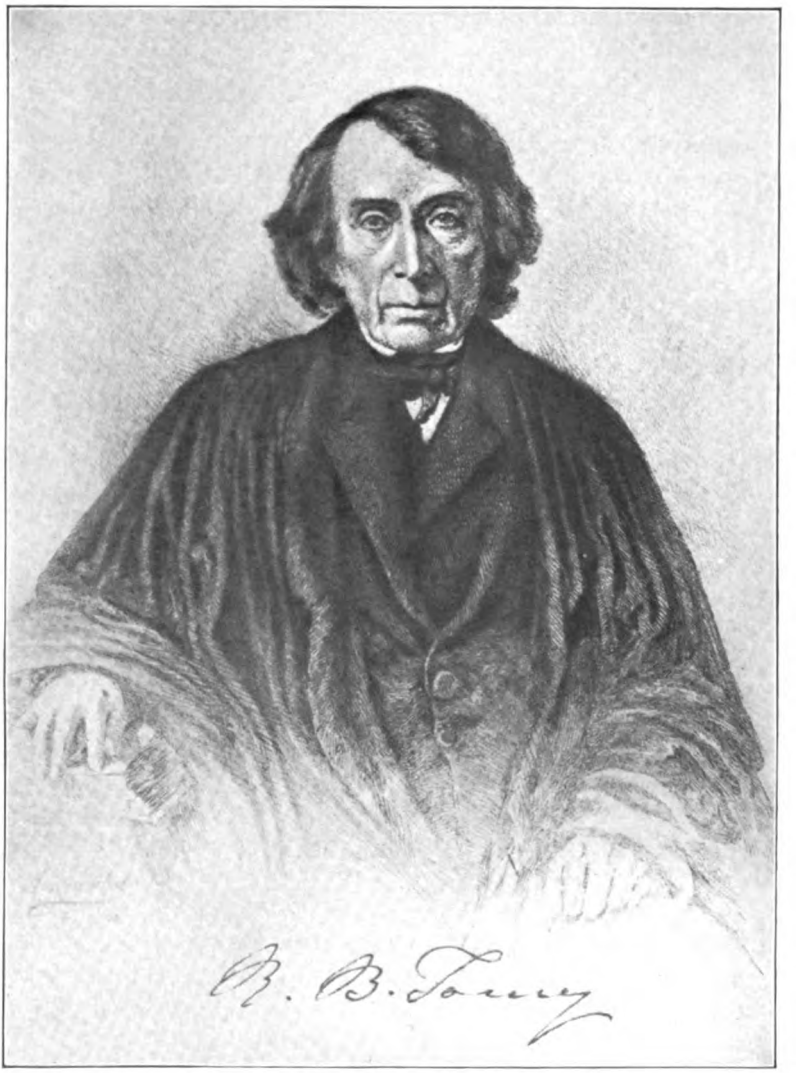
Robinson, Charles Pitts.—At Providence, R. I., Dec. 20, aged 68. Studied law at Brown University and at Heidelberg, Germany; formerly president of the Providence common council.

Sheldon, George P.—At Greenwich, Conn., Dec. 25, aged 62. Was graduated from Yale in 1867, and from Columbia Law School; counsel for, and later president of the Phenix Insurance Co.

Thompson, Philip.—At Washington, D. C., Dec. 15, aged 64. Fought in Confederate army in the Civil War; elected Commonwealth's attorney for the Harrodsburg (Ky.), district; member of the Forty-sixth, Forty-seventh and Forty-eighth Congresses.

Van Horne, Robert M.—At Montgomery, O., Dec. 15, aged 48. Held several offices under the city administration of Cincinnati, where he practised.

Van Winkle, Albert Wallace.—At New York City, Dec. 17. Lawyer and president of a harness company in New York.



CHIEF JUSTICE TANEY

FROM THE ETCHING BY MAX ROSENTHAL

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The Green Bag

Volume XXII March, 1910 Number 3

Roger Brooke Taney, Chief Justice of the United States*

By Henry K. Braley

Associate Justice of the Supreme Judicial Court of Massachusetts

In a government of divided, but co-ordinated powers defined by a written constitution, the different departments will tend to become prominent and influential in proportion to their ability to meet the demands of the popular will as it may be manifested in the varying stages of national growth. We have seemingly entered upon a period when the people expect a degree of personal leadership in the executive branch far beyond that which possibly can be exerted by the Congress. The exclusive control of the veto power rightly holds the President to a measure of responsibility which by its mere exercise enables him powerfully and legitimately to control legislation, while the more than regal authority and patronage attached to the office constitutes, when skillfully used, one of the most potent forces for the furtherance and establishment of the Presidential will.

In the formative years, however, while slowly and experimentally the machinery of our constitutional system was being adjusted, prominent members of the Cabinet or Senators, or Representatives, were largely, if not equally influential in the administrations of Washington and John Adams, and their governmental conceptions, finding expression along the lines of well defined policies, influenced public opinion to adopt at the polls their views of the Constitution as reflected by the administration at the national capital. The range of the government began and ended in the political opinions and movements of the executive and of Congress. But meanwhile, although the common law remained the inheritance of the states, whose courts expounded and applied its principles, a national jurisprudence was yet to be created, and the powers of the judicial department awaited definition.

The early history of the Supreme Court of the United States as the head of the federal judicial system is barren of any effort to enter upon the task. Clothed with the most ample powers either of original or appellate jurisdiction in all cases in law and equity arising under the Constitution, the laws of the United States, and treaties made under their authority, all cases of admiralty and maritime jurisdiction, and controversies to which the United States

* A paper read before the Brookline (Mass.) Thursday Club, Nov. 4, 1909.

is a party, to controversies between the states, or between citizens of different states, or between citizens of the same state claiming lands under grants of different states, within constitutional limits its authority was absolute and its judgments were final. Although in dignity and the attributes of jural prerogative it was second to no court of last resort in the civilized world, and its members were removed from the vicissitudes of political changes, owing to the permanency of their tenure, positions upon its bench, at first and long afterwards, were not sought or looked upon as the goal of professional ambition. Robert Hanson Harrison, after being commissioned an Associate Justice, resigned the office and returned his commission to accept the position of Chancellor of the State of Maryland. John Jay, who was commissioned by Washington as the first Chief Justice September 26, 1789, held the office until 1795, when he resigned to accept the Governorship of New York. John Rutledge, of South Carolina, resigned as Associate Justice to become Chief Justice of that state, was commissioned during a recess to succeed him, but not being confirmed by the Senate, William Cushing, the senior Associate and the first Justice appointed from New England, was promoted, but declined the honor, the only instance in the history of the court of the advancement of an Associate Justice to be its head. He was followed by Oliver Ellsworth of Connecticut, the framer of the Judiciary Act of 1789, which provided for the Circuit and District Courts and the appellate jurisdiction of the Supreme Court. Having been appointed in October, 1799, one of the three envoys extraordinary and ministers plenipotentiary to France, the Chief Justice because of ill health resigned the office from Paris in 1800. John Adams, then President, nominated Jay the second time, who was confirmed, his commission bearing date Sept. 19, 1800. Jay however declined. Perhaps the standing of the court, and the importance of its functions as viewed by men of public affairs, cannot better be shown than in his words declining the office, written January 2, 1801. "I left the bench," he says, "perfectly convinced that under a system so defective it would not obtain the energy, weight and dignity which was essential to its affording due support to the national government, nor acquire the public confidence and respect which as the last resort of the justice of the nation it should possess. . . . Independent of this consideration the state of my health removes every doubt." He did not foresee that the court was yet to become "the living voice of the Constitution." It illustrates not only the dearth of business but the fact that the judicial office was largely looked upon as a position whose duties were not incompatible with the holding of other public offices, to know that Jay concurrently held the office of Chief Justice while acting as special envoy of the United States in England, while Chief Justice Ellsworth, as we have seen, went to France as an Ambassador. He left the court without a quorum, as Judge Chase at the August term in 1800 was absent from the bench in Maryland on a political campaign in favor of the administration. If this course of action had persisted it would have wrecked whatever standing the court possessed as a seat of judgment. But this great and threatening evil soon passed.[1]

John Marshall, commissioned by John Adams January 31, 1801, although he retained the office of Secretary of State

[1] See Carson's Supreme Court of the United States, vol. I.

until Jefferson's inauguration, from that time on devoted his great powers to the establishment of the court as an efficient part of the government. It constantly advanced during the thirty-four years of his administration, assisted and supported by a group of able associates, in the respect and estimation of the country. It is not within the scope of this paper to refer specially to the many notable and earlier decisions by which he may be said to have interpreted the Constitution as a body of organic law, alike adapted for the maintenance of a strong central government as well as recognizing and protecting the autonomy of the states. In the long contest which Marshall waged with Jefferson, Madison, Monroe and Jackson, and the ever rising forces of democracy, the one formidable weapon in the judicial armory to which the executive, and Congress could interpose no effective shield, was the power to declare a federal statute void because not within the sanction of the Constitution.

If Judge Dillon's view,[2] that there are times of great political upheaval and excitement in a democracy when the people by operation of the organic law must be protected from themselves until normal conditions are restored, is the counteravailing balance giving poise to the governmental machinery, yet in England, "where freedom broadens slowly down from precedent to precedent," an act of Parliament is supreme, binding alike the courts as well as the subjects of the realm. If the student of forms of government may sometimes hesitate before saying that the power of a judicial tribunal to thwart the will of the electorate as expressed through their chosen legislative representatives furnishes a greater safeguard for the preservation of their liberties than if legislatures were left untrammeled to work out for good or ill the results intended, our system so far not only has been found workable and satisfactory but has successfully stood the perils of internecine conflict and the period of reconstruction.

In *Marbury* v. *Madison*, 1 Cranch 137, decided in 1803, is found the first announcement of the doctrine that Congress has no power to pass a statute not within the Constitution. The argument of Chief Justice Marshall, while simple, is conclusive. It is, that the Constitution must be regarded as setting a limit to the legislative power by the terms employed in the instrument, and the Supreme Court, upon which original jurisdiction is conferred. must decide conformably to the law, rather than disregard the Constitution, where the act of the legislature is in conflict with its provisions. It is interesting to recall that so much of this decision as discussed the constitutional question and announced this principle was entirely outside of the record and wholly uncalled for. The court had no jurisdiction whatever, and so said, of Marbury's petition for a writ of *mandamus* to compel Madison, who was Jefferson's Secretary of State, to issue to him a commission as justice of the peace, to which office he had been appointed in the closing days of President John Adams' administration. The political differences which gave a vivid accentuation to the decision have long since passed, and irrespective of party affiliations, or that being without jurisdiction this part of the opinion was wholly irrelevant, the court has never departed from the principles announced.

If Marshall when he died in the summer of 1835 had securely laid this corner stone of our federal jurispru-

[2] Laws and Jurisprudence of England and America, 205, 206.

dence, Roger Brooke Taney, his successor, who held office for twenty-eight years, not only continued the foundations but profoundly influenced the superstructure. Born in Calvert county, Maryland, on March 17, 1777, his maternal ancestors were of English descent, while on his father's side the Taneys were among the first settlers of the state where they owned large landed estates, which by descent became the home of the future Chief Justice. To be the head of this tribunal, which from a position of feebleness had now advanced under Marshall's guidance to a place of almost overshadowing power, the new Chief Justice was called at the age of fifty-eight. What were his qualifications for the great trust which he had been chosen to administer?

Reared in an environment of refinement and affluence, and like his paternal forbears a member of the Roman Catholic Church, there was no school but one kept in a log cabin within ten miles of the plantation. To this at the age of eight he was sent. Here he acquired the rudiments of reading, writing and arithmetic as far as the rule of three. Another school somewhat farther away afforded more advanced instruction, but the teacher having become insane it was closed, and the father having decided to give his son a classical education, he fitted for college under private tutors, and at fifteen years of age entered Dickinson College at Carlisle, Pa., where three years later, in the autumn of 1795, he graduated the valedictorian of his class, and received the bachelor's degree. Never of robust constitution, and of a retiring disposition and contemplative habit of mind, the fox-hunting, card-playing, hard-drinking proclivities of his father and the neighboring planters do not appear to have attracted him, although it is said he could follow the chase through a long day's hunt. In the authentic facts of his life as they appear in "Tyler's Memoir," I am unable to find that he ever sought recreation from the cares of his profession in the solution of difficult problems in mathematics, or engaged in scientific pursuits as a solace or avocation. Having been destined for the legal profession, in 1796 he began his studies at Annapolis in the office of Chief Justice Chase of the Maryland Court of Sessions.

The bar of Maryland at that time, among other distinguished men, numbered in its ranks Luther Martin, William Pinkney, Philip Barton Key and John T. Mason. The terms of the court held at Annapolis were attended by these eminent lawyers, and for three years he read law, listened to their arguments, and observed their methods in the preparation and trial of cases. A better school for a young man of Taney's intellectual capacity and habits of reflection, providing him with the theory of the law, with its practice by masters of their art, could not have been furnished, even if in the opinion of the profession of today the *curricula* and moot courts of the law schools must be conceded as superior for the training of the average student.

He was called to the bar in the spring of 1799. Tall, with a dignified presence, and well equipped for practice, he suffered like Erskine and other eminent advocates, as he says in his incomplete autobiography, from "a morbid sensibility," to which was added the weakness of a hot temper aroused almost to fierceness by antagonism. He tells us that at times these conditions were almost so overpowering in the earlier years of his career that he would have willingly abandoned the law if other means of support could have been pro-

vided. But with great strength of will he fought both. He availed himself of every opportunity which offered to speak either in the court room or on the hustings. It is not improbable that these disabilities were intensified by his always delicate and often infirm health, and the untiring efforts which he was obliged to put forth when coming in contact as he frequently did with those great leaders. As Webster strove with Jeremiah Mason, Franklin Dexter and Rufus Choate until he met them on more than an equal footing, so Taney overcame these limitations until he encountered the prominent men not only of the Maryland bar as their equal, and had his claim allowed, but in the larger forum; and before the court of which he was to become the official head, he did not hesitate to engage with William Wirt, or expose himself to the mighty grip of Webster. He has been described by a contemporary "as seeking no aid from the rules of rhetoric nor from the supplied graces of elocution. Nor did he make a single quotation from the poets. Yet his English was always chaste and classical, and his eloquence undoubtedly was great, sometimes impetuous and overwhelming. He spoke when excited from the feelings of his heart, and as his heart was right, he spoke with prodigious effect."

The wine of his opinions, as Dr. Johnson said of Bacon's writings, "is a dry wine." But his use of English as a tool was masterly. Tyler in his memoir tells us, "he was a diligent student. Law was his chief study, but he devoted much time to the study of history and letters. He not only studied thoughts but be studied words with uncommon care. He cultivated a severe taste." If his written style, which is said to have been formed from the reading of Shakspere and Macaulay, but tempered with the calmness demanded in judicial expression, was so limpidly clear as to be sought as a model by Chief Justice Chase who succeeded him, his spoken word accompanied by robust argumentation, and presented with sincerity and conviction, well may have been of commanding power, whether addressed to the court or to a jury.

Of his pure and upright life, his strength of character, his uniform courtesy to all with whom he came in contact, his independent thought, his democratic breadth, from his early manhood to the close of life, there is today no question. Born and nurtured in a slaveholding community, his father a slaveholder, Taney did not hesitate to defend Gruber, a Methodist minister, who addressed about four hundred negroes denouncing slavery, causing his prosecution for sedition. In his closing address to the jury which acquitted the defendant, he used this language, which seems to have voiced his convictions as a man, for he manumitted the slaves afterwards inherited from his father, and never was a slave owner:—

> A hard necessity indeed compels us to endure the evils of slavery for a time. It was imposed upon us by another nation while we were yet in a state of colonial vassalage. It cannot be easily or suddenly removed. Yet while it continues it is a blot on our national character, and every lover of freedom confidently hopes that it will be effectually, though it must be gradually wiped away, and earnestly looks for the means by which this necessary object may be obtained.

The road then as now to large public preferment lay through the field of politics, and Taney, in party affiliation a Federalist, entered the political arena. He was defeated for the House of Delegates, but became a member of the state senate, although unsuccessful in his contest as a Representative to Congress, owing to the dissensions of the Federalist

party over the War of 1812, to which he with many others was opposed. It cannot, however, be said that he aspired to lead a political life, and his constantly increasing practice and rising fame as a lawyer led him to remove from Frederick, where he first settled, to Baltimore, where he shortly became, by appointment of the Governor, Attorney-General of the state. Never much addicted to society, though exceedingly gracious and urbane in social intercourse, he gave himself unsparingly to the law, and the reward both sure and steadfast was his, of complete professional success. But the time was now at hand when at the age of fifty-two he was to pass to a wider career, of which the foundations had been broadly and deeply laid.

In 1828 Gen. Jackson had been elected President on the Republican ticket, defeating John Quincy Adams, who ran for re-election, and in organizing his Cabinet desired a representative of the Federalist party. Taney, although opposed to the War of 1812, after it began cordially supported the government, and this attitude, with his undoubted qualifications for the office, led to his appointment as Attorney-General of the United States. At this period, by reason of his personal fame, and as the legal adviser of Jackson in his long controversy with the United States Bank, Taney became and continued to be a prominent personage in our national life until the opening of the Civil War.

It has been his misfortune, as of other eminent men of whom there are many conspicuous examples, that generally his place in our history has been defined by his political enemies, and not by his friends. If within the range of this paper, time does not permit of more than a somewhat cursory notice before his elevation to the bench, of his relation to President Jackson, or the public men who were his contemporaries, no correct understanding of his influence upon the Court and upon our law can be formed without some reference to him as a member of President Jackson's Cabinet. Whether as Attorney-General or Secretary of the Treasury, he no doubt heartily approved of the Presidential policies, and not only advised as to the veto of the bill renewing the charter of the Bank of the United States but substantially wrote the message. The intensity of feeling over legislation relating to the United States Bank was great. The friends of the bank, Binney, Adams, and McDuffie in the House, Webster, Clay and Calhoun in the Senate, denounced Jackson and Taney in unmeasured terms. It seemingly was not enough to oppose them as political antagonists, whose acts were repeatedly declared to be unconstitutional, but their motives as men and lovers of their country were assailed by the Whig press and the rank and file of the party. It did not tend to mitigate, but rather to increase asperities, that the ground upon which Taney advised Jackson, and upon which Jackson really rested his policy, was that the bank constituted a monopoly more or less destructive of the state banks, and dangerous in its tendencies to the welfare of the states. Final issue, however, was joined at the polls in the Presidential election of 1832, and Jackson was vindicated. Having failed to obtain a continuation of its charter no course was left except liquidation, and the state banks having been found safely adequate as fiscal agents of the government, the President directed Mr. Duane, Secretary of the Treasury, to withdraw the deposits of the United States, and upon refusal, he was removed, and Taney, who had remained in the second Cabinet as Attorney-

General, resigned that office, and at once was appointed Secretary of the Treasury. He issued an order that no further deposits of government funds should be made, but the money deposited was only withdrawn as the needs of the treasury required. Party feeling still ran high, and the Senate was under the control of the Whigs. His appointment to the Secretaryship had been made during recess, and when, on June 3, 1834, his name was sent to the Senate the nomination was promptly rejected, being the first time that a Cabinet appointment had failed of confirmation. Taney resigned and retired to Baltimore, where he was received with every demonstration of affection and honor.

If the struggle over the bank had ended, personal antagonisms born of the strife survived. Webster in a public address at Salem spoke of Taney as the "pliant instrument" of Jackson, to which at a public dinner in Baltimore Taney returned this neat retort:—

> Neither my habits nor my principles lead me to bandy terms of reproach with Mr. Webster or anybody else, but it is well known that he has found the bank a profitable client, and I submit to the public whether the facts I have stated do not furnish ground for believing that has has become its "pliant instrument," and is prepared on all occasions to do its bidding whenever and wherever it may chose to require him. In the situation in which he has placed himself before the public it would far better become him to vindicate himself from imputations to which he stands justly liable then to assail others.

Taney now had been the recipient of distinguished honors. In the atmosphere of large affairs, and in his association with the leading public men of his time his mind had broadened. His extensive juristic learning, leavened by this invaluable experience, began to take on more and more characteristics of wisdom. The higher ranges of the law in its application to the administration of our form of government had become familiar. Profoundly versed in the common law, equity jurisprudence, and maritime law, he walked with ease where lesser though able lawyers sought their course with chart and compass. Time, and association with his fellows, had tempered without weakening, moral and mental qualities which gave him strength and determination for large achievement. Inflexible in purpose when once his line of action had been decided upon, he did not force his way, but by argument and persuasion oftentimes subtle, yet never disingenuous, moved steadily to the goal.

If General Jackson never forgave an enemy he never forgot a friend, and Mr. Justice Duvall of Maryland, who had been appointed by President Madison, having resigned because of his advancing age, in January, 1835, after a judicial service of twenty-four years, the President sent Taney's name to the Senate to fill the vacancy. Marshall, upon hearing of the nomination, wrote to Senator Benjamin W. Leigh of Virginia: "If you have not already made up your mind on the nomination of Mr. Taney, I have received some information in his favor which I wish to communicate." But the Senate took no action until the end of the session, when it voted to postpone indefinitely, and the nomination expired with the adjournment of Congress. We shall now see how "the whirligig of time brings in his revenges."

Chief Justice Marshall having died in the summer of 1835, on Dec. 28, President Jackson nominated Taney to be Chief Justice. The political complexion of the Senate had changed, and though Clay and Webster still vigorously opposed him on political grounds, on March 15, 1836, the nomination was confirmed by a majority of fourteen votes,

and his commission issued. It must have been with no little satisfaction that the old soldier remarked at the inauguration of Van Buren, "There is my defeated Minister to England sworn in as President of the United States by my defeated judge of the Supreme Court."

He had now obtained a position as the head of a department to which Webster and Bryce refer as "the most powerful branch of the government." But this should be qualified by the reflection that the mandate of the Court may be functionless unless the executive recognizes and enforces it. The physical power of the federal government is under the control of the executive and of Congress. There is a suggestion of a grim possibility in Jackson's comment on the opinion of the court in *Worcester* v. *State of Georgia*, 6 Pet. 575, "John Marshall has made his decision, now let him enforce it," or in the subsequent action of President Lincoln, who ignored the writ of *habeas corpus* from the same tribunal, although Congress had not then voted to authorize him to suspend the privilege. It should not however, be overlooked in any consideration of the functions of the court, or the judicial conduct of its members as expressed in opinions on constitutional law, that judges carry their political views with them upon the bench, and especially is this true of appointments to the Supreme Court of the United States, which from its formation have always been largely partisan. Taney, like his predecessors, even when clothed with the judicial ermine, was not exempt from the effect of the political convictions of a lifetime. It was repeatedly said by opponents that he owed his appointment to his aid and support of General Jackson in his contest with Biddle over the United States Bank, and because in obedience to the wishes of his chief he had removed the deposits. But his predecessors, Ellsworth and Marshall, largely owed their advancement to effective service in the interests of the Federalists, while Salmon Portland Chase, his immediate successor and one of the chieftians of his party, went from the Secretaryship of the Treasury to the bench. We may dismiss without further comment these attacks as the last echoes of party strife. Clay on his part recanted and generously gave his unqualified approval of the administration of the Chief Justice. Webster, always more temperate in comment, cordially recognized the excellence of the Court, and in a letter to Story commended the judicial work of Taney.

The Chief Justice took his seat on the bench at circuit at the April term, 1836, in Baltimore, and at the January term, 1837, presided for the first time over the full court. Without making radical departures Taney sought to bring the structure framed by Marshall into greater harmony with the plans of the makers of the Constitution. It has been well said,[3] "It is owing largely to the genius of these two great Chief Justices that an indestructible nation of indestructible states is due. Who in this work performed the greater service is a question which will be answered according to the political views of the person to whom it is propounded." No history of the American nation worthy of the name can be written which does not deal with their work. As well might the historical student expect to comprehend the development of the English people without some knowledge of Westminster Hall, the Assizes after Sedgemoor, and the Trial of the Seven Bishops. Historians and essayists vary accordingly as they write from the point of approach

[3] Great American Lawyers, v. 4, p. 77, "Taney," by Prof. Mikell.

of the partisan narrator, or are guided and informed by an impartial study of constitutional law. If many of the *political* critics seem to forget, when reviewing the work of Taney, that there is no judicial alchemy by which you can evolve sound constitutional law out of the instincts of mere partisan politics, so the constitutional lawyer sometimes fails to appreciate the motive power of facts, and becomes forgetful of the truth that in a democracy grave questions affecting its welfare are never settled until settled according to the dictates of the moral consciousness and sound sense of justice of the plain people. The stream can rise no higher than its source, "and the general standard of justice in a municipal society is so much of the general rule of morality and ethics as that society chooses to enforce upon its members." All laws, written or unwritten, really rest upon public opinion.

In the realm of constitutional jurisprudence the lawyer who has become not only familiar with systems and codes but with their administration by courts of justice, treads with surer footing and is a more illuminating guide than he who deals with the subject solely as a theorist or treats the sovereignty of the states and the prerogatives of the central government as mere incidents varying with the ebb and flow of political parties. In his "John Marshall," speaking of Marshall's work, Professor James Bradley Thayer observes:—

> He determined to give full effect to all the affirmative contributions of power that went to make up a great and efficient national government, and fully also to inforce the national restraints and prohibitions upon the states. In both cases he included not only the powers expressed in the Constitution but those also which should be found, as time unfolded, to be fairly and clearly implied in the objects for which the federal government was established.

Of the effect of this interpretation Professor McDonald says in the "History of the American Nation," edited by Alfred Bushnell Hart, under the title of "Jacksonian Democracy":—

> It was the development of the doctrine of implied powers . . . stated by Marshall in a long series of decisions [that] had given the judicial authority a scope far beyond anything that could have been dreamt by those who saw the national government inaugurated. . . . If progress was to continue in this direction the authority of the nation would soon be overwhelmingly supreme, and the "sovereignty of the states" would become ere long only a memory and a name.

No process of reasoning is required to show that when once the doctrine of implied powers is accepted in its broadest scope, there is no observable limit to which it may not be extended in the hands of a strong Chief Justice, supported by a court which stamps with the impress of final authority its construction of our national charter. While interesting and instructive, I cannot enter farther into this field, and refer to the attitude and decisions of the court upon constitutional questions since Taney's time. When Marshall died, three cases of large interest had been argued and discussed, but apparently were not ready for decision. By reason of his death and lack of a majority they now came on for reargument.

Let us for a moment glance at the personnel of that great bench. To the right of the Chief Justice sits Joseph Story, on the left William Thompson. Then follow in the order of their appointment McLean, Baldwin, Barbour, while Wayne, the last appointee of President Jackson, who had filled the majority of the seats during his Presidency, and destined to survive all his associates, was the junior judge. The original practice had been for the Chief Justice to act as the organ of the court, and while

this had been changed to some extent in Marshall's day, now each judge who wrote an opinion read it upon the coming in of the court. Formerly, in all constitutional questions judgment was not delivered unless all of the members of the court had come into substantial agreement, but in the last days of Marshall this practice ceased. Thereafter, unless a majority of the court concurred, such cases stood for reargument.

We may pass over the cases of *Miln* v. *New York*,[4] where it was decided by a majority of the court, Mr. Justice Story dissenting, that a state statute requiring the master of every vessel arriving at the port of New York to report to the public authorities in writing the number of his passengers did not interfere with the authority to regulate commerce within the express grant of the federal Constitution, and *Briscoe* v. *Bank of the Commonwealth of Kentucky*,[5] in which it was held that the act of the legislature in chartering a state bank was not repugnant to the provision in the federal Constitution which prohibits the states from issuing bills of credit, as there was no limitation in that instrument on the power of the state to charter a bank, it having such power as an incident of state sovereignty, and come directly to the last case, *The Charles River Bridge* v. *Warren Bridge*,[6] which had come up on a writ of error from the Supreme Judicial Court of Massachusetts, where the bill had been dismissed by an evenly divided court.

In 1650 the legislature granted to Harvard College the power to dispose of the ferry plying between Charlestown and Boston over the Charles River. The college received the profits until 1785, when the legislature incorporated a company known as "Proprietors of the Charles River Bridge" to build a bridge "in the place where the ferry is now kept." The right to receive tolls was granted to the company. Its charter was limited to forty years, and until the expiration of that term it was to pay the sum of two hundred pounds annually to the College. After the expiration of the period the bridge was to become the property of the state, except that the College was to receive a reasonable compensation for the annual income of the ferry which it might have received, if the bridge had not been erected. The bridge was built and opened for travel, and in 1792 the charter was extended for a further period of seventy years. In 1828 the legislature incorporated the "Proprietors of the Warren Bridge" to build another bridge over the river in proximity and substantially parallel with the first bridge. The right to take tolls was granted to this company, but the bridge was to become free after the expenses of the proprietors in building, and maintaining the bridge had been reimbursed. This period, however, was not to exceed six years from the time of entering upon the bridge, and beginning to receive tolls. The proprietors of the Charles River Bridge filed a bill in equity in the Supreme Judicial Court to obtain an injunction preventing the erection of the Warren Bridge, and for general relief, claiming that the act authorizing the Warren Bridge impaired the obligation of the contract between the state, the college, and itself. A great principle of public policy was for the first time presented for decision. It was whether the state which had chartered the corporation known as the Charles River Bridge was prohibited from chartering a free bridge, because while there was no express provision to this effect, in granting the charter to the Charles River Bridge, the state impliedly agreed not to charter

[4] 8 Pet. 120.
[5] 11 Pet. 257
[6] 11 Pet. 420.

another bridge which might be erected so contiguous as to lessen the tolls. Webster appeared for the plaintiff, while Professor Greenleaf represented the defendant. Webster in concluding his argument said:—

> The plaintiffs have placed their reliance upon the precedents and authority established by this honorable Court in the course of the last thirty years in support of that Constitution which secured individual property against legislative assumption, and they now ask the enlightened conscience of this tribunal if they have not succeeded in sustaining their complaint, upon legal and constitutional grounds.

The opinion by the Chief Justice very plainly demonstrates that the diversion of travel was not an impairment of the obligation of contracts prohibited by the Constitution, as there having been no express contract of an exclusive privilege, no implied contract was to be inferred, and the act therefore did not conflict with the federal Constitution:—

> We cannot deal thus with the rights reserved to the states, or by legal intendment and mere technical reasoning take away from them any portion of that power over their own internal policy, and improvement which is necessary to their well being and prosperity.

Then with the forecast of the statesman, he proceeds with a line of reasoning alike applicable to the conditions of that day and to our own time of parallel railroads, railways, and telegraph and telephone systems:—

> If this court should establish the principle now contended for, what is to become of the numerous railroads established on the same line of travel with turnpike companies; and which have rendered the franchises of the turnpike corporations of no value? Let it once be understood that such charters carry with them these implied contracts, and you will soon find the old turnpike corporations awakening from their sleep, and calling upon this court to put down the improvements which have taken their place.

The decision was of far-reaching effect, and Webster for the first time had met defeat in the argument of a constitutional question.

It is more than a tradition that Chief Justice Marshall when the case had first been argued was of a different opinion, and was inclined to hold that the state had no power to grant the charter to the Warren Bridge. In support of this view and as he openly stated, in conformity with the position of Marshall, Mr. Justice Story dissented in an elaborate opinion, in which Mr. Justice Thompson concurred, and not only Story and Webster felt that the end of federal supremacy had come, but Chancellor Kent in a letter to Story wrote, "I have lost my confidence and hopes in the constitutional guardianship and protection of the Supreme Court."[7] Time, however, the enlightener as well as consoler, has furnished the true perspective, and in 1891 Mr. Carson, in his history of the Supreme Court of the United States, justly and succinctly sets forth the soundness and effect of the decision in these words:—

> It has enabled the states to push forward great improvements by which the surface of the earth had been subjected to the domain of man. The principle of the *Dartmouth College* case was limited in its application, before it had been carried to the extreme which would have left the state governments in possession of little more than a shell of legislative power. All the essential elements of state sovereignty would have been parcelled out, without the possibility of reclamation, through recklessness, or something worse, among a crowd of applicants for monopolistic privileges.

There were other numerous and noteworthy decisions where may be found the roots of doctrines which by the

[7] See 3 Kent's Com., 14th ed., 459.

lawyer of today are looked upon as elementary in federal jurisprudence. In *Bank of Augusta* v. *Earle*,[8] upon the ground of comity, it was first decided that corporations of one state can sue in the courts of another, and in 1841 the *License* cases from Massachusetts, Rhode Island, and New Hampshire, reported under the name of *Thurlow* v. *Massachusetts*, *Fletcher* v. *Rhode Island* and *Pierce* v. *New Hampshire*,[9] came before the court, and it was decided that a state can regulate the traffic of intoxicating liquors within its borders. *Luther* v. *Borden*[10] brought up a phase of the Dorr Rebellion. The action was trespass for assault. The defendants justified under the authority of the government which had appointed them. The court, however, was not to be enticed into deciding which government was legal, and while saying the question was purely one of political power to be determined by the political, not by the judicial department of the government, declared that the state courts having decided the question the federal tribunal had no jurisdiction to interfere. In February, 1845, the Congress by appropriate legislation had extended the admiralty jurisdiction over the great lakes and navigable waters of the country. The question at once arose, whether the act was constitutional, and the *Genesee Chief* having been libeled for collision on Lake Ontario with another vessel, it was presented for decision. Of this opinion, reported in 12 How. 443, which fully sustained the act, nothing but commendation has been written. The Chief Justice rose fully to the height of the argument, and in lucidity and elegance of expression the opinion ranks with the best juristic efforts. It needed to be convincing, for in *The Thomas Jefferson*,[11] and *The Steamer Orleans* v. *The Phœbus*,[12] the court in opinions by Judge Story had decided that here as in England the maritime jurisdiction of the federal courts was restricted to the ebb and flow of the tide.

It was finely said by Matthew Arnold in praise of Sophocles that "he saw life steadily and saw it whole." So if you read the opinions of the Chief Justice, whether an important constitutional question is to be examined, discussed and decided, or the various questions requiring the application of the principles of maritime or the municipal law or remedial law are to be determined, you find displayed the same calm deliberation which surveys and grasps the whole subject, and then without wavering moves gradually but irresistibly to a conclusion. He possessed the power, the gift of his birthhour common to Mansfield, Marshall, and Shaw, of looking with illuminated insight into the future, which led him to develop and administer the law so that it should be progressive in its operation without weakening its practical and positive application to the case to be decided.

In the serenity of the judicial atmosphere twenty-four years had now passed, and the political animosities of earlier days had long since faded away. All who came in contact with the court, or knew of the performance of its functions, recognized and conceded his fitness for the exalted office. His greatness had been slowly ripening, until in the estimation of the bar and the public men of his time, he was not only the titular, but by intellectual primacy the acknowledged head of the department. But a cloud which when it first appeared in the horizon was no bigger than that which the servant of the prophet saw from

[8] 13 Pet. 519.
[9] 5 How. 504.
[10] 1 How. 1.
[11] 10 Wheat. 428.
[12] 11 Pet. 175.

Carmel had begun to overcast the political heavens.

At the December term, 1854, the case of *Dred Scott* v. *Sanford* first appeared on the docket of the court, having come up on writ of error from the judgment of the Circuit Court of the United States for the District of Missouri, which had decided that being a slave, Dred Scott was the lawful personal property of Sanford. Of the Chief's associates when he took the oath of office only Wayne of Georgia, the last surviving associate of Marshall, and McLean of Ohio, remained. After them in order of seniority sat Nelson of New York, Grier of Pennsylvania, Catron of Tennessee, Curtis of Massachusetts, who had been appointed by Fillmore to succeed Woodbury, Daniel of Virginia, and Campbell of Alabama. It was before these judges, each eminent as a jurist, that the most celebrated case in American judicial annals when the consequences of the decision are weighed came on for argument.

We of today little realize the intensity of feeling which the agitation over the extension of slavery had aroused. Into that hour of fury and sectional strife the future historian, after a sufficient time has passed, will enter with such fullness of information and clarity of judgment as to do full justice to all the participants, whether they joined issue in the forum, or on the field. The contest was inevitable. And while Jackson and Webster had postponed the final arbitrament of arms, it was not within the power of legislatures or courts or of statesmen to stay the march of public opinion, which more and more would not be satisfied with half measures but demanded the abolition of slavery. The "free soil" party, although it had lost the Presidential election of 1856, had been organized to oppose its extension, and it kept up a constant agitation aided by an ever increasing sentiment in its favor at the north. Many of its members looked upon the fugitive slave clause of the Constitution "as a covenant with death and an agreement with hell," while the rank and file of the party regarded laws enacted for its enforcement as a national disgrace, to be removed from the statute-book at all hazards. It was Taney's misfortune that during the closing part of his judicial career the question of whether the nation could exist "half slave and half free" was never absent in some form from the public mind, and indirectly presented itself in new phases for decision in the federal courts. It had unhesitatingly been decided by Chief Justice Marshall in *Williamson* v. *Daniels*,[13] when construing a bequest, and by Mr. Justice Story in *Prigg* v. *Pennsylvania*,[14] and Chief Justice Taney in *Strader* v. *Graham*,[15] that slaves were personal property. It was established law, whatever might be rightfully said by moralists and humanitarians of the iniquity of such a conception, or of a doctrine so unjust, and subversive of the higher law, that a slave was a chattel, passing with his offspring by bargain and sale from owner to owner. The Missouri Compromise in 1820, when Missouri was admitted to the union as a free labor state, provided that slavery should not be carried into the territory north of 36° and 30′, which was the parallel of latitude bounding Missouri on the south. The compromise of 1850 declared that Congress would not interfere with the question of slavery in the territories organized since the Missouri Compromise, but would leave the question to be determined by their inhabitants when admitted as states. In 1852 the Demo-

[13] 12 Wheaton 568.
[14] 17 Peters 611.
[15] 10 How. 82.

cratic party in its platform pledged itself to maintain the compromise of 1850, but notwithstanding this pledge the Kansas-Nebraska bill was introduced, which became law, and territory assigned as free under that compromise was then open to settlement by slave owners accompanied by their slaves. Then followed the scenes in Kansas which embittered both North and South. Deep called unto deep as with increasing recrimination each section approached the line of cleavage. No one will accuse Judge Curtis of being an alarmist, or as viewing great public questions or movements other than sanely, but in April, 1850, in an address of welcome to Mr. Webster, after having alluded to the American nation, its prosperity and glory, and that it was only under the Constitution that the union could be preserved for posterity, he continued:

> Recent events have awakened our most painful attention to this great subject. You are well aware, sir, that it involves some important conflicting interests, and still more conflicting opinions and feelings. Any attempt to reconcile them must for a time at least be the cause of offending many honest men. But even they, sir, can scarcely withhold their respect from manliness which dares to speak disagreeable things, and from the patriotism which seeks in a spirit of conciliation a remedy for an inflamed and disordered state of the public mind.

In reply, among other things, Mr. Webster said, referring to the 7th of March speech:

> I have felt it my duty on a late occasion to make an effort to bring about some amelioration of that excited feeling on that subject, which pervades the people of the country everywhere North and South, and made an effort also to restore the government to its proper capacity for discharging the proper business of the country, for now, let me say, it is unable to perform that business. That it may regain that capacity there is necessity for effort both in Congress and out of Congress. Neither you nor I shall see the legislation of the country proceed in the old harmonious way until the discussion in Congress and out of Congress upon the subject to which we have alluded shall be in some way suppressed. Take that truth home with you, and take it as truth. Until something can be done to allay this feeling now separating men, and the different sections, there can be no useful and satisfactory legislation in the two houses of Congress.

The futility of attempting to convert a political into a judicial question was shown by the result in the case of Dred Scott. It is unnecessary to refer to the accusations of conspiracy of either himself or the majority of his associates with slave-holders, or with the President, or his alliance with motives that were unholy or infamous in the administration of the judicial office. All these charges have long since been exploded and shown to have no basis of fact upon which to rest. He had said in his opinion:—

> It is difficult at this day to realize the state of public opinion in relation to that unfortunate race which prevailed in a civilized and intelligent portion of the world at the time of the Declaration of Independence, and when the Constitution of the United States was framed and adopted. They had for more than a century been regarded as beings of an inferior order, altogether unfitted to associate with the white race in social or political relations, and so far inferior, that they had no rights which the white man was bound to respect, and that the negro might justly and lawfully be reduced to slavery for his benefit.

The phrase "that they had no rights which the white man was bound to respect" was wrenched from its context, seized upon, and promulgated throughout the North until it is no exaggeration to say that in the mind of the masses the name of Taney was the incarnation of injustice and judicial infamy. Ornate perhaps in expression, but no less severe, were the comments of Seward, of Sumner,

of Phillips, of Garrison, and the famous and shrewd innuendo of Lincoln, who in the campaign with Stephen A. Douglass carried with him a copy of Curtis's great dissent, from which it is said he drew many of his arguments in reply to the author of the Kansas-Nebraska bill.[16]

As the decade preceding the opening of the Civil War advanced premonitions of the coming storm multiplied, and casting about to find some relief by which presumably it could be averted, President Buchanan in 1856 most unwisely said in his inaugural that a case was pending in the Supreme Court of the United States as to the occupation of the territories by slave owners by whose decision he should be governed, and which might determine the vexed question. He referred to the *Dred Scott* case, of which the best statement, taken from the reports, is given by George Ticknor Curtis, who was of counsel for Dred Scott. Dred Scott was a negro slave, and belonged to one Dr. Emerson, a surgeon in the army of the United States. Emerson took him from the state of Missouri to a military post at Rock Island, in the state of Illinois, and held him there as a slave until 1836. Emerson then removed him to the military post at Fort Snelling in the territory of the United States north of 36° 30′ and north of the state of Missouri, where he held him as a slave until 1838. Dred Scott married Harriet, a negro slave of another officer of the army, and she was taken by her master to Fort Snelling and there held as a slave until 1836, when she was sold to Dr. Emerson, and he held her as a slave at that place until 1838. In 1838 the plaintiff and Harriet with Dr. Emerson's consent were married. There were two children born of the marriage, one in the state of Missouri and the other on a steamboat on the Mississippi River north of the north line of the state of Missouri. In 1838, Dr. Emerson removed Dred Scott with his wife and children to the state of Missouri, where they had ever since resided. Before suit was brought Dr. Emerson had sold and conveyed Dred Scott, his wife and chifdren, to Sanford as slaves, and he thereafter claimed to hold them, and each of them, as his property. Dred Scott brought suit for his freedom in the Circuit Court of St. Louis county in the state of Missouri,[17] and obtained judgment in his favor, but the Supreme Court of the state, on a writ of error reversed the judgment and remanded the case to the state circuit court, where it was continued to await the decision of the case subsequently brought in the federal court. When the last case came on for trial at circuit, the facts which have been stated being proved, the jury under instructions from the court returned a verdict that the plaintiff, his wife and children, were negro slaves, the lawful property of the defendant. When the case reached the Supreme Court of the United States it presented two principal questions:—

First, Whether Scott by reason of his African descent from ancestors who were imported into this country and sold as slaves, independent of the question of his personal freedom, could or could not be a citizen of one of the states of this union.

Secondly, Whether Scott, who was formerly a slave in the state of Missouri, having been taken by his master into the free state of Illinois and then into a part of the Louisana Purchase north of the parallel of 36° and 30′ where slavery was prohibited by an act of Congress known as the Missouri Compromise and then brought back into the state of Missouri, was not legally and effectually emancipated by residence with his master in a free state or free territory so that the condi-

[16] See v. 2, p. 270, Rhodes' History of the United States.

[17] *Dred Scott* v. *Emerson*, 15 Mo. 576.

tion of servitude would not reattach to him on his return into Missouri.

If it was decided that Scott was not within the Constitution by reason of his African descent, then it was clear enough that the circuit court had no jurisdiction, and the order would be to direct that court to dismiss the case, and there would be no necessity of taking up the second question. Both questions were presented at the first argument Feb. 11, 1856, and after consultation by the court the case was assigned to Mr. Justice Nelson to write the opinion upon the first ground, to which Justices McLean and Curtis announced that they would dissent. After Judge Nelson had written the opinion, Mr. Justice Wayne, believing that if the second question was decided the agitation over slavery would cease, persuaded the Chief Justice and the majority of his associates to take up and decide the constitutionality of the question whether Congress had the right to prohibit slavery in the territories. May 12, 1856, a reargument was accordingly ordered, which took place Dec. 15, 1856, and the case was decided March 6, 1857, in a majority opinion written by the Chief Justice sustaining the ruling below, and further declaring that Congress could not constitutionally prohibit slavery in the territories carved out of the Louisiana Purchase. An irretrievable mistake was thus made in going beyond the record.[18] In his argument in *Pollock* v. *The Farmers' Loan & Trust Company*,[19] the late James C. Carter uttered this profound warning:—

> Nothing can be more unwise or dangerous, nothing more foreign to its spirit, than attempts to baffle and defeat a popular determination by a judgment in a law suit. If an overwhelming majority in an effort to accomplish justice finds itself arrested in its course by another majority of a body of six or more who happen to have a different opinion upon substantially the same questions, but who speak with a different authority, and to utter the will of the law, the consequences can hardly fail to be disastrous to the law itself. The popular majority, if persistent, is likely to find its way to the accomplishment of its end over the ruin it may be of any Constitution, or of any court.

When Taney died, Congress refused the customary portrait bust of the Chief Justice to be placed in the court room, and it was not until the death of Chief Justice Chase in 1873 that the statues of both were voted, and his effigy in marble was fittingly placed by the side of his illustrious predecessor.

But as time wore on, as the intensity of views over the abolition of slavery became modified and normal national judgment resumed its sway, the opinions of men changed and a more just estimation began to prevail. One by one the imputations cast upon him have been shown to have been groundless, by Tyler, Curtis, Reverdy Johnson, Clarkson N. Potter, Blaine, Carson, James Ford Rhodes, Professor Mikell and others, until the eclipse of this malign influence has passed from off his fame, and in the firmanent of our jurisprudence his reputation as a great jurist and upright judge glows with steady radiance.[19a] But although the opinion in the *Dred Scott* case was written when the Chief Justice was eighty years of age, the time to lay the judicial armor off had not yet come, and at fourscore he held on his way with mental vision undimmed, and his intellectual power unabated. He was yet to vindicate his unwavering stand with Jackson against nullification and disunion in whatever form it might show its presence, in an opinion in which, with

[18] See *Monthly Law Review N. S.* v. 10, p. 61, for an instructive review of the *Dred Scott* case. The article is said to have been prepared by the late Judge Lowell or the late Judge Horace Gray.

[19] 158 U. S. 601.

[19a] I am indebted to these writers for many of the facts and incidents used in this paper.

trenchant logic and perspicacity of expression, he demonstrates that the federal union, while composed of indestructible states, is itself indestructible and paramount.

In 1857 the extraordinary and popularly unknown cases of *Ableman* v. *Booth*, and *United States* v. *Ableman*,[20] arose. We are wont to refer to the Hartford Convention and the action of South Carolina over the tariff law as the prominent examples of the expression of the doctrine of the right of a state to secede or to nullify the federal law. In the state of Wisconsin an effort had been made to inforce the obnoxious fugitive slave law, and the Supreme Court of the state promptly declared the act of Congress unconstitutional, while the state resisted to the utmost the inforcement of the statute. Booth had aided in the escape of a fugitive slave from the United States deputy marshal, who held him under process issued by the United States District Court. He was arrested for this offense, tried, convicted, and sentenced in that court. Upon his application the Supreme Court of Wisconsin discharged him upon *habeas corpus*. A writ of error was then issued by the United States Supreme Court upon application of the Attorney-General, Jeremiah S. Black, to which the Supreme Court of Wisconsin directed its clerk to make no return, and to make no entry upon its record concerning it. The Supreme Court of the United States then ordered a copy of the proceedings, which the Attorney-General had before procured, to be entered upon its docket with the same legal effect as if the clerk had made the proper return, and the case thus stood upon the docket for argument. Judgment in favor of the United States, reversing the judgment of the Supreme Court of Wisconsin, was pronounced March 7, 1859, upholding the exclusive jurisdiction of the federal over the state courts. Thereupon the state legislature, in joint resolution adopted March 9, 1859, solemnly declared that the judgment of the Supreme Court of the United States was "without authority, void and of no force," and "that a positive defiance of . . . all unauthorized acts done under color of . . . the Constitution is the rightful remedy." Like his predecessor, in the case of *The Cherokee Nation* v. *The State of Georgia*,[21] the Court was powerless to carry out its mandate. Only the executive by use of military power could inforce the judgment. Happily no state has since followed this unwise example, although Wendell Phillips said: "Some of us had hoped that our beloved commonwealth would have placed that crown of oak on her own brow. Her youngest daughter has earned it first." This decision has been often cited in support of the paramountcy of federal jurisdiction over state, where jurisdiction is conferred by the federal Constitution.

March 4, 1861, Abraham Lincoln was inaugurated, and for the seventh time the Chief Justice administered the oath of office to a President of the United States. Not only were physical infirmities increasing, but the throes of civil war were more and more felt. Washington was becoming an armed camp, and even Baltimore, his own home, shared in the passions of the impending conflict. May 25, 1861, John Merryman, a resident of Baltimore and a citizen of Maryland, was arrested by the military authorities and committed to the custody of the commandant of Fort McHenry. He petitioned for a writ of *habeas corpus*, alleging that he was held in duress "without any process or color of law

[20] 21 How. 506.

[21] 5 Pet. 1.

whatsoever."[22] The Chief Justice issued the writ, directing the commandant to produce the prisoner in court. The writ was duly served, but the prisoner was not produced, on the ground that he had been arrested and was held on the charge of treason. But holding that under the Constitution the President had no power to suspend the writ of *habeas corpus* without authority from Congress, which had not then acted, though subsequently, March 3, 1863, it passed a statute conferring this power upon the President under certain limitations, Taney directed a judgment for contempt to issue against the commander, Gen. Cadwallader. The deputy marshal, however, upon arriving at the fort, was not permitted to enter the gate, or serve the attachment. It being evident that the court could not inforce its process, the marshal was excused from further effort by the Chief Justice, who now prepared and filed an opinion in this much discussed case, a report of which may be found in 1 Campbell 246. With his usual clearness, he states the question, which was that the President without proclamation claims not only the right to suspend the writ, but he can delegate this power to a military subordinate, leaving it discretionary with him either to obey the judicial process or ignore it. There have not been wanting defenders of the course pursued by the government, chief of whom were Horace Binney and Chief Justice Joel Parker of New Hampshire. But while public opinion as voiced by a majority found no unjustifiable violation of the Constitution, because of necessity *inter arma leges silent* and the preservation of the Union was paramount, Judge Curtis in his pamphlet on "Executive Power" not only supports the Chief Justice fully, but it would seem to the impartial reader demonstrates, if further elucidation were needed, "that the citizen has nothing but the judiciary to which to appeal against the executive acts." The doctrine of martial law, or of military law in time of insurrection, cannot be applied to citizens of a state not in rebellion, and where the courts are open and their process unobstructed. In Massachusetts by the Acts of 1786, c. 41, the writ during Shay's Rebellion had been suspended from November, 1786, to July, 1787, but this is the only instance where a state has taken such action, although during the Civil War this course was pursued by the seceding states, but only under a statute of the Confederate Congress. Maryland was not in rebellion, and her citizens, of course, were within the full protection of the Constitution.

Having shown conclusively that in England only Parliament could suspend the writ, Chief Justice Taney quotes from Marshall's decision in *Ex parte Bollman* v. *Swartwout*,[23] and from Story's Commentaries on the Constitution, that here only Congress has this power, and closes with this paragraph:—

> I have exercised all the power which the Constitution and laws confer on me, but that power has been resisted by a force too strong for me to overcome. It is possible that the officer may have misunderstood his instructions, and exceeded the authority intended to be given to him. I shall therefore order all the proceedings in this case with my opinion to be filed, and recorded in the Circuit Court of the United States for the District of Maryland, and direct the clerk to transmit a copy under seal to the President of the United States. It will then remain for that high officer, in fulfillment of his constitutional obligations, to "take care that the laws be faithfully executed," and to determine what measures he will take, and cause the civil process of the United States to be respected and inforced.

[22] See 3 *Political Science Quarterly* 454 for a full discussion of that case and a history of the controversy as to whether the President was independent of Congress or the courts or could refuse to obey the writ.

[23] 4 Cranch 95.

In this hour of trial, but not of humilitation, as alone and unaided he steered his course true to the oath and duties of his office and the noblest traditions of his profession, it was not granted to him to foresee that less than six years would pass when the Supreme Courts of Wisconsin, Indiana and New York,[24] and the Supreme Court of the United States in *Ex parte Milligan*,[25] by their decisions would reaffirm the principles he unfalteringly had laid down, and like him interpose the bulwark of the law, to the end that no citizen of a state not in insurrection and who was not in military service, should be despoiled of his freedom, or deprived of his life, except by the judgment of his peers and the law of the land.

The long day's work was done. This was his last important decision. The careers of lawyers and judges, however eminent, leave but a fleeting impression upon the popular mind and memory. A few names may linger, Webster, Choate and Pinckney, Marshall, Kent and Story still recur in the thought of the people, as connected with the history of the administration of the law. But with the exception of Kent and Story each of them had entered largely into the political life of their times, while these two by their Commentaries have achieved an enduring place in legal literature. If within this group the name of Taney may be appropriately included, we must turn to the reports for the summing up of his judicial labor. In the twenty-eight years of service he wrote about three hundred opinions, of which it is a pleasure to say only seven were dissents. He differed in but twenty-six cases from the judgment of the court, and in these, two or three of his associates concurred. Judge Curtis tells us that his opinions would have been more numerous notwithstanding his semi-invalidism, but being absolutely free from vanity, he gave all his associates an opportunity to express their views. If the test of a judge, as Curtis wrote to Story, is his work at *nisi prius*, Taney there united in marked degree the two most essential judicial qualities, an earnest desire to arrive at a just conclusion, with inflexible courage to inforce it.

Of the home life of the Chief Justice, and of his friendships much might be said, but the time already taken to bring out important matters without which his entire career cannot be understood or appreciated forbids any extended review. The death of his wife in 1855, to whom he was tenderly attached, was the great sorrow of his life. She died when he had begun to write his autobiography, and the affliction so affected him that he never resumed the work. A devout Christian and a regular communicant of his church, his sympathies were broad, and his personal friends were drawn from all ranks and conditions of men. To the last he was accustomed to talk about the affairs of the day with keen interest and large insight. The man who by his personal qualities had gained and kept the affection of his associates, however much some of them differed from him on constitutional questions, and the esteem of the leaders of the bar of the United States, and the good will of the humblest person with whom he came in close personal touch, must have possessed, as all his contemporaries unite in saying that he did, traits of character, with a disposition, which made him "in social life . . . attractive as he was instructive and eminent in professional life." His distinguished and strenuous career closed Oct. 12, 1864, in the eighty-eighth year of his age.

[24] *In re Kemp*, 16 Wis. 360; *Griffin* v. *Wilcox*, 21 Ind. 370: *People* v. *Gaul*, 44 Barbour 98.
[25] 4 Wall. 2–142.

The Federal Corporation Tax Constitutional?

By William E. Dorman, of the Massachusetts Bar

THE case against the constitutionality of the federal corporation tax is not wanting in variety of attack, or in skill and ingenuity on the part of those who assail it. Several lines of reasoning have been formulated in support of the view that the Supreme Court cannot affirm the validity of the tax, without doing violence to certain principles heretofore sanctioned by that tribunal. Of these, two have been urged with much vigor. One proceeds upon the theory that the law contemplates a direct, the other, an indirect tax.

At the basis of the contention that the tax is direct, and therefore void for want of apportionment, are the famous *Income Tax* cases.[1] Those who insist that the fate of Section 38 of the Tariff Act of 1909 is concluded by these decisions, profess to see no difference between a "special excise tax—with respect to the carrying on or doing business" by a corporation, "equivalent to one per centum" upon its entire net income, as imposed by the act under discussion, and a tax upon incomes generally, as imposed by the Act of 1894.[2] If there is no difference, the exchequers of the corporations will escape, for the assailants of the law are well justified in assuming that the court will consider the substance and not the form.

The income tax law of 1894 purported to be a tax on incomes, and on nothing else. Its provisions afforded no ground for disagreement as to the subject-matter of the tax. It was the bald ownership of an income that was taxed, and the court failed to find any substantial difference between ownership of the property and that of the income resulting from it. On the other hand, the Act of 1909 purports to tax the doing of business by corporations and joint stock companies. Whether this is a tax on the corporate franchise, or on the "privilege of doing business as an artificial entity and of freedom from a general partnership liability," which is the view of President Taft,[3] or whether it operates as a tax on the transaction of business through the agency of corporations and joint stock companies, is immaterial in considering this phase of the question. It cannot be seriously doubted that the foregoing rights and privileges are proper subjects of a federal excise or indirect tax, waiving, for the time being, the further question, hereinafter discussed, of the federal right to tax a state granted franchise.[4] It is apparent, then, that no fault is found with the law on this score, when it describes the measure as a "special excise tax—with respect to the carrying on or doing business by a corporation" until are reached the words "equivalent to one per centum upon its entire net income." Granted, then, that the assessment of corporate franchises, or the conduct of business thereunder, constitutes an indirect tax within the meaning of the Constitution, is a tax which pur-

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[1] *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S. 429, 158 U. S. 601; *Hyde* v. *Continental Trust Co.*, 157 U. S. 654, 158 U. S. 601.

[2] 28 Statutes at Large, 509.

[3] President Taft's message to Congress June 16, 1909. *Congressional Record*, p. 3450.

[4] *Pacific Insurance Co.* v. *Soule*, 7 Wall. 433; *Scholey* v. *Rew*. 23 Wall. 331; *Knowlton* v. *Moore*, 178 U. S. 41; *Spreckels Sugar Refining Co.* v. *McLain*, 192 U. S. 397; *Portland Bank* v. *Apthorp*, 12 Mass. 252.

ports to be levied on either privilege converted into a direct tax, because the income accruing from its enjoyment is adopted as a standard or measure of the assessment? Such is the specific issue involved in this line of attack.

Very recently, the Supreme Court has held that a tax avowedly levied on one object, the taxable value of which is measured by another object, is not thereby imposed upon the object serving as the measure of assessment. Such was the decision in the *Spreckels* case,[5] now proving a stumbling block of the first magnitude to those who are asserting that the federal corporation tax is not what it purports to be, a "special excise." In that case, a tax on the carrying on or doing the business of refining sugar, equivalent to a percentage on the gross amount of all receipts, was held to be a tax on the business and not on the receipts. The brevity of the reasoning in the *Spreckels* case is doubtless responsible for the belief that means of distinguishing the corporation tax would readily be found.

Without doubt, the federal corporation tax could be held a direct tax without overruling the *Spreckels* case, on the ground that a tax on the gross receipts of a business is not necessarily a direct tax, while a tax on net receipts or income is direct. The court could escape the charge of inconsistency by reasoning that whether the tax fell upon the business or on the receipts, an excise tax might properly be applied to either. Only by such a distinction can the *Spreckels* case be held to leave unanswered the query: May Congress levy an excise upon proper subject-matter of such a tax and measure its assessable value by reference to that of subject-matter which is itself not taxable by way of an excise?

If this inquiry is not answered in the *Spreckels* case, prior decisions in both state and federal courts have relieved the question of much doubt. The courts have repeatedly sustained schemes of taxation whereby the taxable value of a corporate franchise is measured by the possession of property which is itself entirely immune from taxation, or which, if not entirely immune, is not assessable by the same type of tax. In 1829 the Supreme Court held that federal securities were beyond the reach of state taxation.[6] Further protection was accorded the borrowing power of the United States by withdrawing from the field of state taxation the capital stock of corporations and the deposits of savings banks to the extent that they were invested in United States stocks and bonds.[7] Relying upon these decisions, corporations have sought to escape entirely, or substantially diminish, the payment of franchise taxes, because computed on their capital stock, invested wholly or in part in United States securities. This was the ground taken by the company in *House Insurance Company* v. *New York*[8] (1889), which involved a New York statute subjecting corporations to a tax "upon (their) corporate franchise or business, computed upon their capital stock and dividends." In his opinion, Mr. Justice Field stated "the contention of the plaintiff in error" as being "that the tax in question was levied upon its capital stock, and therefore invalid so far as the bonds of the United States constitute a part of the stock." The contention was dismissed with the observation that the tax was not levied in terms upon the capital

[5] *Spreckels Sugar Refining Co.* v. *McLain*, 192 U. S. 397.

[6] *Weston* v. *Charleston*, 2 Peters 449.

[7] *Bank of Commerce* v. *N. Y. City*, 2 Black 620.

[8] 134 U. S. 594.

stock, and that reference was made to the capital stock for the purpose of determining the amount of the tax. The court cited with approval the case of *Munroe Savings Bank* v. *Rochester*,[9] to the effect that where a state tax is imposed as a property tax, so much of the property as is invested in United States bonds is to be deducted,—"but this rule can have no application to an assessment upon a franchise, where a reference to property is made only to ascertain the value of the thing assessed."

In *Home Insurance Co.* v. *New York*, the court placed reliance upon a prior decision, appealed from the Supreme Court of Connecticut, where a savings bank, to the extent that its deposits were invested in United States securities, sought to escape the burdens of a tax equivalent to a certain percentage on the total amount of deposits.[10] The federal Supreme Court, conceding its illegality viewed as a tax on the deposits, and observing that a corporate franchise or privilege is a thing of value and taxable, ruled that reference was made to the total amount of deposits, "not as the subject-matter of assessment, but as the basis for computing the tax. . . ." In this connection, it is interesting to compare the argument of the counsel for the corporation, to the effect that a franchise tax, "estimating its value by the money it has secured, is the same thing in substance as taxing the money received," with that employed by those who argue that a tax on a corporate franchise, computed on its income, is substantially a tax on the income.[11] The force of this decision is not diminished by the fact that the statute did not purport to be a franchise tax, but simply a tax on the corporation "equal to three-quarters of one per cent on the total amount of deposits."[12]

Undoubtedly, a corporate franchise tax computed on income would operate the same on the treasury of the corporation as a tax levied directly upon income. From the financial point of view of the corporation, there would be little to choose between them. Economic identity, however, does not establish identity of legal effect. This proposition was forcibly asserted by Justice Moody in delivering the opinion of the court in *Home Savings Bank* v. *Des Moines*[13] when he said: "If the state has not the power to levy this tax, we will not inquire whether another tax which it might lawfully impose would have the same ultimate incidence." This case stands for the proposition that the capital of a corporation, invested in United States securities, may not be taxed by merely adopting as a measure of taxable value the value of the shares in the hands of the stockholders, although such shares are themselves taxable. The validity of a tax on that which constitutes the measure of taxable value, no more than its invalidity, is conclusive of the validity of the real subject-matter of the tax.

We may therefore consistently conclude that while Congress may not levy a general tax on incomes without apportionment, whenever the income of a corporation represents the fair and reasonable value of a right, privilege or

[9] 37 N. Y. 365.

[10] *Society for Savings* v. *Coite*, 6 Wall. 594.

[11] See also the argument of Mr. Bristow in *Home Insurance Co.* v. *New York*, 119 U. S. 133.

[12] A similar result was reached in a Massachusetts case, where a "tax on account of its depositors" of a certain percentage on the amount of its deposits was held to be a franchise tax on the bank, and not a tax on property, *i. e.*, the deposits. *Provident Institution* v. *Mass.*, 12 Allen (Mass.) 312; 6 Wallace 611. In this case, a tax on the deposits would have been doubly objectionable, as an unproportional property tax under the state constitution, and as being in part invested in federal securities. See also *Comm.* v. *People's Savings Bank*, 5 Allen 428.

[13] 205 U. S. 503.

business which is subject to a federal excise, the income may be used as a basis for computing the amount of the excise. This distinction is logical and sound. The principle on which is rests has been repeatedly affirmed by the Supreme Court. It leaves the doctrine of the *Income Tax* cases unimpaired. Of course, the income must constitute a fair and reasonable measure of the value of the subject-matter, for if it cannot serve as the measure of the tax, the only possible function left for it to fulfill is that of the subject-matter itself. This qualification would render it impossible to select arbitrarily a certain portion of its income as measuring the taxable value of a right or privilege productive of income from several other sources as well.

Rather than accuse Congress of evading the limitations of the Constitution, let those who shut their eyes to a real distinction, founded on reason and authority, suggest a more equitable mode of taxing a corporate franchise or business than that adopted in the Act of 1909.

If we are satisfied, then, that the law contemplates not a tax upon the corporate income but an excise upon the corporate franchise or business, we are confronted with a further ground of attack, based, not on the omission to assess the tax in accordance with the modes stipulated in the Constitution, but upon a complete absence of taxable jurisdiction. This want of authority rests upon an implied restraint on the taxing power of both the nation and the states, incident to the distribution of the powers of government among them. The principle underlying this restraint is almost as old as the Constitution itself. It was enunciated contemporaneously with that of implied powers when the court, presided over by John Marshall, decided the case of *McColloch* v. *Maryland*,[14] in 1819. The state of Maryland had levied a tax upon the issue of notes by the Baltimore branch of the bank of the United States. The federal government had incorporated the bank of the United States, not in pursuance of any asserted authority to create corporations, but because Congress deemed it an appropriate means of exercising certain governmental functions imposed upon it by the federal Constitution. Among them were the right and duty of collecting taxes, of borrowing money, and of regulating commerce. By incorporating the bank it created an agent for the purpose of expediting the discharge of the powers of government, and hence, in levying a tax upon the operations of the bank, the state of Maryland was doing nothing more nor less than taxing the operation of a function of the national government. Accordingly the court held the tax unconstitutional.

In subsequent decisions,[15] the taxing power of the federal government has, in the interest of the states, been subjected to the same kind of restraint, so that there is now no principle more securely established in our constitutional law than that neither the nation nor the states may impede the exercise of the proper functions of either, by the exercise of the power of taxation. Did Congress, in enacting the federal corporation tax, contravene this well-founded principle?

That taxation by a state of the franchise of a corporation created by the federal government, excepting those corporations chartered for general purposes in the territories and District of Columbia, is invalid is more than probable. But because the restraint itself is reciprocal, that is to say, because it controls

[14] 4 Wheat. 316.

[15] Notably, *Collector* v. *Day*, 11 Wall. 113.

federal taxation in the interest of the states, as well as state taxation in the interest of the nation, those who invoke it against the federal corporation tax erroneously assume that its operation will in all cases be reciprocal. Such an assumption would lead to the desired conclusion that because a state may not tax a federal franchise, or its exercise, therefore the nation may not tax a state franchise, or its exercise. That this reasoning is misleading would seem to follow from a comparison of the power of the federal government to grant corporate charters with that of the states.

That there is a fundamental distinction between the right of the federal government to create corporations and that of the states is elementary. The right when exercised by a federal government is not substantive, but incidental. It can be employed only as a means of carrying into the effect the enumerated powers of the federal government. The resulting corporation is thus necessarily the means of exercising a federal function and is to be regarded as an instrumentality of government. In fact, if it cannot be so regarded, there is no constitutional warrant for its existence. The United States bank was chartered to provide the government with a fiscal agent. The incorporation of the Pacific railroads by Congress can be justified on no other ground than as a means of regulating interstate commerce.[16] But the creation of a corporation by a state rests upon its general power to incorporate. Such a power is exercised by the states as an independent, and not as a dependent, power. If the power of the states to create corporations were co-extensive with that of the federal government, there would be no escape from the assumption that because a state may not tax a federal franchise, therefore the federal government may not tax a state franchise. Every corporation created by the state would then be an instrumentality of the state government, and as such, beyond the reach of federal taxation.

Without question, a state frequently creates a corporation for no other purpose than to serve as a kind of agent in the discharge of governmental functions. Such is the ordinary municipal corporation, whose franchise is beyond reach of federal taxation. It is conceivable that there may be others of a less public nature that might be regarded as instrumentalities of the states, without unduly straining the doctrine. But corporations of this character are comparatively few. The vast majority of corporations of state creation can in no proper sense be regarded as instrumentalities of the states, but are private enterprises, pure and simple, organized primarily to make profit for their promoters and stockholders.

In so far, then, as the principle invoked has any application to the federal corporation tax, it would operate to withdraw from its provisions those corporations, and those corporations only, that can fairly be said to perform a function of the state under whose authority they were created. The same principle would likewise operate to exempt from the provisions of a general income tax, levied under the proposed "sixteenth amendment," the incomes of state officials. In either case its appreciable effect would be too slight to affect the constitutionality of the tax.

[16] *California* v. *Central Pacific Railroad Co.*, 127 U. S. 1.

The Thirty-third Annual Meeting of the New York State Bar Association

THE thirty-third annual meeting of the New York State Bar Association, held in Rochester, N. Y., Jan. 20–21, brought together distinguished attorneys from all parts of the state. The annual president's address was delivered by Adelbert Moot, Esq., of the law firm of Moot, Sprague, Brownell & Marcy, of Buffalo, who spoke at length on "Bar Association Ideals." He told of the organization of the state association in 1876. The men who modeled the organization were high minded lawyers, deeply in earnest—men whose strength, character and earnestness had left a lasting impression on his mind.

"The object of this association, as then stated," he said, "and since by many other associations in nearly the same words, was ideal. They state that object to be —

To cultivate the science of jurisprudence, to promote reform in the law, to facilitate the administration of justice, to elevate the standard of integrity, honor and courtesy in the legal profession, and to cherish a spirit of brotherhood among the members thereof.

"Of course, that object has not yet been attained. In fact, as we approach our ideals, we always find that, like the stars, they are still far above us to guide our feet in the way they should go."

Reference was made to an examination for the bar conducted more than thirteen years ago by such able lawyers as Rufus W. Peckham and David B. Hill, when about eighty per cent of the class was admitted ,and it was thought the percentage rejected was extraordinarily high. Today, said President Moot, not more than ten per cent of that class would be admitted on a similar oral examination.

To the bench, he said, the lawyers and the people must look for much in the uplift of the profession, and he deplored the exception to what he declared was the rule of honest, intelligent, conscientious judges, which is to be found in New York City. However, New York is not to be taken as typical of the state in this respect, he said.

The last task of all for the lawyers, said President Moot, would be to eliminate war from the earth. "Your President-elect [Mr. Root] is an ideal jurist to lead in the fight for such ideals."

REFORM IN CRIMINAL APPEALS

Mr. Moot's address was given in the afternoon. The morning session was devoted chiefly to routine business, and to the presentation of the paper of John D. Lindsey of New York, on "The Necessity for a Court of Criminal Appeal," which elicited a spirited discussion. An extract follows:—

Think of the irony of a statutory enactment which confers a right of which only the man of substantial means may avail himself. The murderer, however brutal his crime, may stay the execution of the just sentence of the law by serving a notice of appeal, and counsel are assigned to argue his case, to whom substantial compensation is awarded. But the man adjudged guilty of any lesser degree of crime, whatever its circumstances or character, and even though a higher court might deem his acts wholly innocent, can have no review for lack of the necessary funds to prepare and present his case. . . .

The people at large know that the man who is able to command the resources necessary to a proper presentation of his case to a court of review has at least a chance to obtain a reversal. The pauper has none. . . .

The remedy, it seems to me, is a simple one. If the state ought to pay the expense of the murderer's appeal, including the compensation of his counsel, it should do as much for the impecunious defendant convicted of a lesser crime, provided that his case presents legal questions deserving of considerating in a court of review.

The condition existing, and being shown by the certificate, either of the presiding judge, or of a respectable member of the bar, counsel should be assigned to take and prosecute an appeal, which should be heard upon the original, or copies of the record and stenographic minutes in the court below, unless the appellate court directs otherwise, in which case the record should be printed at the public expense. Counsel should be reimbursed for any necessary money outlay and also awarded reasonable compensation for his services, except when the appellate court deems the appeal to have been frivolous. Provision should be made for the discipline of counsel guilty of any abuse of this character.

If legislation on the lines suggested would unduly increase the business of the existing appellant tribunals, a Court of Criminal Appeal should be created with exclusive jurisdiction to hear and determine all criminal appeals. . . .

Most of the speakers who took part in the discussion took issue with Mr. Lindsey. President Moot expressed the opinion that the idea that the rich are able to escape justice was greatly exaggerated. Judge A. T. Clearwater of Kingston thought the rich criminal was a rare bird; his rarity excites attention

and comment; the greater danger lies in a general disregard of the law. The machinery of the state is ample to protect the innocent. but not potent at times to punish the guilty, Frederick Heindrich of New York defended Mr. Lindsey's views, disagreeing with Judge Clearwater.

Simon Fleischmann of Buffalo presented the report of the Committee on Proposed Legislation, which favored amending the practice in the Surrogate's Court. The committee reported that bills had failed in the Legislature for several years and recommended that the committee be continued to advocate their passage.

George P. Decker of Rochester presented the report from the Committee on Law Reform. Its recommendations are embodied in a number of bills that have been prepared for presentation to the Legislature. The report was accepetd with a slight amendment.

SALARIES OF FEDERAL JUDGES

The afternoon session opened with a report of the committee on the salary of federal judges, which was submitted by William B. Hornblower of New York City, the chairman. It urged that the district judges of the United States should receive a salary equal to that received by the judges of state appellate courts of the state in which they reside. Such salaries of district judges, the report recommended, should not exceed $9,000 in any event, however.

"The Dishonesty of Sovereignties" was the subject of an interesting paper presented by Simon Fleischmann of Buffalo, treating of the doctrine of the immunity of the state from suits. "The nation, the state, the county and the city," he said, "should be placed by legislative, or, if possible, by constitutional enactment upon precisely the same basis as is every individual and private corporation. There should be no distinction or quibbling as to the difference between governmental or other functions."

The report of the special committee on medical expert testimony, which was given by Judge A. T. Clearwater of Kingston, recommended the submission to the legislature of a bill substantially the same as that considered at the last annual meeting, which was defeated in the Senate after having passed the Assembly. A resolution was adopted providing for the appointment of a committee composed of one representative from each judicial district to urge its passage by the legislature.

REASONABLE RAILROAD RATES

In the evening, Senator Joseph W. Bailey of Texas discussed government regulation of railroads, giving the annual address before the Association. He said in part:—

The Supreme Court has expressly and correctly decided that the states possess the power to regulate intra-state railroad charges, and it has decided in effect that Congress possesses a like power over interstate railroad charges. It has also decided that all such charges are subject to a judicial inquiry as to their reasonableness; but it has not yet laid down a satisfactory rule by which the reasonableness of every charge must be judged. What is a reasonable rate? May it be so low on one hand as to almost touch the point of confiscation, or so high on the other hand as barely to miss the line of extortion; and is it possible that the people can be compelled to pay and the railroad compelled to accept any rate between these wide extremes? I think not.

In my judgment a reasonable rate must mean one which affords the railroad a just compensation for its services. If it means more than that, neither the legislature of any state nor the Congress of the United States has any right to compel the people to pay it; and if it means any less than that, neither the legislature of any state nor the Congress of the United States has any power to compel the railroad to accept it.

The speaker then quoted at considerable length from *Smyth* v. *Ames*, deducing the following conclusions therefrom:—

All of these statements must be read together and read with reference to each other; and reading them in that way, I deduce from them all that Judge Harlan meant to say was:

First, That the public is entitled to use a railroad upon the payment of a just compensation for the service rendered; and

Second, That in determining what is a just compensation for the railroad's service we must look to the fair value of the property with which the service is rendered.

To the first deduction I assent without qualification; and I will assent to the second, if it is to be treated as a mere rule of evidence tending to establish what constitutes a just compensation. I cannot, however, accept the doctrine that a railroad is entitled to such rates as will yield a fair return on the value of its property irrespective of the value of its services; nor will I agree that a railroad can be required to render a service for less than a just compensation in order to reduce its net income to a fair return on its property. The power to regulate the charges of a common carrier was never conferred on any government for the purpose of enabling it to prevent losses or to limit profits, but it is designated, always and only, for the protection of the people against over-charges. . . .

I do not doubt that in determining what is a just compensation for the use of any property, it is proper and even necessary for us to consider the value of that property in connection with the ser-

vices which it renders, but all testimony of that kind, however essential it may be to a just decision of the case, is after all merely a means to an end, and is not the end itself. . . . The cost of my property and the cost of the railroad's property are purely evidential, and are intended to aid us in fulfilling the constitutional requirement that the railroad shall pay me a just compensation for my property and that I shall pay the railroad a just compensation for its service. . . .

While I do not believe that the Supreme Court has yet found the true rule for measuring justice both to the people and to the railroads, I have never for one moment doubted that it will find it. That great tribunal has erred on more than one occasion, but it has sooner or later always realized and corrected its errors. It is this universal belief in its ultimate wisdom which has given it a character enjoyed by no other department of this government and approached by no other tribunal in the history of the world.

At the conclusion of his address, Senator Bailey was unanimously elected an honorary member of the Association.

On the second day, features of the morning session were the reports of three committees, proposing important changes in the laws, and an interesting address by Hon. James F. Tracey of Albany.

THE PLEA OF INSANITY

One of the most important reports presented during the entire meeting of the Association came from the Committee on the Commitment and Discharge of the Criminal Insane. The committee, with particular emphasis on the procedurally monstrous circumstances of the Thaw case, advocated that the criminal insane be made amenable to the criminal law in the same way as sane persons.

The following extract from the report outlines the changes in the law recommended by the committee:—

The insane man is just as dangerous to the community as the sane. In fact, he is more so, for the sane man is to some extent open to the restraints of law, or at least of prudence. The insane man is believed to be under no such restraint, although it might be noted that experience at the insane asylums would seem to show that the insane man is restrained by fear of punishment, as well as the sane. We bind over to keep the peace, and can imprison, if need be, the sane man who threatens violence which he may never do. We acquit as innocent an insane man, who has actually done a deed of violence. Was ever a more horrible mockery? The man who has already demonstrated that he is a menace to society is, on the opinion of an expert that he is not likely to misbehave again, allowed to go free. Whereas a man, whose violent words have never actually ripened into deeds, can be laid by the heels.

If these views be sound, they could be put into effect with but little change of the statute law. Replace section 20 of the Penal Code by the following words: "Insanity or other mental deficiency shall no longer be a defense against a charge of crime; nor shall it prevent a trial of the accused unless his mental condition is such as to satisfy the court upon its own inquiry that he is unable, by reason thereof, to make proper preparation for his defense."

Provide, that if at the time the jury renders the verdict the court has reason to believe that at the time of the commission of the crime the prisoner was insane or afflicted with any mental deficiency, it may then defer sentence and cause an inquiry to be made, and if as the result of that inquiry the prisoner is found to have been sane, the court shall then sentence him to be electrocuted or imprisoned in a jail, as the case requires; and if insane, the court shall then sentence him to be confined in the proper state asylum during his life or for a term of years, as the case requires. Thus the insane man's family would be protected from unjust stigma, and society would be protected from him. It may be that the inquiry as to sanity should be made as now by the jury which passes on his guilt. That is a detail. The only point we urge for consideration is, that a man who has done an evil deed ought not to be acquitted, but found guilty, and if insane, should be sentenced to an asylum. Being under sentence, he would have no right to a writ of *habeas corpus*, and could only be set free by a pardon. Thus the judicial farce, of murderers being acquitted by reason of insanity and set free on account of sanity, would be ended.

The committee reported as its recommendation that the secretary cause copies of the report to be widely circulated and that an expression of views be requested as to whether insane persons should be made amenable to the criminal law. The resolution was adopted.

CONTINGENT FEES

The abuse of the contingent fee was the subject of a frank report by a special committee that aroused much interest and discussion. The committee states that stronger sentiment than now exists must be created before fitting legislation can be secured. It therefore asked for further time. This is its statement of the situation:—

There is no dispute that the permission granted by the Legislature of 1848 and continued ever since, under which the custom of contingent fees has grown up and flourished, has resulted in grave abuses. Nor is there any dispute that something must be done to lessen those abuses. It is not necessary to rehearse them here, for they were fully set forth in the report of this committee two years ago. No one has denied them. Although it is well known that the practice of unprofessional solicitation is indulged in by many lawyers, who desire to be considered men of standing in the profession, there is not a lawyer from Montauk to Buffalo, even among those who indulge in the practice, who will in a body of lawyers stand up and admit that he engages in it. Men who denounce it in public practice it in private. Some will even defend it in others, when not courageous enough to admit doing it themselves.

This argues such a lowering of the tone of the profession that it is obvious that there will be difficulty in having remedial legislation placed upon the statute book until it comes as the demand of a substantially united bar or an outraged public. In other words, the bar as a whole must be brought to a realizing sense of the necessity of doing something to stem this tide of demoralization. This means a campaign of education for the purpose of demonstrating that the true interests of individual lawyers are on the side of a high plane of professional ethics.

John Brooks Leavitt of New York read the report of the committee, and the committee was authorized to continue its efforts.

Hon. James F. Tracey of Albany, former Associate Justice of the Supreme Court of the Philippine Islands, presented a paper on "Law in the Philippines."

The report of the Committee on Arrest and Imprisonment in Civil Actions advocated changes in the present laws in order to abolish arrest and imprisonment in civil proceedings, saying that the time had arrived for striking a fatal blow at an unjustifiable system. This report aroused considerable opposition. The matter was finally laid over another year.

William P. Goodelle of Syracuse presented the report of the Committee on Judicial Nominations. It was confined mainly to the successful action taken by the committee in bringing about the defeat of Justice William E. Scripture.

WORKINGMEN'S COMPENSATION

Frederick B. Campbell of New York offered the report of the special committee upon compensation to workingmen for injuries suffered in the course of their employment. The report dealt with those portions of the common law that bear upon the subject, and indicated the possible constitutional obstacles that might be in the way of embodying such a principle in law. By investigation, the committee said that it had found that the systems of workingmen's compensation in effect in other countries have proved beneficial alike to the employer and the employee, and has removed an important cause of friction and unrest. Continuing, the report said:—

"We approve and recommend the enactment of a well considered statute embodying a conservative application of the principle of workingmen's compensation; and we suggest at the outset such a statute be made applicable only to dangerous trades and industries."

The paper of Miss Cristal Eastman, secretary of the Commission on Employer's Liability and Causes of Industrial Accidents, Unemployed and Lack of Farm Labor, on "The Employer's Liability Act" was then read, before the subject was thrown open for general discussion. Miss Eastman's paper aroused considerable interest:—

In addressing you as economists, I set forth facts showing that under our present employer's laws, the great bulk of the income loss from industrial accidents rests where it first falls, on the injured workmen and their dependents. In addressing you as judges, I argued that the employer's liability law is uncertain of its principles, unjust even according to common law doctrine, and that, considered in the light of modern industrial facts, the basis and underlying principle of it is unjust. In addressing you as business men, I have reminded you that the law in its actual operation is cumbersome, wasteful, productive of strife, and that it is of little use in preventing accidents. From these three points of view, the American system of employer's liability stands condemned. I think there is left hardly one thoughtful person who seriously defends it. The question today is no longer, "Shall we retain our liability system?" but, "What shall we put in its place?"

It should make limited compensation for all accidents of employment. It should make that compensation sufficient in amount to result in shifting a considerable share of each accident loss from the family immediately affected to the employer, and thus to the whole body of consumers, and to provide an effective incentive for the prevention of unnecessary accidents. It should reduce the possibility of disputes to a minimum and provide for a speedy settlement of all questions remaining.

Senator J. Mayhew Wainwright, the chairman of the state commission appointed to consider this question, and several others discussed the report and the paper. A resolution to the effect that the Association approved in a general way the subject-matter of the report was adopted, including the provision that the report should be referred back to the committee for further investigation in co-operation with the state commission.

The meeting closed with a banquet at the Genesee Valley Club at which the chief guests and speakers were Senator Bailey, Mr. Justice Ridley of Toronto, Congressman James Breck Perkins of Rochester, Hon. John G. Milburn of New York, Senator Root of New York, Henry A. Estabrook of New York and Herbert M. Mowatt of the King's Court at Toronto.

THE NEW OFFICERS

Senator Root was elected president for the coming year, Frederick E. Wadhams and Albert Hessberg, both of Albany, being re-elected secretary and treasurer, respectively. The next annual meeting will be held in Syracuse.

Review of Periodicals*

Articles on Topics of Legal Science and Related Subjects

Aërial Navigation. "The Law of the Air-Ship." By Chief Justice Simeon E. Baldwin of Connecticut. 4 *American Journal of International Law* 95 (Jan.).

"In Coke on Littleton we are told that the owner of land owns upwards the 'Ayr, and all other things, even up to Heaven, for *cujus est solum, ejus est usque ad coelum.*'" This maxim . . . is the production of some black-letter lawyer, and like every short definition of a complex right must be taken with limitations. . . . It would seem that one of these must be that a proprietor of land cannot be heard to complain of any use of the air above it by which no injury to him can result. . . . Perhaps we may go farther and say that he has no legal right at all over the air above his land, except so far as its occupation by others could be of injury to his estate. . . . This seems to be a view quite in accordance with the spirit of our times."

"The Beginnings of an Aërial Law." By Arthur K. Kuhn. 4 *American Journal of International Law* 109 (Jan.).

"In European countries a tendency is noticeable toward subjecting air navigation, in at least some of its forms, to the monopolistic control of the state. In countries like our own, more favorable to private enterprise, concessionary control will suffice, coupled nevertheless with a strict governmental supervision by registration, license, and inspection. The federal government may properly take action in so far as the regulation of *interstate* intercourse is concerned."

"American Corpus Juris." See Codification.

Appeals. See Procedure.

Banking and Currency. "The Building of a Money-Trust: How Banking Power of Three Billion Dollars Has Been Centralized at Mr. J. P. Morgan's Desk." By C. M. Keys. *World's Work*, v. 19, p. 12618 (Feb.).

An article of intense interest, compact with information.

"Mr. Morgan stands astride the world. The method he used to strengthen himself and the financial structure against panic was typical of his character. It was direct, swift and practical. . . . He organized and created, around his office at 23 Wall Street, an organized banking power that he believes strong enough to take the place of the Central Bank in England, France or Germany."

"Essential Financial and Banking Reforms." By Hon. Charles N. Fowler. *Atlantic Monthly*, v. 105, p. 124 (Jan.).

"Geographically, politically, economically, and practically, the establishment of a Central Bank in the United States today is unthinkable; unless the sole purpose of starting such an institution is to serve some special interest, to the incalculable and never-ending injury and cost of the American people."

"The Kansas Bank Guaranty Law. A Comparison with Present and Past Guaranty Laws." By Attorney-General Fred S. Jackson. Delivered before the Kansas City Bar. 12 *Kansas City Bar Monthly* 3 (Jan.).

"The Kansas law adopts the principle of mutuality between banks. It goes as far in scientific lines as it may with our present banking system. It is a step in the right direction, and when the time comes, as it surely will come, that we are given a system of bank currency, under state or federal supervision, it will find the Kansas guaranty plan ready for action in consonance with the new plan."

For Central Bank, See Government.

Bankruptcy. "Right of Fraudulent Vendee to Share with Attacking Creditors in Proceeds or Property as to Debt Unconnected with Fraud." By James F. Minor. 15 *Virginia Law Register* 657 (Jan.).

Continued from November number of the same magazine (see 22 *Green Bag* 18).

"The universal consensus of the cases is that the bankrupt courts must follow the state law, in administering the assets, as correctly deduced from the state statutes and decisions of the state courts of last resort, where the bankrupt law does not otherwise provide. We think we have shown that under the statute of fraudulent conveyances of Virginia and West Virginia the fraudulent grantee cannot share as creditor in these proceeds. Therefore it seems to follow, and we submit with much confidence that it does follow, that the bankrupt court, in distributing this fund, should follow what would be the rule in the state court and *deny* the fraudulent grantee *any right to share as creditor.* . . ."

"Business Success and Failure." By Frank Greene. *Century*, v. 79, p. 583 (Feb.).

"Business life . . . can be made still safer by greater co-operation on the part of business men with the credit agencies to expose fraud and by more stringent laws defining responsibility for false statements.

"When the business community finally

*Periodicals issued later than the first day of the month in which this issue of the *Green Bag* went to press are not ordinarily covered in this department.

wakes up to the knowledge that business failure, like fire damage, is largely preventable, . . . swifter progress will begin to be made in reducing the burdens of losses which the business community and, through it, the country at large must bear."

Basis of Law. "Review of Current Theories of Jurisprudence." By George H. Smith. 43 *American Law Review* 821 (Nov.–Dec.).

This writer rejects the predominating views of English and American jurists, and substitutes for the doctrines of Holland, Maine, and Pollock, a theory which he conceives to have been that of the Roman jurists and to have had its germ in the writings of Aristotle. A large portion of Mr. Smith's conclusions are undoubtedly sound. A serious defect, however, is the failure to accentuate the existence of a principle which differentiates legal justice from morality. It will not do to confound legal with moral justice, even though the subject-matter of legal and moral rights be identical. If the state, through its appropriate organs, will take no notice of certain moral rights, it must be because of a principle of legality which determines the policy of the state in setting apart certain rights from others to be erected into a legal system. Such a principle ranks as not less important than any other principle of social conduct.

From the ignoring of this principle of legality results inattention to other important considerations. Not only is there some such principle, which may be considered as one of the folkways, but its mode of application need not always be the same. In countries which inherit the traditions of the common law it is applied in the *a posteriori* spirit, invariably with an appeal to the experience of the past to determine the actual substance of legal rights. In continental countries it is applied more *a priori*, with the object of anticipating the experience of the future rather than of formulating deductions from that of the past. Consequently, a system of jurisprudence based only on the broad foundation of ideal moral rights and duties would be utterly foreign to the genius of Anglo-Saxon institutions. Because the classical jurists treated *jus gentium* as not less truly the law of the state than *jus civile*, it must not be assumed that moral and legal rights are equivalent in every system of law. Such a theory of jurisprudence would be both unscientific and impractical.

See Legal Evolution.

Bastardy. "Can Parents Give Evidence to Bastardize Their Issue?" By Wilfrid Hooper. 26 *Law Quarterly Review* 47 (Jan.).

"The broad statement that parents cannot give evidence to bastardize their issue was never correct. . . . The more accurate proposition was that parents could not be permitted to say after marriage that they did not have access, so as to affect the status of their issue born within wedlock. Even this more circumspect form has, however, in view of the many modifications, long been inaccurate."

British Constitution. See Government.

Capital and Income. "Economic and Legal Differentiation of Capital and Income." By W. Strachan. 26 *Law Quarterly Review* 40 (Jan.).

This article affords an interesting illustration of the interdependence of legal and economic science.

"(1) The theory of 'fund' or 'flow' formulated by the leading authority on the subject [Prof. Irving Fisher of Yale University] provides a scientific and practical working theory for distinguishing capital and income.

"(2) Economics shows that income is a detachment from capital.

"(3) Law decides by rules adopted in the particular circumstances (the relation of the parties being an important one) whether as a question of *fact* such detached portion shall be regarded as 'capital' or as 'income,' using those terms in a popular sense."

Causes of Action. "The Materiality of Motive in Litigation." By Garrard Glen. 19 *Bench and Bar* 106 (Dec.).

"The courts will always content themselves with a real plaintiff who will receive some pecuniary benefit as a direct result of his cause of action, should he successfully maintain it, however slight may be that possibility, or however small the recovery, and the motive of such a litigant under such circumstances in pressing his claim is immaterial. But if the situation is such that the plaintiff cannot receive any advantage of a pecuniary nature whatsoever, as the direct result of his litigation, but instead will have his indemnity from some other source than the only legitimate one, the suit in court, then his motive is material in the sense that the court lays its hand upon the real party whose interests constitute the motive of the straw plaintiff, and will deal with the parties accordingly."

Chinese Law. See Comparative Jurisprudence.

Codification. "A Modern View of the Law Reforms of Jeremy Bentham." By Frederick N. Judson. 10 *Columbia Law Review* 41 (Jan.).

"While professional opinion since Bentham's time has been more or less interested in the academic discussion of codification, it cannot be said that in either England or the United States there has been any general agreement upon its feasibility, or even in its desirability." However, "we must not overlook the fact that there is a form of codification going on, perhaps that best suited to the character of our people and our institutions. Thus we have what is known as *tacit* codification, whereby the principles decided in the adjudged cases are so collated that rules formulated from them become acknowledged and adopted as the statement of the written law. . . .

"Much may come of the National Conference endorsed by the National Administration for the promotion of uniformity in the laws of the different states. A tacit or unofficial codification will also be very much facilitated under the plan proposed by eminent jurists,—Dean Kirchwey of the Columbia University Law School and others,—for the preparation of a complete, logical co-ordinate statement of the American *Corpus Juris*."

Comparative Jurisprudence. "Some Leading Principles of Chinese Law." By Gustavus Ohlinger. 8 *Michigan Law Review* 199 (Jan.).

"Chinese law is pre-eminently criminal. . . . The ethical basis of the law is manifested in that intent and design are punished. The code provides that 'any person convicted of a design to kill his or her father or mother, grandfather or grandmother, whether on the father's or mother's side, . . . shall, whether a blow is or is not struck, suffer decapitation.'"

Constitutional Law. See under special topics. For Federal Corporation Tax Act and for Proposed Income Tax Amendment, see Taxation. For Proposed Federal Incorporation Law, see Interstate Commerce. For these topics see also Government.

Contract. "Orders of Arrest in Actions Based on Contract." Editorial. 19 *Bench and Bar* 96 (Dec.).

"It may come as a surprise to some legal practitioners to know that in New York State there are actions founded on breach of contract other than a contract to marry, and not involving fraud either in the making of the contract or in the disposition of property to defraud creditors, in which, nevertheless, an order of arrest may be issued and the defendant taken into custody and held in bail *pendente lite*. A recent case in which this was done is *General Explosive Company* v. *Hough* (63 Misc. 377)."

Corporations. "The Evolution of the 'Private Company.'" By Edward Manson. 26 *Law Quarterly Review* 11 (Jan.)

See also Capital and Income, Interstate Commerce, Monopolies, Speculation. For Federal Corporation Tax Act, see Taxation.

Courts. "The Last Year With the United States Supreme Court." By Alex P. Humphrey. 44 *American Law Review* 37 (Jan.–Feb.).

"Turning now to the opinions, we find that in one hundred cases the judgment of the lower court was affirmed and in forty-two cases was reversed. In opinions *per curiam* we find ten cases affirmed and two cases reversed. Where opinions are delivered we find writ of error or appeal dismissed in thirty cases, and we find *per curiam* dismissal for want of jurisdiction in twenty-five cases. It seems to me that this shows well for the courts of first instance—one hundred and ten affirmances to forty-four reversals."

"Equity of the Statute." See Legislative Powers.

Fraud. "Dr. Cook's Status Under the Criminal Law." Editorial. 19 *Bench and Bar* 94 (Dec.).

"As Cook is now supposed to be in hiding in a foreign country, it remains to be seen whether he will be indicted, extradited and tried. We wonder whether the wily gentleman has already sought an asylum not subject to an extradition treaty with his native land."

Government. Under this heading, it is the custom of the *Green Bag* to consider important contributions to the study of that division of constitutional law which deals with the extent and distribution of the powers of government. At the present time the distribution of these powers is a subject of acute controversy both in the United States and in England. In our own country, the relative power of the nation and of the states calls forth more discussion than any other topic of constitutional law, in connection with the questions involved in the federal corporation tax act and proposed income tax amendment (see Taxation, *infra*) and in the proposed federal incorporation law (see Interstate Commerce, *infra*). In England, the debate with reference to the relative powers of the two Houses of Parliament shows no sign of dying out.

For American readers a thoughtful contribution to the general topic is that of the following writer, who considers that the leading measures supported by the national administration contemplate an unwarranted extension of federal power and threaten the security of constitutional guaranties:—

"Sociology for the Constitution, the Wreck of Regulation." By Frank Hendrick. *Editorial Review*, v. 2, p. 45 (Jan.).

The first fundamental change proposed in the Constitution, says this author, is the adoption of an amendment to provide election of United States Senators by popular vote. Such an action would jeopardize the unamendable provision securing equal suffrage for each state in the Senate.

"The second proposal is that the Constitution of the United States be so amended as to permit Congress to pass an act imposing a tax on incomes without the necessity of providing for apportionment of the amount to be raised, according to the census, among the several states. . . . If a tax on incomes, so-called, is nothing if not a direct tax, then the exemption of a tax on incomes, so-called, from the requirement of apportionment, is an exemption of nothing if not of a direct tax, and if of one direct tax, by whatever name called, then, on principle and in practice, of any direct tax, and . . . all limitations upon the levying of direct taxes upon property within

the states heretofore imposed by the rule of apportionment are to be removed. . . ."

The author contends that the Corporation Tax law of 1909 is not an excise but a discriminatory direct tax on capital. It "presents no new question. Such a tax, imposed in substantially the same language, has already been declared an unconstitutional direct tax. . . ."

"The proposal for a central bank may profitably be considered in this connection. . . . Control of commodities and monopoly of facilities in a few hands are to be dreaded, but to give to one leadership a magic wand to change the supply and purchasing power of the people's money would be folly indeed. . . . To give irresponsible control of credit, by a federal law, to any body of men would be an abdication by the national government of all its great power to regulate commerce and a failure to work the institutions of the country in the public interest. . . .

"Since the enactment of the Sherman Anti-Trust Act, in 1890, the problem of controlling corporations and commerce has been one for the courts, a question of jurisdiction. . . . What is needed is precisely a legislative rule of jurisdiction which shall light up the twilight zone by making a case in which that can be proved which was proved in the *Knight* case cognizable, if preferred, and at the instance of the aggrieved party, in any proper one of the thousands of state courts which have been largely put out of operation so far as the solution of this problem is concerned, and by denying protection of the federal courts to notorious, because self-confessed, combinations in restraint of trade. . . .

"To make the Sherman Anti-Trust Act, the Constitution of the United States, the common law, and the whole American judicial machinery, work so as to enforce common fairness as the rule of trade and commerce, the only national legislation needed is an amendment to Section 1 of the Judiciary Act of March 3, 1887. There should be added the provision:—

"That the Circuit Courts of the United States shall not take cognizance of any suit of a civil nature, either at common law or in equity, between a corporation created or organized by or under the laws of any state and a citizen of any state in which such corporation, at the time the cause of action accrued, may have been carrying on any business authorized by the law creating it, except in cases arising under the patent or copyright laws, and in like cases in which said courts are authorized by this act to take original cognizance of suits between citizens of the same states; nor shall any suit between such a corporation and a citizen or citizens of a state in which it may be doing business be removed to any Circuit Court of the United States, except in like cases in which such removal is authorized by the foregoing provision in suits between citizens of the same state.

"To this amendment, which was introduced in 1887, but not passed, there should be added this further provision:—

"Nor shall the Circuit Courts of the United States take original cognizance of any suit of a civil nature, either at common law or in equity, in which such a corporation shall be a party plaintiff unless such corporation shall have previously filed its certificate of incorporation, a sworn list of its actual officers and directors, and a sworn statement of the stocks, bonds, or other securities of other corporations held or controlled by it, in the office of the Department of Commerce and Labor; nor shall any suit in which such a corporation may be a party defendant be removed to any Circuit Court of the United States unless such corporation shall have previously filed its certificate of incorporation and such sworn list and statement as aforesaid."

See also Interstate Commerce, Taxation.

Closely related to the question of the relation between federal and state powers is that of the constitutionality of—

"The Delegation of Federal Jurisdiction to State Courts by Congress." By James D. Barnett. 43 *American Law Review* 852 (Nov.–Dec.).

"Where the devolution of jurisdiction upon the states by act of Congress is deemed to be constitutional, *must* they assume the exercise of such jurisdiction? With the exception of a few cases in which the supremacy of federal law is interpreted to render the exercise of jurisdiction both lawful and compulsory, the courts have invariably held, either without argument, because apparently the matter is too clear for argument, or upon the expressly stated admission that the state courts have been, for particular purposes, *established* by Congress, a view the principle of which, as above explained, has generally been repudiated."

British Constitution. In England, the sentiment opposed to vesting in one organ of the government powers so great as to cripple a co-ordinate authority is very powerful, if not predominant. With some partisan heat, but nevertheless not without perception of the momentous issue involved in the proposal to give the House of Commons all that it demands, the *Quarterly Review* pleads for the supremacy of popular rights over the prerogatives of the party in control of the last Parliament:—

"The Appeal to the Nation." Editorial. *Quarterly Review*, v. 212, no. 422, p. 281 (Jan.).

"Unionists, like their opponents, are united by one idea; their fundamental faith is the necessity and the duty of insisting that the rules and the action of party government, the very privileges of the House of Commons, which were originally acquired for the defense of the country against the threatening tyranny of the Crown, shall be made subordinate to the authority of the nation."

In a similar spirit another writer defends the rights of the House of Lords, also dragging in the question of Irish Home Rule:—

"The Constitutional Crisis." By J. A. R. Marriott. *Nineteenth Century and After*, v. 67, p. 22 (Jan.).

"The co-ordinate legislative authority of the Second Chamber is to be overthrown, not only in the interests of collectivism, but because it represents a formidable barrier against the disruption of the United Kingdom. . . .

"For eleven critical years in the middle of the seventeenth century the people of this country submitted sullenly but silently to the alternate supremacy of an unlimited unicameral Legislature and a military autocracy. In due season the mighty autocrat paid the common toll of humanity; the voice of the people at last found vent, and with their first breath they affirmed the historic resolution that 'the government is and ought to be by King, Lords, and Commons' (May 1, 1660)."

The House of Commons has, however, its defenders:—

"The House of Lords." By Sydney Brooks. *Atlantic Monthly*, v. 105, p. 128 (Jan.).

But this writer inadvertently refutes himself by slipping into a paradoxical statement unawares:—

"The problem before the British people is now to enforce the financial predominance of the House of Commons, to see to it that it can never again be challenged, and at the same time to preserve to the House of Lords those suspensory and revisory powers which all democracies feel the need of vesting in some institution, and which, in a land where Parliament is unfettered and supreme, are pre-eminently essential to the stability of the state."

In connection with the British Constitution, Mr. Lucas' historical article on the question whether the King has ever ruled alone under the Constitution may be of interest (see Legal History, *infra*).

South African Union. "A Comparative Study of the South African Constitution." By Lester H. Woolsey. 4 *American Journal of International Law* 1 (Jan.).

The fullest and most luminous account we have yet seen of the provisions of the new Constitution of the South African Union, which are set forth with much detail and compared with the fundamental law of Canada, Australia, the United States, and other typical countries.

"We are now perhaps in a better position to discuss the broad question of division of powers which was raised above, and to consider the position of the provinces in the various constitutional systems. In the first place it will be noted that in South Africa the organization of the provinces and their fundamental laws are to be found in the South Africa Act. They have no local constitutions such as the provinces in Canada and the states in Australia brought with them into the Union (Aust. 106, Can. 92 (1)) and still enjoy. Hence the South African provinces have no power of amendment as is expressly granted to the political divisions of Canada and Australia in respect to their local constitutions. Moreover, the South Africa Act provides that an ordinance of a provincial council shall have effect as long and as far only as it is not repugnant to any Act of Parliament (S. A. 86). Furthermore, the power of amending any portion of the South Africa Act lies in the Union Parliament (S. A. 152) subject to the restriction that bills abridging powers of provincial councils shall be reserved for the King's pleasure (S. A. 64). Thus it is seen that the province in South Africa is not dignified by a constitution; it has no control over private law; its ordinances are subject to the Acts of Parliament; and the same agent may with the consent of the Crown shear it of the few powers it possesses."

See also Legislative Powers, Police Power, Political Evolution.

International Arbitration. "Proposal to Modify the International Prize Court and to Invest it as Modified with the Jurisdiction and Functions of a Court of Arbitral Justce." Editorial. 4 *American Journal of International Law* 163 (Jan.).

"It is . . . hoped that a proposition so reasonable in itself and based upon precedent will meet with a friendly response, and that not only the International Prize Court but the Court of Arbitral Justice may be established for the consenting Powers at one and the same time. It is impossible to over-estimate the benefits that would accrue from the establishment of this international tribunal, because, permanently in session, it would not need to be constituted, it would always be open to receive and decide cases submitted to it, and the expenses of the court would be borne by the community of nations, thus obviating the delays in the constitution of the temporary tribunal and the large expense incidental to its operation."

"Compulsory Arbitration at the Second Hague Conference." By Heinrich Lammasch. 4 *American Journal of International Law* 83 (Jan.).

"There was finally a combined English-American-Portuguese proposition to adopt a list of cases unconditionally subject to arbitration. . . . At the last ballot thirty-two votes were given in favor of and eight against the English-American-Portuguese proposition. . . . After the conciliatory propositions of Austria-Hungary (Merey) and Switzerland (Carlin and Max Huber) had been rejected, the conference agreed on a declaration drafted chiefly by Tornielli. . . .

"Although it is true that probably no war would ever have been prevented by adopting the 'list,' there is likewise no doubt that its adoption 'in principle' would have been of greater value than the high sounding words of the afore-cited declaration. Consequently those who are called 'peace lovers' with a certain shrug of the shoulders were not the only ones who regretted its rejection."

International Law. See Navigable Rivers, Prescription.

Interstate Commerce. "The Power of Congress and of the States Respectively, to Regulate the Conduct and Liability of Carriers." By Frederick H. Cooke. 10 *Columbia Law Review* 35 (Jan.).

"It seems clear that it is beyond the power of Congress to exercise such power [to regulate the conduct and liability of a carrier] directly for the benefit of intra-state travelers and shippers. This conclusion seems in accord with the statement in *Gibbons* v. *Ogden* (9 Wheat. 1, 194) reiterated in the *Employers' Liability* cases (207 U. S. 463, 493) that the power does not extend to 'that commerce which is completely internal, which is carried on between man and man in a state, or between different parts of the same state, and which does not extend to or affect other states.' In this connection, however, it should be borne in mind that the power of Congress to enact legislation incidentally affecting such internal commerce is very broad, and not easily to be defined."

"The Exclusiveness of the Power of Congress to Regulate Commerce." By Frederick H. Cooke. 43 *American Law Review* 813 (Nov.–Dec.).

"I regard as the true theory, that the power of Congress under the commerce clause is exclusive *in all cases;* that *in no case* whatever may a state regulate commerce within the scope of such provision. This is what in the article above referred to is termed the Exclusive Theory.

"Now it is obvious enough that, in a variety of ways, legislation indisputably within the power of a state may more or less remotely have an effect upon such commerce. But the point to notice is that, in the view herein taken, in every case this is merely the incidental effect of the exercise under authority of a state, not of the power to regulate commerce, but of some other distinct power reserved to the states."

See also Corporations, Taxation.

Juries. "Trial by Jury in Illinois." By Edgar L. Masters of the Chicago bar. 4 *Illinois Law Review* 408 (Jan.).

"If trial by jury, as it existed at common law, should be restored in Illinois, the trial courts would have cast upon them the responsibility which they now shirk of supervising the record on motion for a new trial, on questions of the weight of evidence, and the amount of damages. The Appellate Courts would then have nothing but questions of law to consider."

Jurisprudence. See under special topics, *e. g.*, Basis of Law, Legal Evolution.

Law Reporting. "Loose Leaf Law Reports." By Percy T. Carden. 26 *Law Quarterly Review* 75 (Jan.).

"The object of this article is to advocate a change in the form in which law reports are published, the change suggested being the substitution of a combined system of leaves and cards for the present system of bound volumes. . . . Were the proposed scheme carried to its ideal logical conclusion, each subscriber might turn over the heaps of legal lore mouldering round the roots of the legal tree of knowledge, from whose branches it has fallen during the course of more than five centuries, and pick out the portions suited to his taste or needs. He would in this way get more of the cases which he required, pay less for them, and be cumbered with less useless litter."

Legal Classification. "The Making of a Law Index." By F. Granville Munson. 43 *American Law Review* 801 (Nov.–Dec.).

"To the writer's mind, this is the prime essential of a law index—not so much to guide inquirers to existing law as to assure them of the non-existence of non-existing law. . . . The writer hopes that these . . . remarks may show the value of the ideas of the Index-Analysis of the Federal Statutes, not only for indexes of other law books, but for indexes of law libraries as well."

Legal Education. "The Present State of Legal Education in England." By Harold D. Hazeltine. Read before the Association of American Law Schools. 26 *Law Quarterly Review* 17 (Jan.).

"At certain schools two years are spent upon English Law, but at other and perhaps at most schools the course in English Law is essentially a one-year or a one-and-half-year course. The time to be spent on English Law could be increased by reducing somewhat the time spent on such subjects as Roman Law, Jurisprudence and Public International Law; but there can be no doubt that English legal educators are right in insisting upon the high importance of such subjects, for they not only have an educational value, but also a practical significance as regards various branches of the English Law itself. . . .

"Undoubtedly the present method of instruction does lead in many cases to cramwork. . . . The extensive use of this inductive case-method would, I believe, do much towards the rooting out of mere cramming for examinations; for this method necessarily involves careful preparation and the development of the student's own reasoning capacities."

Legal History. "The Co-Operative Nature of English Sovereignty." By W. W. Lucas. 26 *Law Quarterly Review* 54 (Jan.).

A striking collation of historical learning gathered in the endeavor to settle the question, "Has the monarch ever ruled alone, either in legislation or administration, with the sanction of the Constitution?" This question is answered in the negative.

If the deductions of this writer are sound—and they are enforced by a formidable collection of historical evidence—in the obscure mediæval beginnings of the British polity there is no longer any occasion for supposing that at any time the King may have been the sole sovereign of the kingdom, superior alike to the people and to Parliament. Rather it is to be assumed that the people have always reserved political powers to themselves of which no King could legally dispossess them. This is what the writer means by his theory of co-operative sovereignty.

"The Norman Conquest provided a splendid opportunity for the kingly quest for absolute rule. Viewed positively, the kingship was indeed a most powerful function, viewed relatively in conjunction with the ancient and unsurrendered claims of the community to participate in working out its own salvation, and which eventually were slowly and surely made good, the kingship was nothing more than the principal office in 'the Crown.'"

Legal Literature. "Blackstone's Commentaries." By Prof. A. V. Dicey, K.C. *National Review*, v. 54, p. 653 (Dec.).

A richly informed article, setting forth the author's ripe reflections upon the influence of Blackstone upon legal literature and legal education, and written in a style much more than merely academic. The London *Law Times* digests it as follows:—

"He shows when and why the popularity of the great work waned, and suggests the means by which critics of the present day may gain a due appreciation of its merits. The reception of the Commentaries was remarkable. From the King himself (George III) down to the humblest student of constitutional problems ranged the list of readers. For sixty years the work maintained its position, Professor Dicey thinks that the editing of Blackstone by Serjeant Stephen was the chief cause in the decline of its popularity. Stephen's regard for Blackstone restrained him from writing a new work, and the result of the imposition of his logical faculty upon Blackstone's literary charm was unsatisfactory. 'By virtue both of his knowledge of law and of his literary genius,' writes Professor Dicey, 'Blackstone produced the one treatise on the laws of England which must for all time remain a part of English literature. . . . The united labors of a thousand lawyers may create, and I trust will create, an encyclopædia of English law, but they will never, even though they have a Lord Chancellor at their head, give birth to a work which will rival the Commentaries on the Laws of England.' Finally, Professor Dicey shows how the first Vinerian professor anticipated and marked out the path of reform in the teaching of the law which has been accomplished on both sides of the Atlantic. Kent's Commentaries is the only work which can rival Blackstone, and the Dane Professorship of Law in Harvard University, held by Joseph Story, was modeled upon the Vinerian professorship. It may be suggested that Professor Dicey might perhaps have written a word of eulogy on the generosity of Charles Viner, whose benefaction gave Blackstone his opportunity, and, it may be added, facilitated the disposal by Professor Dicey of his last learning in the service of the community for nearly thirty years."

Legislative Powers. "The Due Process Clauses and 'The Substance of Individual Rights.'" By Robert P. Reeder. 58 *University of Pennsylvania Law Review* 191 (Jan.).

In an acutely analytical article, based on an extended study of the decisions of the Supreme Court, the author, with admirable clearness of reasoning, reaches the conclusion that the due process clause of the federal Constitution properly relates only to procedure, and not to substantive law. *Hurtado* v. *California* (110 U. S. 516, 4 Sup. Ct. 292) and other leading decisions are adversely commented upon. (*Cf.* article by Ex-Chief Justice Simeon E. Baldwin, reviewed in 21 *Green Bag* 630.) It would follow from this position that the courts should have no power, if the question be considered purely as one of principle, to declare a legislative act unconstitutional under the due process clause, merely because it was held to contravene social justice.

"Certainly it is the duty of the court, when interpreting provisions of the Constitution, to ascertain whether the terms had established meanings when placed in the Constitution and, if so, to apply them in accordance with those meanings. And it seems clear that when the due process provision was placed in the federal Constitution it referred simply to those deprivations which are usually made by way of punishment, and that it referred simply to procedure. . . . There are abundant reasons for saying with positiveness that the courts should hold that the provision relates only to procedure. . . ."

Not unlike the "due process of law" doctrine, as regards its practical operation, is Blackstone's doctrine of the "equity of the statute," according to which the court will look beyond the letter of the law to its reason and spirit and sustain it or hold it void accordingly:—

"A Very Frank and Honest Avowal of Judicial Heterodoxy." By Judge Edward S. Doolittle. 17 West Virginia *Bar* 15 (Jan.).

"Blackstone's exposition of the law, in this respect [as to the 'equity of the statute'] has been assailed by numerous courts and textwriters. That judge, who is one of these critics, will, in the trial of cases, probably, but inconsistently with his own theory, do indirectly what Blackstone affirms is within his lawful authority.

"He will qualify the literal meaning of a harsh and impolitic statute, or abate its rigor, by his rulings upon the trial; by directing a verdict; by requiring the plaintiff to reduce the damages assessed by the jury; by setting aside the verdict; or by other means known by the experienced judge.

"As a practical rule to guide us in the administration of justice, I believe the text of the great commentator is right."

Master and Servant. "Some Phases of the Law of Master and Servant: An Attempt at Rationalization." By Judge Arthur Gray Powell of the Georgia Court of Appeals. 10 *Columbia Law Review* 1 (Jan.).

"The servant's business,—the execution of the work, would be inefficiently done but for his ability to secure the co-operation of certain conscious animate agencies,—fellow servants, in fine (just as he must procure the tools and inanimate instrumentalities); and the nature of the relationship is such that the master must furnish the animate as well as the inanimate agencies; but, in an appreciable sense, it may be seen, the tools, the fellow servants, all the instrumentalities by which the work is executed, are the agencies of the servant, necessary to his business as a laborer. Of course, as the furnisher of these agencies, the master must use ordinary care and diligence to see that the animate are competent and that the inanimate are not defective. But when it comes to the question of absolute responsibility for the conduct of a conscious agent, the principle of *respondeat superior* rests not so much upon the circumstance that the principal contractually employed the agent, as upon the physical fact that the agent was acting in the scope of a business being performed for him who was the proprietor of the business. In this sense, the fellow workmen while engaged in co-operating with the servant in executing the details of the labor are agents acting in the scope of their employment and in furtherance of the servant's business;—and to this extent the negligence of the fellow servant is to be imputed to the servant as well as the master."

Monopolies. "Monopolies: The Cause and the Remedy." By Charles P. Howland of the New York bar. 10 *Columbia Law Review* 91 (Feb.).

"Artificial inequalities have long been recognized as one of the greatest dangers to a democracy. For this reason methods of accumulation threatening excessive inequalities—monopolies arising out of combinations of men, private trusts for accumulation, and perpetuities—have long been forbidden. . . .

"We have now repealed the policy of centuries and re-established mortmain. All that is denied to individuals by limitations of nature and of public policy is now granted to corporations by law. Upon their power to possess no limit is placed. . . .

"The Sherman Act affords no relief against size. . . . Our measures of relief must go straight at the cause. To prevent monopoly we must restrain the consolidation of corporate wealth by limiting corporate size; we should altogether forbid intercorporate stockholdings and should impose carefully chosen limitations upon the amount of capitalization and the holding of corporate assets. The limitation upon capitalization will depend upon the extent of the national market; if no corporation is allowed to grow big enough to fill this market, some competition at least within the nation is restored. . . .

"Here, then, is indicated the first series of measures in the restoration of equality: *Any state, sincerely hostile to monopoly, may forbid any company, foreign or domestic, to do business within its jurisdiction if it own the stock of others, or through ownership of its own stock be servient to a monopoly, or exceed a forbidden size*, and the legislation may legitimately include corporations already doing business in the state. Such a state would cease to create or voluntarily to foster monopoly. . . .

"*The maintenance of monopolies by certain states against the protests of sister states may be prevented by an Act of Congress, regulative of commerce, providing that the anti-monopoly laws of a state shall apply to all goods owned by corporations whenever they arrive at the territorial boundary of the state and demand entry.* The state legislation thus approved should forbid the obnoxious corporations to do business within the state boundaries."

"Trust Regulation Today." By Gilbert Holland Montague. *Atlantic Monthly*, v. 105, p. 1 (Jan.).

" 'Coercion,' 'force,' and 'fraud' are well-established terms in law. They are capable of definition and application by courts and juries to varying states of fact. . . . 'Destroying or restricting free competition' and the other phases above quoted, are of more recent usage. In common speech, and as used by the courts, they include practically every phase of coercion, force and fraud, as applied to competition. . . . It may well be contended that these phrases are sufficiently definite to serve in a statute providing for a criminal penalty."

"The Tobacco Pools of Kentucky and Tennessee." By Anna Youngman. 18 *Journal of Political Economy* 34 (Jan.).

"Until the last few years the economist has rather dogmatically assumed that the modern movement toward combination characterizes only those forms of enterprise which necessitate the employment of large amounts of fixed capital. . . . Yet the farmer is not altogether unfamiliar with proposals to combine, nor has he always turned a deaf ear to the pooling schemes that have been evolved for his benefit.

"Whether the people of Kentucky and Tennessee will submit to a recrudescence of the régime of the night-riders is matter for doubt. . . . Should the tobacco growers succeed, however, in maintaining their co-operative selling agencies, there seems to be no reason why they should not come to a permament agreement with the American Tobacco Company and the other allied buying organizations. The amalgamated associations could then present a united front to the consuming public."

Navigable Rivers. "Notes on Rivers and Navigation in International Law. By Charles Cheney Hyde. 4 *American Journal of International Law* 145 (Jan.).

"The practice of maritime states during the past century or more justifies the following conclusions:—

"*First*, that any right of navigation is dependent upon the consent of the territorial sovereign.

"*Secondly*, that the law of nations imposes upon such sovereign the duty to yield its consent to the navigation of its own waters by the inhabitants of any other upstream riparian state.

"*Thirdly*, that where a river and its tributaries afford the sole means of water communication between several riparian states and the ocean by reason of a channel of sufficient depth to be of general commercial value, it becomes the duty of any riparian state bordering the lower waters to consent to the free access to countries upstream by all foreign merchant vessels.

"*Fourthly*, that in the absence of arrangement for international regulation, the territorial sovereign may exercise large discretion in the control of navigation within its own waters."

Negro Problem. See Race Discrimination.

Penology. "Vasectomy—A Crime Against Nature." By Prof. Alfred W. Herzog, M. D. 27 *Medico-Legal Journal* 150 (Dec.).

An answer to "Hereditary Criminality and its Certain Cure," by Judge Warren W. Foster of the Court of General Sessions, New York City, in *Pearson's Magazine* for November. (See 21 *Green Bag* 627.)

"Prisons and Progress." By Lyman Beecher Stowe. *Outlook*, v. 94, p. 252 (Jan. 29).

"There are still some prisons which are no better than was the average prison of fifty years ago, . . . but there are a few which, like the Maryland Penitentiary, at least approximate what a prison should be—a hospital for the morally sick."

"A Self-Supporting Penal Labor Colony." By Edith Sellers. *Nineteenth Century and After*, v. 67, p. 108 (Jan.).

A description of Witzwil, in the Swiss Canton of Berne.

Perpetuities. "The Struggle for a Perpetuity." By John R. Rood. 8 *Michigan Law Review* 181 (Jan.).

An able historical review of the growth of the series of doctrines which were the forerunners of the modern rule against perpetuities, from the time of Bracton and the Year Books down to the seventeenth century. Here, for example, is a view of the source of the famous rule in *Shelley*'s case:—

"Even before a means was found of escaping from entails, attempts were made to accomplish the same result of indestructibility as entails enjoyed when the donor desired to convey a fee simple. This was sought to be accomplished by a conveyance to the donee expressly for life only, and then limiting the remainder in fee to his heirs, thinking thereby to make his heirs purchasers. But the courts as early as A. D. 1325, in *Abel's* case (Maynard's Year Books, 18 Edw. II, fo. 577) declared that a man could not limit a gift to his own heirs as purchasers, and that a gift to one for life with remainder in fee to his heirs was no more than a more elaborate expression of the intention more commonly expressed by a gift to one and his heirs; for it could not have been intended and never had been understood by such a gift that the donee and his heirs should take concurrently, but rather should take in succession. Some two hundred and fifty years later this doctrine acquired the name of the Rule in *Shelley's* case."

Police Power. The White Slave Traffic Speech of Hon. Charles S. Bartlett of Georgia, in House of Representatives Jan. 11. *Congressional Record*, v. 45, no. 21, p. 657 (Jan. 15).

Congressman Bartlett, opposing the bill designed to enable the federal government to prevent the white slave traffic, discussed the extent of the police power from a lawyer's standpoint, reviewing leading cases, and said:

"It must follow, from these decisions, that the federal government has no police power, and cannot exercise any such within the several states."

Procedure. "Criminal Procedure in the United States." By Prof. James W. Garner, Ph. D., of the University of Illinois. *North American Review*, v. 191, p. 49 (Jan.).

This writer cites, together with other examples of the law's delays, the litigation growing out of the burning of the Iroquois Theatre in Chicago as a typical case. The fire, resulting in the loss of nearly six hundred lives, occurred on Dec. 30, 1903. Two months thereafter the owner of the theatre was indicted. The indictment was finally quashed. On March 4, 1905, a new indictment was found and was held for seven months and a half. Finally, three years and four months after the commission of the offense charged, the case was brought to trial only to result in the release of the accused on a technicality. Such delays are not only a wrong to the accused, if he be innocent, but they always work an injury to society and often defeat the ends of justice itself.

"A Further Study of the English Judicial Establishment." By Judge Stephen A. Foster. A paper read before the Chicago Law Club, October 1, 1909. 4 *Illinois Law Review* 381 (Jan.).

"Professor Kales makes no reference to the Commercial Court of London, which, to my mind, is a most important innovation in the English judicial system. It is not in reality a separate court at all, but merely a branch

of the King's Bench Division of the High Court, to which a judge specially skilled in commercial law is appointed. . . .

"The judge of this court, upon a motion to place any case upon the commercial list, decides the preliminary question as to what, if any, pleadings are necessary. He sometimes makes a note of the points of defense then stated and orders that such memorandum stand as the defendant's pleading, or he may order the defendant's lawyer to write a letter to the plaintiff briefly setting out points relied upon. He also orders the parties to exchange for inspection any documents upon which either may wish to rely and frequently secures admissions by counsel of matters not seriously in dispute. . . . The familiarity with the questions in dispute which the judge acquires before trial enables him to reach a decision on the real merits with greater certainty and promptness."

See Juries.

Race Discrimination. "Race Distinctions in American Law, X." By Gilbert Thomas Stephenson. 43 *American Law Review* 869 (Nov.–Dec.).

This instalment presents many facts regarding the standing of the negro in the courtroom since 1865, as spectator, as judge, as lawyer, as witness, and as juror; statutes providing for separate courts and different punishments for negroes are also considered.

Real Property. "Destruction of a Demised Building." By James Edward Hogg. 26 *Law Quarterly Review* 71 (Jan.).

"When the question of the liability of a tenant of an upper floor that has physically disappeared does come before the English Courts, it is pretty certain that considerable light will be thrown on a part of our real property law that is still very obscure."

See Capital and Income, Perpetuities.

Taxation (Federal Corporation Tax Act). The literature of this subject is now largely taken up with replies to the attacks on the constitutionality of the law with which the discussion opened three months ago. Whether those attacks have now been effectively met, and whether the preponderating weight of authority at present favors the position that the act is unconstitutional, the reader must judge for himself.

Professor Frank J. Goodnow's article (see 22 *Green Bag* 128, Feb.) was one of the most convincing of those in which the act was argued unconstitutional. His arguments seem to have chiefly been in the mind of the following defenders of the Administration measure:—

"The Constitutionality of the Federal Corporation Tax." By Ralph W. Aigler. 8 *Michigan Law Review* 206 (Jan.).

(1) "Professor Goodnow has taken the position that the act is unconstitutional in so far as it includes income derived from property, on the ground that under the income tax decision such tax would have to be apportioned. Just how he arrives at that conclusion does not appear. In another part of his article he takes the view that the tax is really upon the franchise or privilege. If he is correct in that, necessarily the tax must be an excise, no matter how its amount is measured. And if the tax be considered as imposed on business, it is equally an excise. In neither case need it be apportioned. . . .

(2) "It can no longer be seriously disputed that Congress, under the taxing power, has the right to lay an excise upon inheritances. . . . The point made by Mr. Justice White in *Knowlton* v. *Moore* (178 U. S. 41, 59), would seem to be an almost complete answer to the argument that the corporation tax is invalid because it taxes a matter under the exclusive control of the state. This tax is no more a burden upon or an interference with the state's power of control than was the inheritance tax. . . .

(3) "There is no doubt of the geographical uniformity of the corporation tax. There can, therefore, be no question as to its validity on that point."

Mr. Pierson's article in the *Outlook* (see 22 *Green Bag* 29, Jan.) drew forth the following reply:—

"Is the Federal Corporation Tax Constitutional?" By Hugh A. Bayne. *Outlook*, v. 94, p. 20 (Jan. 1).

"The writer has been unable to find any decision denying to Congress the power to impose excise taxes on the exercise of private privileges or franchises conferred by the states. He has found a number of decisions recognizing the right of Congress to tax the exercise of such privileges. . . .

"As Mr. Pierson's objection is that the Corporation Tax imposes a tax on the exercise of privileges pertaining to the corporate form, and as the corporation, in exercising those privileges, does not discharge a governmental function, but merely a private function, I conclude that the statute does not invade the constitutional barrier of state sovereignty."

Bench and Bar was one of the first hostile critics of the act (see 22 *Green Bag* 29, Jan.), and further considers the subject.

"The Proposed Federal Incorporation Law." Editorial. 20 *Bench and Bar* 2 (Jan.).

"Manifestly no business corporation can be denuded of all local characteristics or activities. . . . If it were impossible expressly to authorize a corporation chartered by the federal government to manufacture its raw material within a state, it is at least very doubtful whether the same result could be accomplished indirectly by authorizing a federal corporation to hold stock in a state corporation."

See Government, Tariff.

Taxation (Proposed Income Tax Amendment). See Government.

Torts. See Quasi-Contracts.

Reviews of Books

REMINISCENCES OF A K.C.

Reminiscences of a K.C. By Thomas Edward Crispe of the Middle Temple. Pp. xxi, 306. Methuen & Co., London. (10*s.* 6*d. net.*)

THIS book of reminiscences consists of two hundred and ninety-four pages of which not one page is either dull or ill-natured. Mr. Crispe was born in 1833, and was called to the bar in 1874. He is an instance of a man not called to the bar until he had reached middle-age, and rising to the first rank in his profession. Like Montagu Williams and Sir Francis Lockwood (the Solicitor-General), Mr. Crispe began his life on the stage. Montagu Williams was in turns master at a Grammar school, an officer in the militia, a playwright, an actor, a criminal lawyer, a police magistrate, and author of "Leaves of a Life." Lockwood joined the Kendal Company as an actor, but he was preserved for the Bar, apparently by being built on too large a scale for the stage. Lockwood was "a fellow of infinite jest," yet his reputation will scarcely survive his contemporaries. Mr. Crispe refers to Mr. Birrell's Memoir of Lockwood as not "doing his friend justice," and indeed it does not. Mr. Birrell

"Who, born for the universe, narrow'd his mind,
And to party gave up what was meant for mankind."

was a humorist, as well as a Chancery K.C., before he became Secretary of State for Ireland. His memoir of his friend, Sir Frank Lockwood, is a singular book, because although written by a wit on a wit, the quality of wit is altogether absent. Mr. Crispe's references to Lockwood, brief as they are, give you a far better idea of the man than Mr. Birrell's Memoir.

Mr. Crispe was naturally drawn to Lord Chief Justice Cockburn. To know him was to love him. He was full of tenderness as well as of brain-power. Like all thoroughbreds, he was sensitive, and not disposed to exert his consummate powers unless he felt the occasion demanded them. His successor as Chief Justice was Lord Coleridge, the father of the present Judge of the King's Bench. Lord Coleridge's opinion of his predecessor—who was his opposite almost in every moral and intellectual quality—is too interesting to omit. In the *Saurin* case, Sir Alexander Cockburn was the Judge and Sir John Coleridge, K.C., led Mr. Alfred Wills as Counsel for the plaintiff. Mr. Wills was afterwards promoted to the bench, and retired as senior puisne of the King's Bench—a man immensely respected by all, and loved by his friends. In writing to a friend, Mr. Wills said, "I expressed one day to Coleridge my admiration of the way in which he dealt with Cockburn, adding that it seemed to me like riding a hot-tempered, fidgety chestnut mare. 'Chestnut mare,' he replied, 'it's riding a barrel of gunpowder with two red-hot pokers for a bridle.' " In justice to Cockburn it should be added that the *Saurin* case was an action of assault, libel and trover brought by an Irish lady, formerly a Sister of Mercy, against the Lady Superior and another. The hearing took up twenty days, and would have tried the temper even of a phlegmatic judge. We mention these facts, as Mr. Crispe writes, "I fear the judge (Sir Alexander) was not all I have depicted him." Poor Dr. Kenealy, who from his crass folly threw away all the distinctions of the bar, wrote some lines on Cockburn which Mr. Crispe justly says are no mere panegyric:—

And I have seen a Court where every man
Felt himself in the presence of a gentleman,
Whose genial courtesy made all things genial,
Whose exquisite bearing captured all men's love,
Whose sun-bright justice brightened every cause,
And sent even him who lost, away content.

Sir John Coleridge was known both at the bar and in the House of Commons as "silver-tongued." The office of Chief Justice of England has been filled in succession by Lord Campbell, Sir Alexander Cockburn, Lord Coleridge, Lord Russell and Lord Alverstone, all of whom had in turn filled the office of Attorney-General. We will give only one instance of Coleridge's eloquence at the bar, not only because it was reported by, and greatly impressed, his successor, Lord Russell, but because it is proof of how intimate is the knowledge of the Bible in the middle and lower classes of England. Coleridge was a consummate artist, but he was also a winner

of verdicts. He did not soar over the heads of the twelve jurymen. "Gentlemen," said Coleridge in the *Saurin* case, "I cannot help thinking that people who devote themselves to this life (*i. e.*, convent life) imitate too exclusively one part of the life of our divine Lord, and forget the other. They rememebr the forty days in the wilderness, and the hours in the garden, and on the mountain, but they fail to bear in mind the 'Marriage of Cana' and the 'Feast of Bethany.'"

Lord Russell was a Roman Catholic, while Lord Coleridge was a High Churchman. But among the delightful characteristics of the Bar of England, the entire absence of religious intolerance is the most delightful. There have been men of extreme views, like the late Mr. Reader Harris, K.C., the founder of the Pentecostal League, and Judge Willis, the passive resister, but their opinions never interfered with their friendships or stopped the flow of briefs to their chambers. There has rarely existed a closer friendship at the bar than that between the late Mr. Justice Day and Judge Willis. The one was a rigid Roman Catholic and Conservative, the other is an equally rigid Nonconformist and Radical. Judge Willis has written a small of "Recollections" in which he tells us: "Day was a Papist and I was a Baptist; we seldom discussed, we loved." Mr. Justice Day's solemn expression won him the nickname of "Judgment Day," but he was blessed with dry humor, which his legal learning never quenched. Mr. Crispe gives an instance of this. He was cross-examining the defendant, and asked him for his trade card. On this card he was described as an undertaker with a telegraphic address. "I asked him why he gave a telegraphic address. The Judge (Day) interposed, "Oh," said he, "I suppose it is for the convenience of people who want to be buried in a hurry."

Mr. Crispe has nothing to tell us of Lord Justice Bowen, but he has something to add to our knowledge of that equally great judge, Sir George Jessel, the Master of the Rolls. Mr. Crispe, being a common law man, was naturally not thrown across Lord Justice Bowen. We will only say of Bowen that he was an ideal judge, combining as he did perfection of form with perfection of substance. He was an instance of sound law always clothed in the tersest and wittiest language. How different a man was his brother Chancery Judge, Sir George Jessel, but wisdom is justified of all her children. Jessel, like Bowen, had a warm heart. Sir Alfred Willis (the retired judge) in a lecture gave the following anecdote which as it illustrates the comradeship of the bar Mr. Crispe has very properly preserved.

"Of Jessel, when Solicitor-General having had a brilliant passage of arms with Lord Chief Justice Cockburn, a little creature at the bar said to Sergeant Parry, 'Why, Parry, he drops his aitches.' I shall never forget the manner in which the sergeant turned round, glaring at him and said, 'Sir, I would rather drop my h's with Jessel in hell than aspirate with you in heaven.'"

When a new trial has been ordered, it is not proper or right to refer to the amount of damages given by the jury to the plaintiff at the first trial. Sergeant Ballantine was charged with disregarding this rule. On one occasion when Sergeant Parry was leading Mr. Crispe at the second trial of an action, where the plaintiff claimed damages for injuries sustained while on the defendant's premises, the plaintiff's solicitor was fearful of not getting such large damages as at the first trial and suggested to the sergeant that in his opening he might mention the amount previously obtained. "How dare you make such a suggestion? If you repeat it, I will throw up my brief."

Lord Westbury is referred to by Mr. Crispe, but one little known fact linking the Lord Chancellor with Sir George Jessel is not given, and may be mentioned here. Jessel applied for silk to Lord Westbury, but his application was refused, and for the four years (1861–65) that Lord Westbury occupied the woolsack, Jessel had to practise as a junior. As Westbury and Jessel belonged to the same political party his exclusion was mainly due to personal dislike or prejudice on the part of the Chancellor. Every one is not as broad-minded as Sergeant Parry. When Jessel was examining a French witness through an interpreter, he thought his meaning was not being conveyed, and said to the interpreter: "Do tell the man, he don't grasp my meaning. My question 'ad nothing to do with 'eating the pipes." This the interpreter translated, "Monsieur l'Avocat vous prie de croire, qu'il ne s'agit nullement, dans son interrogatoire, de 'manger les tuyaux.'"

The late Lord Chancellor began his career at the Old Bailey, and doubtless acquired there—in the study of criminals—his knowledge of human weaknesses. Mr. Crispe tells one anecdote of an Old Bailey lawyer and his

client too racy to omit. A man with a cropped poll of unmistakably Newgate cut slunk into a counsel's room. "I'm sorry to say, sir, our little Ben has 'ad a misfortin'. Fust offense, sir." Counsel was not disposed to reduce his fees, even though the father reminded him that he had " 'ad all the family business." His client then proceeded to dole out the guineas, and remarked, "I may as well tell you, sir, you wouldn't 'a got the couters if *I hadn't had a little bit of luck on the way.*"

If there are two matters about which an Englishman may feel legitimate pride, they are the government of India, and the purity of British Courts of Justice. Mr. Crispe touches on the latter, and remarks that "in our country a corrupt judge is unknown." This is no flattery, but a statement of fact. How was it that Bacon, probably the wisest and wittiest man that ever filled the office of Lord Chancellor, how was it that such a man was convicted of corruption? The question is not asked, but it is answered by some information furnished by Mr. Crispe. Lord Bacon was always harassed by want of means. We have the sense to pay our judges good salaries; three hundred years ago our ancestors paid their judges miserable salaries, and some of their judges eked out their salaries by taking bribes. Mr. Crispe takes the period of Sir Edward Coke and the judicial salaries of 1616 (five years before the official degradation of Bacon):—

Sir E. Coke, Lord Chief Justice of England	£224. 19. 9.
Circuits	33. 6. 8.
	£258. 6. 5.
Puisne Judges of King's Bench and Common Pleas	188. 6. 8.
Circuits	33. 6. 8.
	£221. 13. 4.

The value of money was far greater then than now, but compare them with the present salaries:—

Lord High Chancellor	£10,000
Lord Chief Justice	8,000
Master of the Rolls	6,000
Chancery and Puisne Judges	5,000

We have said enough to show that in building up a large practice, Mr. Crispe has not forgotten his love of a joke and his appreciation of all those finer traits which go to form a successful advocate and a high class man.

WILLISTON ON SALES, AND THE UNIFORM SALES ACT.

The Law Governing Sales of Goods, at Common Law and under the Uniform Sales Act. By Samuel Williston, Weld Professor of Law in Harvard University. Baker, Voorhis & Co., N. Y. Pp. cix, 1155+appendix and index 148. ($7.50.)

TO most of our readers, the author's reputation will alone sufficiently assure the merits of this work. Professor Williston, the draughtsman of the Uniform Sales Act, which has been adopted in six or more states, and for many years one of the most successful teachers of the law of sales in this country, has prepared the volume not merely as an annotation of the Sales Act but as a treatise on the common law of sales as well. As such, it takes rank with that class of legal literature to which American lawyers can point with pride when they are told that most of our law treatises are poor. Williston on Sales is likely to remain for some time the standard American work of its class. Clearness both of analysis and of exposition will commend it to scholars and students, while its full citation of cases and comprehensiveness of scope will render it useful in practice.

The book is not a mere digest of decision nor a stringing together of established rules of law; it is rather the carefully thought out statement, in his own language, of the author's legal views. While he has not hesitated to criticize decisions which seemed to him opposed to principle or to the convenience of trade, he has not allowed his opinions to interfere with an accurate statement of the law as it has been declared.

Thanks are due Professor Williston fo what is undoubtedly a valuable public service. The Uniform Sales Act bids fair to become widely enacted through the United States. Judicial interpretation of that Act can now be made practically uniform, its author having placed his special equipment at the disposal of all who will read him. He is already entitled to a place of honor in the heart of the legal profession, as the author not alone of the Sales Act but of the Warehouse Receipts Act and of the Bills of Lading Act. It is unusual to find the practical jurist and the academic scholar so happily combined in one person, as in the case of Professor Williston, whose learning has possibly accomplished more than that of any other one man for the actual working out of uniformity of legislation.

The book is large, and its index and other

features are constructed and arranged upon the most approved plan. The Uniform Sales Act and the English Sale of Goods Act are both printed in full in the appendix. The typography is excellent.

THE NEW YORK ELECTION LAW

Manual for Election Officers and Voters in the State of New York. By F. G. Jewett, Former Clerk to the Secretary of State. 17th ed. Matthew Bender & Company, Albany. Pp. xxii. 561 + index 83. ($4.)

A COMPLETE up-to-date work on New York election laws as they now exist under the new consolidated laws of 1909 is available in the seventeenth edition of Jewett's Manual, which has long been the standard. The work has been entirely rewritten, revised and enlarged by Messrs. Melvin Bender and Harold J. Hinman of the Albany bar, and the forms have been revised and increased in number. The value of the work is greater than ever before. It cites and digests the decisions construing the election law of New York state and also gives the federal law and all laws or codes that affect elections in New York.

HISTORY OF THE NEW YORK COURTS

The Courts of the State of New York; their History, Development and Jurisdiction. By Henry W. Scott. Wilson Publishing Co., New York. [1908.] Pp. 506. ($5.)

A SHORT history of the courts of the state of New York is given by Judge Henry W. Scott of the New York bar. The book is particularly readable for the reason that it gives such a clearly drawn picture of the institutions of Colonial times which determined the future development of practice not only in the Empire State, but in those other states whose judiciary evolution has been influenced or actually created by the New York courts. Legal traditions of New York City and graphic pictures of old Dutch conditions make the book highly interesting to all who are fond of the Colonial traditions of the bench.

NOTES

Prof. A. V. Dicey, who once believed in woman suffrage, has lately written a little book, entitled "Letters to a Friend on Votes for Women" (London: Murray), which contains a powerful argument against woman suffrage. In a clear, logical style, fortified with wide legal and political learning, he analyzes the nature of the elective franchise, and reviews the arguments for and against female suffrage at length.

Mr. R. B. Wise's "The Commonwealth of Australia" (Little, Brown & Co., $3) is to some extent modeled after Mr. Bryce's "The American Comt monwealth." He has written with great fulness and pains about the government and political conditions of that interesting sister commonwealth.

The three finely printed volumes of "The Legislation of the Empire "(reviewed in December *Green Bag* p. 638), give a most valuable outline of the legislation of all the British Dominions during the past ten years. The Cromarty Law Book Company, 1112 Chestnut street, Philadelphia, are the sole agents for the work in the United States.

The Proceedings of the Illinois State Bar Association, at its thirty-second annual meeting, contains a number of papers of note and interest. The paper of John S. Stevens, on "The Ethics of the Bar," provoked much interesting discussion, and the paper of Alonzo Hoff, on "The Public Control of the Issuance of Corporate Stocks and Bonds," also excited an extended debate. The volume contains several other important papers, " The Sherman Anti-Trust Law and Proposed Amendments Thereto," by Hon. Charles E. Littlefield; "The Ethics of the Bench," by Jesse Holdom; and "The Enforcement of Law," by Roscoe Pound.

NEW BOOKS RECEIVED

RECEIPT of the following new books which will be reviewed later, is acknowledged:—

Day in Court; or, The Subtle Arts of Great Advocates. By Francis L. Wellman. Macmillan Company, New York. Pp. 257. ($2 *net.*)

Crime and Criminals. By the Prison Reform League. Prison Reform League Publishing Company, Los Angeles. Pp. x, 283 + appendix 28 and index 8.

Law Office and Court Procedure. By Gleason L. Archer, LL.B., Dean of the Suffolk School of Law. Little, Brown & Company, Boston. Pp. xxxv 291 + appendix 20 and index 16. ($3 *net.*)

An Introduction to the History of the Development of Law. By Hon. M. F. Morris, Associate Justice of the Court of Appeals of the District of Columbia. John Byrne & Co., Washington. Pp. 315. ($2.)

Shippers and Carriers of Interstate Freight. By Edgar Watkins, LL.B., of the Atlanta (Ga.) Bar. T. H. Flood and Company, Chicago. Table of cases, etc., pp 74 + text 488 + appendices 27 + index 28. ($6 *net*)

The Statute and Case Law of the State of New Jersey Relating to Business Companies, under an Act Concerning Corporations (Revision of 1896) and the Various Acts Amendatory thereof and Supplemental thereto, with Annotations and Forms. By James B. Dill, Judge of the Court of Errors and Appeals of New Jersey. Pp. l, 216 + index 36.

The Civil Code of the German Empire, as Enacted on August 18, 1896, with the Introductory Statute Enacted on the Same Date. Translated by Walter Loewy, B. L. (Univ. of Cal.), LL.B. (Univ. of Pa.) J. U. D. (Heidelberg). Translated and published under the auspices of and annotated by a special committee of the Pennsylvania Bar Association and the Law School of the University of Pennsylvania. Boston Book Co., Boston; Sweet and Maxwell, Ltd., London. Pp. lxxi, 568 + appendix 54 and index 67. ($5.)

Latest Important Cases

Aërial Navigation. See Patents.

Attorney and Client. *Equitable Lien for Attorney's Services on Funds Not Passing through His Hands—Contingent Fees.* D. C.

The beneficiary of certain legacies, having reason to fear an attack on the will, engaged counsel to resist possible litigation, and entered with him into an agreement under which he was to receive compensation in the form of contingent fees. About two years later, the attorney having prevented any contest of the will or any compromise of a claim, the client received from the executor a sum of money in cash and real estate notes. On this fund the lawyer insisted that he had an equitable lien, and this was the question presented, on appeal, in *De Winter* v. *Thomas*, which was decided Dec. 7 by the Court of Appeals of the District of Columbia (*Washington Law Rep.*, Dec. 17).

Mr. Chief Justice Shepard, delivering the opinion of the Court, denied that an equitable lien was thus created, and said:—

"It may be conceded that where the situation of the parties and the attendant circumstances favor such a construction, an agreement to pay a certain percentage of a fund may be deemed equivalent to a promise to pay the same out of the said fund. But where either expression is used, the intent must appear that the fund itself is looked to for security. It is true that the fee in this case was contingent upon success in the undertaking, and the defendant was not to be bound to pay any compensation unles these should be a final establishment of the will and distribution under its terms. Until some money or other property should be obtained under the will there was no personal liability of the defendant for services performed by the complainant.

Banking. *Kansas Bank Deposit Guaranty Law Unconstitutional—Fourteenth Amendment—Unjust Discrimination.* U. S.

The bank deposit guaranty law of Kansas has been held unconstitutional as discriminatory by the United States Circuit Court. The opinion, written by Judge John C. Pollock, contained the following words:—

"In the light of authorities it must be held, a legislative enactment that confers special privileges and benefits on a class which, by the law, and not by conditions are denied to another class, in the same business or calling, and which privileges and benefits so conferred on the favored class may be and are employed to impair and destroy the business of those belonging to the excluded class, is inhibited by the provisions in the fourteenth amendment to the national Constitution."

Conflict of Laws. See Wills and Administration.

Defamation. *Publication at Point of Destination of the Libelous Matter—Jurisdiction of Federal Courts—State Offenses.* U. S.

The indictment against the Press Publishing Company, publishers of the New York *World*, charging Joseph Pulitzer and others with criminal libel against Theodore Roosevelt, President Taft and others, was quashed Jan. 26 in the United States District Court at New York City.

Judge Hough, in rendering his decision, said, in part:—

"It is charged here that the crime of sending libelous matter through the mails is punishable at the place of destination of the libelous matter. In this case we have an alleged libel that was published in New York city and sent out into Orange county. But we find that in the distribution made in Orange county it happened to be disseminated at West Point, a territory ceded to the government, and therefore the action comes up in this court.

"The law that has been invoked here is, I take it, simply a territorial convenience, and therefore, in this case, if any crime has been committed it is to be regarded rather as an offense against the state of New York which happened to be committed on government land than an offense against the government under the statute." (See discussion in *New York Law Journal*, Feb. 2.)

Interstate Commerce. *Charter Fees Levied by State on Foreign Corporations—Interstate and Intra-state Commerce.* U. S.

The general attitude of the Supreme Court of the United States toward the proposed federal incorporation of corporations and allied questions connected with the interpretation

of the interstate commerce clause, was possibly adumbrated in its decision Jan. 17, holding invalid the Kansas "Bush" act of 1898 requiring foreign corporations to pay a fee as a condition precedent to engaging in business within, the state. *Western Union Telegraph Co.* v. *Kansas* (L. ed. adv. sheets Oct. term, No. 6, p. 190).

The court's opinion in this case was written by Mr. Justice Harlan. The decision turned on the finding that the law imposes a burden on interstate commerce, which it was declared a state could not do under the Constitution. Justice Harlan said the requirement was hostile alike to the letter and the spirit of the Constitution.

In the latter case Mr. Justice Holmes read an opinion in dissent, in which the Chief Justice and Mr. Justice McKenna concurred, and the late Justice Peckham would have concurred.

Interstate Commerce. *Power of Interstate Commerce Commission to Dictate Distribution of Cars Sustained.* U. S.

The Supreme Court of the United States decided the case of *Interstate Commerce Commission* v. *Illinois Central R. R.* in favor of the government Jan. 10. The case involved the right of the Interstate Commerce Commission to direct the distribution of cars in the interest of independent coal companies, and the power of the Interstate Commerce Commission was upheld in a decision delivered by Mr. Justice White.

In announcing its decision the court overruled two objections to the delegation of power to the Commission; first, that no such delegation was made by the interstate commerce law respecting the distribution of company fuel cars as a means of prohibiting unjust preferences and undue discrimination, and, second, that even if such powers should be conferred the order enjoined by the court below was beyond the authority conferred by the law. (L. ed. adv. sheets, Oct. term, No. 6, p. 155.)

Patents. Prima Facie *Infringement of Airship Patent—Essential Claims.* U. S.

The first judicial opinion in American jurisprudence, it is believed, involving an airship was rendered by Judge Hazel of the United States Circuit Court at Buffalo Jan. 3, when he granted the Wright Company a preliminary injunction against the Herring-Curtiss Company and Glenn H. Curtiss, restraining them from infringing the patents of the petitioner. The Court said:—

"The essential claims of an infringement are an aeroplane, or supporting surface, the lateral portions of which are capable of adjustment to attain different angles of incidence, and a vertical rudder in the rear of the machine. Claims further include as elements a horizontal rudder, which is positioned forward of the machine, and means for raising and lowering it so as to present its upper and lower side to the pressure of the wind."

Police Power. *Municipal Ordinance Regulating Weight of Loaves of Bread—Police Powers of Municipalities.* Ill.

The Supreme Court of Illinois, in *City of Chicago* v. *Schmidinger* (Dec. 22, reported *Chicago Legal News* Jan. 1), upheld as constitutional the ordinance of the city of Chicago providing that all bread sold should be of prescribed weight of loaves, and should bear labels plainly indicating the weight. The court said:—

"The power to regulate the sale and determine the weight of bread in the loaf when offered for sale, is a legitimate exercise of the police power by such municipalities as the plaintiff, has uniformly been recognized by the courts, and the exercise of such power is now too firmly established to be challenged. *Munn* v. *People*, 69 Ill. 80; *People* v. *Wagner*, 86 Mich. 594; *Guillotte* v. *City of New Orleans*, 12 La. Ann. 432; *Mayor* v. *Yuille*, 3 Ala. 137; *Paige* v. *Fasackerly*, 36 Barb. 392; *Commonwealth* v. *McArthur*, 152 Mass. 522; *In re Nasmith*, 2 Ont. 192.

Stock Transfer Tax Law. See Taxation.

Taxation. *Exemption of Property Used for Church Purposes—Property Leased to a Church and also to Other Tenants, not Exempt.* Mass.

Where a religious organization owned a building, used in part for church purposes by means of a lease to a church society and in part for other purposes by leases to other tenants, it was held by the Supreme Judicial Court of Massachusetts that exemption from taxation, under the statute exempting church property, applies only to religious organizations occupying and using edifices for church purposes, and the arrangement with the church society leasing the premises was not such as would show the building to be held in trust for the church within the meaning of the statute. Consequently the owner of the building could claim exemption only to the extent of the special exemption granted in its charter of incorporation. *Evangelical Baptist Benevo-*

lent and Missionary Society v. *Boston*, decided Jan. 6.

Taxation. *Stock Transfer Tax—That Part of a Statute Authorising Examination of Broker's Books to Verify Returns Unconstitutional—Right Against Self-Incrimination.* N. Y.

In a decision handed down Jan. 10 in *People ex rel. Ferguson* v. *Reardon* (*N. Y. Law Jour. Jan.* 21), the Court of Appeals of New York declared unconstitutional the section of the stock transfer tax law under which the state Comptroller claimed the right to examine the books and papers of stock brokers to verify returns, as it might be used to compel a person to give evidence against himself.

"The court never has decided directly or indirectly," the court said, "that the Legislature could compel a person to submit himself or his private books for examination in an investigation where the primary purpose was to discover that he had been guilty of offenses for which, by the aid of the evidence thus discovered, he could be punished criminally or by penalty." Such a procedure would violate the guaranty contained in the state constitution, sec. 6, art. 1.

Wills and Administration. *Wills Made in France by Foreign Testator May Conform to Law of Foreigner's Country.* France.

A recent decision of the Civil Chamber of the French *Cour de Cassation* holds that a will made in France by a foreigner under the provisions of the law prevailing in the foreigner's country is to be held valid without prejudice to the rule "*locus regit actum.*" The decision goes on to say that this rule, "which had been formulated with special reference to foreigners residing in France, constitutes in its application to wills a privilege which they are free to claim and not an obligatory provision."

A Theory

BY HARRY R. BLYTHE

WHEN judges pass on pretty points
Not passed upon before,
Do they declare what is the law
Or what it was of yore?

I know a man who often says
(It may be legal sin)
That brand new cases but declare
What law has always been.

The court but simply calls to work
The living legal word,
Whose force has ruled the race of man
Since Eve in Eden erred.

This logic, therefore, would conclude
(Though I confess it jars)
That there prevailed in Babylon
The law of motor cars.

The theory may be beautiful,
But its results—Gee Whiz!
For one, I'm quite content to say
Courts make the law that is.

The Editor's Bag

A CORRECTION

LAST month, in urging in this department the need of a million-dollar Foundation of Jurisprudence as an aid to the securing of a complete and adequately co-ordinated statement of the American *Corpus Juris*, we referred to Lucien Hugh Alexander's connection with the drafting of the American Bar Association's Code of Ethics.

Mr. Alexander did not know of our editorial in advance of publication, and considers that we gave his connection with the drafting of the canons undue prominence, and in order to prevent any misimpression, has asked us to state that the various drafts for the American Bar Association's Canons of Ethics were the work of the entire committee, and that the final result was in a very real sense the joint product of the earnest labors of all the members of the committee, aided by the suggestions and criticisms of more than a thousand members of the American Bar Association.

THE PLEA OF INSANITY

THE most important feature of the thirty-third annual meeting of the New York State Bar Association, in the opinion of the daily press of the country as well as of many of its members, was the presentation of the report aimed at remedying the evil of the abuse of the plea of insanity in criminal trials. The recommendation of the report, and it is one likely to elicit wide discussion, was that insane persons charged with crime shall be tried like other persons, unless adjudged by the court incapable of properly preparing for their own defense, that on trial they shall not be allowed to plead insanity, that when a verdict has been rendered the court may defer sentence and cause an inquiry to be made into the mental condition of the prisoner at the time the crime was committed, and that after such an inquiry the prisoner shall be sentenced either to death or imprisonment, or to confinement in an asylum, according to whether he is found sane or insane.

The adoption of these recommendations would unquestionably be a step in the right direction. The practice of allowing the plea of insanity to be interposed as a defense has resulted in debasing criminal trials into farcical proceedings to determine the sanity or insanity of a prisoner, the jury being a body necessarily unfit to undertake such an inquiry. Laws designed for the protection of society are violated just as truly by the insane as by the sane, and the legitimate province of a jury is solely that of determining whether or not there has been such a violation. Efficient administration of the criminal law demands concentration of the attention of the jury upon the essential issues of fact, without regard to matters of law and of penal discretion which properly fall exclusively to the lot of the court.

In allowing the court to decide whether or not an inquiry should be instituted into the mental condition of the prisoner

there is no danger of any impairment of the rights of insane defendants. It can safely be asserted that our American judiciary is sufficiently humane, wherever a human life is at stake, not to abuse the discretion thus conferred. After a verdict of guilty has been rendered, the insanity of the prisoner should be determined not as a part of the regular trial but as an *ex parte* proceeding. By this means he could be pronounced guilty only by the only authority competent to render such a decision, namely either the court itself or a commission of experts.

In this respect, therefore, the report of the committee is open to criticism, when it remarks in passing: "It may be that the inquiry as to sanity should be made as now by the jury which passes on his guilt. That is a detail." Such an observation, if it is to be taken very seriously, weakens the logical consistency of the report. If the determination of this question by the jury during the trial is such an evil as to require a remedy, it is an evil under any circumstances.

Closely related to the subject of the plea of insanity is that of the indeterminate sentence. Too rigid a system of penal law has had the unforeseen effect of rendering the jury judges not simply of facts but of punishments as well. How often have unmerited acquittals been brought about by too stringent and hide-bound a penal statute! The degree of punishment is a matter for the discretion of an expert. Perhaps the indeterminate sentence is objectionable when the court is left absolutely free to impose a sentence of that sort, but the law should at least provide for a large measure of discretion in determining the mode and degree of punishment, that the jury may not be prejudiced in its effort to reach a fair verdict. And if juries are to fulfill this duty satisfactorily, it might be well to provide by law that an insane person found guilty of murder need not be sentenced to confinement in an asylum for life, lest there be some chance of some day restoring him to sanity.

THE GREAT DANGER OF CROSS-EXAMINATION—SOMETIMES

SOME time ago we printed the entertaining charge in *State* v. *Wilson*, sent us by one of our readers in Columbus, O. To the kindness of the same lawyer we are indebted for the account of the following incident, which antedates the other by about thirty years. The presiding judge of the anecdote, by the way, was his own father-in-law:—

It was 'way back yonder in time, when Ohio was not half as old as it is now. The presiding judge himself told me the story long ago, though I personally, when a beginner in the profession, knew all the actors in it.

W. was a tall, thin, angular, slow-moving, slow-thinking, iron-gray lawyer, who spent as much time before justices of the peace as in all the higher courts. He had a distinguished nasal twang in speaking.

He was defending a client indicted for a felony. The prosecuting attorney was not legally very closely put together and therefore was apt to leave gaps in his professional work.

In the trial evidence in chief for the state and for defendant had been closed, and the last witness for the state in rebuttal had been called, examined, cross-examined and re-examined, and had left the stand.

It had been noted by the court that the prosecutor had not fixed the venue of the offense, and all that W. had to do was to wait a moment until the state rested and then successfully move the discharge of his client on the ground of failure of proof. As the last witness reached the bar-gate on his way to the lobby, W. rose and, pointing a long, bony finger toward him, in defiance of rules, shouted through his nose, "And you say that

all these things occurred within the body of Franklin County?"

"Yes," and so he sent his client to the penitentiary for years.

A SUMPTUARY LAW LIBRARY

WE desire to condemn the action of the Law Library Association of St. Louis, in defeating a by-law which would have allowed members to smoke in the library. It was Aristotle who said that man is by nature a social animal, implying that he is a born smoker. Thus to impose Puritanical restrictions on a natural impulse of the race is an evil of sumptuary legislation, and lawyers should be the first to rebel against it.

The *St. Louis Republic*, in an editorial which lends added dignity to the moral victory of the defeated minority in the Association, offers shrewd counsel to ascetic organizations of lawyers throughout the land. It says:—

We learn with surprise that in the alignment upon the question in the Law Library Association the line of demarcation corresponded roughly to a certain intermediate point in the span of human life—*nel mezzo del cammin di nostra vita*, as Dante phrases it—and that the young men were arrayed on the side of smoke, while the lean and slippered pantaloon stood for an unobscured sky line and air as clear as the crystal of Heliconian dawn. And age won! An ancient proverb reads, "Old men for council, young men for war"; but we have reached a place in the advance of things legal where counsel is war.

We believe that the true maxim is that in a multitude of counsel there is safety, safety being the better part of valor. However that may be, an Association which should have been foremost in upholding free institutions and masculine traditions has fallen victim to senility and decay. Let this serve as a warning to other associations that there is a higher law, which no provincial prejudice, however strong, can set aside, and that its *arcana* are safely ensconced in a higher law library somewhere, which not even the angels would wish to ventilate in accordance with the whims of effete and debased humanity.

MR. CHOATE'S EXPERIENCE AT THE BAR

AT the opening of the joint meeting of the American Historical and American Economic Associations, December 28, in New York City, Hon. Joseph H. Choate presided, and mentioned that one practical question had been already settled which might well have been left to the theorists. President Nicholas Murray Butler, delivering the greetings of Columbia, referred to the settlement of this question as follows:—

"Straight whiskey has been defined. I would have supposed that the President would have referred so difficult an economic question to the chairman of this meeting. Surely his long experience at the bar must have qualified him to guide us in the matter of labels."

"I will explain," retorted Mr. Choate, "why the great question was not referred to me. For two years I was one of the counsel of the people and opposed a little group of whiskey distillers in Kentucky manufacturing what they contended was the only whiskey. The people asserted that anything they were in the habit of calling whiskey was whiskey. In my enthusiasm I approached the British Embassy and tried to enlist it in the popular cause, but Mr. Bryce, though he had represented a Scotch constituency for twenty-five years, did not know one kind of American whiskey from another.

"It is a pure question of taste, and if the President had submitted the question with the samples we submitted to him to the authorities we have here tonight, to the executive committee of the Historical and Economic Associations, they would have decided this great historical and economical question exactly as the President has done."

A JURY THAT FOUND BOTH WAYS

A CURIOUS occurrence in Judge Withrow's Court at St. Louis, Mo., is reported in the news columns of the *St. Louis Globe-Democrat*. One Joseph Sterneck, it seems, sued the United Railways Company for an injury received in a fall from a street car.

On Jan. 27, the taking of testimony having been completed, Judge Withrow handed two forms to Louis Schneider, foreman of the jury, telling the jury in case it found for the railroad company to sign the first form, and if for Sterneck to sign the second, and fill in the amount.

A few minutes later Schneider returned and handed the court both forms. One was in favor of the company and the other gave Sterneck $500 damages.

"Which one am I to use?" asked the court.

"Well, the jury thinks you had better use the one giving Sterneck $500," said Schneider.

"But that is utterly impossible, for when you return two conflicting verdicts I cannot accept either," Judge Withrow answered.

He then ordered the jury to retire and find a single verdict, while attorneys for both parties argued that the verdict in their favor was the one the court should accept.

JUDGE BELFORD'S COURAGE

JUDGE JAMES P. BELFORD, formerly of the Supreme Court of Colorado, whose death occurred Jan. 7, is mourned as the last of the "Old Guard" which had survived that state's earlier days. As a campaign orator, a judge and a statesman he was a remarkably brilliant and well-rounded man. That he was not wanting in courage is illustrated by the following anecdote told by Judge E. T. Wells, his colleague on the territorial Supreme bench:—

"He was a man of nerve, who would take a chance with his life in following out a course he believed to be right.

"I saw him sitting on the bench in a lawsuit at Georgetown with a double-barreled shotgun across his knees. I forget the title of the case now, but it was one involving large interests in a wealthy mine of the district. Both sides had engaged the services of noted gun men to make a demonstration in the town and later in his court room. Judge Belford had given a great deal of study and deliberation to the issues raised, and he was satisfied of the soundness of his decision.

"It had got noised around that on that particular day he would read his decision, and the little court room was packed with partisans of the litigants. Belford took his place on the bench, adjusted the shotgun on his knees, unfolded his manuscript and began to read. His judgment was entered on the record, court adjourned, and there was no bloodshed, but before he entered the room he did not know but that they would carry him out feet first."

THE LAW'S LIFE LINE

I'M the Reasonable Doubt,
Friend of the persecuted,
Enemy of the gallows,
And the pen,
Twin relics of barbarism.
So raise all the hell you like—
Cut,
Slash,
Kill,
Waylay,
Rob,
Grind your heels in their face;
Don't be afraid—
You'll find me there
At the trial,
Because
I'm the law.
When I get in Among
Those twelve
Upright,
Honest,
Intelligent patriots,
Meaning the jury,
They'll see me,
And only me.
So what do you care?
Nobody this side
The Pearly Gates
Can tell
Just what I am.
Therefore they have to take me—
Sights unseen—
Blindly,
In the dark,
And give me the benefit
Of what they don't know,
Which is lots.
But they'll do it;
It's the law,
Which has justice
Skinned a mile.

I stand for mercy for the living.
Let the dead lie
In peace.
He ought've dodged,
Or carried a gun himself,
Then maybe
I'd have given him a lift.
Get busy—
Shoot, stab, kill;
Jump on 'em,
Boil your grandmother in oil,
Tear your wife's eyes out,
Strangle your children,
Smash your best friend,
Turn the old world inside out;
Count on me,
Ever your friend,
Reasonable Doubt.

EDGAR WHITE.

Macon, Mo.

"Your methods," said the indignant official, "were simply highway robbery."

"Again you wrong me," answered the sugar importer. "They were low-weigh robbery."

—*Ohio State Journal.*

A certain prominent English jurist was transferred from the chancery court to the admiralty court rather unexpectedly. While conversant with English law to a surprising degree, this gentleman had spent little time in marine law, and was rather dubious as to his ability to cope with the duties of his new office.

His colleagues, in recognition of the occasion, gave him a dinner, after which he was called upon for an address. He made a long and serious speech, which embraced about everything from free trade to England's foreign policy. Then, pausing a moment, he glanced round the crowded room and said:

"Gentlemen, in closing, I can think of no better words than the lines of Tennyson:—

" 'And may there be no moaning of the bar
When I put out to sea.' "

—*Youth's Companion.*

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

Correspondence

THE TEACHING OF LAW IN CORRESPONDENCE SCHOOLS

To the Editor of the Green Bag:—

Sir: In your issue of January in an article, "The Bar and the Young Man," by Shearon Bonner, Esq., in the fifth paragraph, the following statement appears:—

"As a preliminary warning, let me advise you not to put very much faith in correspondence schools. I am inclined to believe that these schools depend for their success on a new crop of young men each year, rather than on any reputation they have made for efficiency and straightforwardness. I believe that the law can be successfully taught by correspondence; but whether or not it is now being done by any person or school is a different question."

I beg to state that, in answer to the first sentence of this quotation, quite a number of the correspondence law schools are doing good work in imparting legal knowledge to students.

Speaking from experience, I would state that I have had work with one of these Correspondence Law Schools, and I must acknowledge that I was rather skeptical in enrolling, but have discovered that they, at least mine, have compelled me to toe the mark in all of their work. The papers have been examined and commented upon and errors pointed out with explanations and proper citations. My further experience was that in one examination, where my average was 64½, I was compelled to take another examination upon a re-review of the subject. The average for each subject is 70, and there was nothing to have prevented this school from passing me on this subject and I never would have known the difference.

I am glad to read of some one of the profession who is a member of a Law School faculty who is broad-minded enough to feel that the law can be properly taught by correspondence, for here in Philadelphia the entire profession hold up their hands in "*Holy Horror*" to even think of such a thing, alone to study in this fashion. Our Board of Examiners almost think it a crime.

I trust that there will be some more liberal-mindedness on the part of the profession.

E. M. W. A. G.

Philadelphia, Pa., Jan. 20, 1910.

The Legal World

Important Litigation

The Paper Board Association, comprising one hundred and forty prominent paper manufacturers, was indicted by the federal grand jury in New York Jan. 8, charged with being an illegal combination in restraint of trade. The indictment is but one of many ramifications of the investigation the government has instituted against paper manufacturers.

As the result of a full examination of the government's case against the roads, which Attorney-General Wickersham made personally, President Taft directed the Attorney-General on Jan. 28 to proceed with the suit against the Harriman merger, refusing to yield to the argument of Judge Lovett and his associates that the evidence taken by the government had not made out a case.

That the government's investigation into the affairs of the so-called Beef Trust is to be national was shown late in January at the examination before the federal grand jury of the beef packers at Chicago. Judge Kenesaw M. Landis of the United States District Court, in his charge to the grand jury, declared that it was through information furnished by him that the present proceeding was started.

The record in the case of *United States* v. *Oberlin M. Carter* embraces about fifty thousand printed pages, and is the most voluminous record in the history of the United States Supreme Court. Carter was formerly a captain of engineers, and was in charge of harbor work at Savannah when the Greene and Gaynor scandal startled the country. The government has been seeking to recover from him about $700,000 for the past nine years.

After taking up three years in examining witnesses on both sides, the government's brief in its suit to break up the alleged anthracite coal trust was filed in the United States Circuit Court at Philadelphia Jan. 18 by William S. Gregg, special assistant to the Attorney-General. The suit was brought in April, 1907, and the government's case was prepared by G. Carroll Todd and J. C. McReynolds. The government contends that all the defendants have long been parties to a general combination and conspiracy which stifles competition and obstructs trade and commerce among the states, in anthracite coal and that they have monopolized the trade.

The United States has practically completed the preparation of the *Newfoundland Fisheries* and *Orinoco Steamship Co.* cases for submission to the Hague Court of Arbitration. The former, the more important, grows out of the contention between Great Britain and the United States with regard to the question whether the boundary of territorial waters is formed by a line parallel to and three miles from the shore, or is established with reference to a straight line connecting the headlands of bays. The latter is one of the five claims which led to the severance of diplomatic relations with Venezuela when Castro was president. The *Newfoundland Fisheries* case will be heard before the following judges of the Permanent Court of Arbitration: Dr. Heinrich Lammasch of Austria, president of the tribunal; Luis M. Drago of the Argentine Republic; Jonkheer A. F. De Savornin Lohman of the Netherlands; Judge George Gray of Delaware, and Sir Charles Fitzpatrick, Chief Justice of the Supreme Court of Canada. Senator Root will present the case for the United States.

With the litigation to test the constitutionality of the corporation tax provision of the Payne tariff act inaugurated by the Vermont case in January, four suits involving the same point were enrolled on the docket of the Supreme Court of the United States Jan. 26. Two suits were brought from the Circuit Court of the United States for the federal district of New York, the corporations being the Coney Island and Brooklyn Railroad Company and the Home Life Insurance Company. Two suits were docketed from the United States Circuit Court for the northern district of Illinois. They were the cases of Fred W. Smith against the Northern Trust Company, and of William H. Miner against the Corn Exchange National Bank of Chicago. The Supreme Court has declined to rush the cases, but there is hope that the question may be determined before the close of the period for the payment of the tax, June 30. Other actions have been brought in the lower federal courts. Judge R. W. Taylor in the United States Circuit Court at Toledo, O., and Judge L. B. Colt, in the United States Circuit Court at Boston, have upheld the act by sustaining demurrers in cases brought before them.

Important Legislation

Forty-one distilleries and five big breweries in Nashville were forced to suspend operations Jan. 1 on account of the law passed by the last legislature prohibiting the manufacture of intoxicating liquors in Tennessee. Most of them closed with their warehouses full. It has been said that the breweries will go into the soft drink business.

Uniformity in insurance laws was the keynote of a big conference of the executive

officers of the principal life insurance companies in the United States, held at Washington, D. C., Jan. 19–20. The sessions were devoted to discussion of uniform life insurance legislation in the various states and the new movement for the conservation of the public health which recently originated with some of the largest life companies.

Governor Pothier of Rhode Island, in his second inaugural message Jan. 4, called attention to the new veto power given to the Governor, which may be set aside only by three-fifths of the legislature. He recommended biennial instead of annual state elections and advised investigation of the expediency of providing District Attorneys to assist the Attorney-General in prosecuting criminal cases. He also suggested better regulation of foreign corporations and added state supervision of the fight against tuberculosis, and proposed an effort to secure uniform automobile regulations throughout New England.

The commission to propose amendments to the constitution of Vermont made its report early in January, favoring eight proposals: (1) to remove the "time lock" on the constitution in consequence of which amendments can be acted on only once in ten years, (2) to require a two-thirds vote when legislation is to be passed over the Governor's veto, (3) to change the dates of state elections to conform to those of national elections, (4) to require the requests of more than one member to enforce a call of the yeas and nays on any vote in the legislature, (5) to deprive the legislature of the powers of reviewing conviction of murder, commutation of sentences, and pardon of murderers, (6) to prohibit legislators from accepting remuneration of other public offices, (7) to abolish special legislation to charter corporations, and (8) to reclassify or codify the constitution to introduce these amendments in their proper places.

The recommendations made in Governor Hughes' annual message included the following: that the development of the water powers of the state be subject to certain principles necessary to safeguard the public interest; that the Public Service Commissions law be extended to telegraph and telephone companies; that the Governor ought to have power to appoint a cabinet of administrative heads, though that would require a constitutional amendment; that a simplified form of ballot in which the names of candidates appear but once be adopted; that publicity of all campaign expenditures, without exception, be brought about; that proposed constitutional amendments be notified by more effective methods to the voters; that only enrolled voters be allowed to participate in party primaries; that a system of direct nominations for elective offices be provided; stricter scrutiny of the qualifications of notaries public; provision for frequent examination of insurance companies; the adoption of automobile legislation adequately protecting the public under a system of licenses; an amendment to make the penalized practice of bookmaking include oral betting; and the simplification of court procedure by measures devised to provide more economical and less technical methods.

Personal—The Bench

Governor Swanson of Virginia has reappointed Judge Robert Riddick Prentis chairman of the Virginia State Corporation Commission for a term of six years.

Judge H. K. Hanna, who has served for many years as circuit judge of the first judicial district of Oregon, and is more than eighty years old, now leaves the bench for a well-earned retirement.

The State Probate Judges' Association of Kansas has approved of some proposed legislation, one of the features of which would be a reduction of the time allowed for the closing of estates from three to two years.

Alfred R. Page, Nathan Bijur and Edward J. Gavegan, who were chosen at the last election to succeed Justices Dowling, MacLean and Truax of the Supreme Court of New York, took their places Jan. 3. Justice Dowling went to the Appellate Division.

Judge James Gould of Pine Bluff, Ark., resigned his position as county and probate judge of Jefferson county Jan. 16. At the expiration of his present term, which ends in October, he expects to move to Chicago or St. Louis to engage in the bonding business.

Justice Claudius B. Grant of the Supreme Court of Michigan was given a banquet by seventy members of the Detroit bar Jan. 8, commemorating the occasion of his retirement from the bench. Justice Grant was presented with a testimonial signed by all present.

The President and Mrs. Taft received the members of the Supreme Court and the judiciary as guests of honor at the reception at the White House Jan. 18. The first guest to be received was the Chief Justice, who was accompanied by his family. They were followed by the Associate Justices and their families. Among those present were the visiting Governors and their wives, and the recently appointed Minister to China and Mrs. W. J. Calhoun of Chicago.

The following appointments of President Taft have been confirmed by the Senate: George A. Carpenter, United States District Judge, northern district of Illinois; William H. Pope, Chief Justice of the Supreme Court of the Territory of New Mexico; Alexander G. M. Robertson, United States District Judge of

Hawaii; Edward Kent, Chief Justice of the Supreme Court of Arizona; John T. DeBolt, to be Associate Justice of the Supreme Court of Hawaii; William J. Robinson, to be third judge of the circuit court of Hawaii.

President Taft nominated as the five members of the new Customs Court authorized by the Aldrich-Payne tariff law, United States Circuit Judge Alfred C. Coxe of Utica, N. Y., to be Chief Justice, and Marion De Vries, of California, who for the past ten years has been a member of the Board of General Appraisers of Customs at the port of New York; William H. Hunt, of Montana, United States District Judge for the District of Montana, and formerly Governor of Porto Rico; Gen. James F. Smith of California, formerly Governor-General of the Philippines, and O. M. Barber, a lawyer of Bennington, Vt.

Personal—The Bar

Louis Glickman of Sacramento is probably the youngest lawyer in the United States, having been admitted to the California bar on Dec. 23, his twenty-first birthday. He is a graduate of the law department of the University of Southern California.

Commissioner H. W. Macfarland of the District of Columbia, who recently resigned in order to practise law, has formed a partnership with Charles Cowles Tucker and J. Miller Kenyon, who have practised for years as Tucker & Kenyon in Washington.

Orion Howard Cheney has been appointed Superintendent of Banks by Governor Hughes of New York. Mr. Cheney is about forty years old, a graduate of the University of Michigan, and began practice in 1897. The services he has already rendered to the state have been valuable.

John F. Forbis of Butte, Montana, has retired from practice to his estate near Portland, Ore. At a dinner given in his honor Dec. 29 by the Silver Bow County Bar Association, distinguished lawyers from various parts of the state were present, and the Supreme bench was fully represented.

Hon. Joseph H. Choate, former Ambassador to the Court of St. James, celebrated his seventy-ninth birthday Jan. 24 by pressing a suit in the federal court, in the case of Receiver Ladd of the New York City Railway Company against the directors of the Metropolitan Securities Company.

The $775,000 fee said to have been paid the New York corporation lawyer, Samuel Untermyer, for his professional services in relation to the merging of the Boston Consolidated Copper Company with the Utah Copper Company, his services extending over no more than four years, is believed to be the largest fee ever received by a lawyer in this country or elsewhere, in corporation practice.

Albert T. Patrick, who has been a prisoner for nearly ten years, now serving a life sentence in Sing Sing prison, was formally disbarred as a practising lawyer by the appellate division of the Supreme Court of New York Jan. 28. This was a serious blow to Patrick in his long fight for freedom, as it deprives him of many privileges in preparing his appeals.

George H. Lyman, after nearly twelve years' service as Collector of the Port of Boston, voluntarily relinquished that office Jan. 24 to his successor, Edwin U. Curtis. Mr. Lyman was born in Boston Dec. 13, 1850, and was educated at the Boston Latin School, St. Paul's School, Harvard College and Harvard Law School. He entered the law office of Ropes, Gray & Loring, in Boston, and confined himself to his law practice until his interest in politics led to his selection for important offices on political committees.

The following appointments of President Taft of United States Attorneys have been confirmed by the Senate: Arba S. Van Walkenburgh, western district of Missouri; H. Roy Waugh, northern district of West Virginia; Robert T. Whitehouse, district of Maine; Marion Erwin, southern district of Georgia; Asa P. French, district of Massachusetts; Joseph E. Morrison, district of Arizona; Charles A. Wilson, district of Rhode Island; Ernest F. Cochran, district of South Carolina; John M. Cheney, southern district of Florida; Lunsford L. Lewis, eastern district of Virginia; Francis S. Howell, district of Nebraska; Charles A. Houts, eastern district of Missouri.

Bar Associations

The Omaha Bar Association was successful in its efforts, during the past year, to secure the passage of a law lengthening the residence required before divorce suits may be instituted.

The State Bar Association of Utah held its annual meeting Jan. 10 in Salt Lake City. Addresses were made by the president, Hon. LeGrand Young, and by Messrs. Stephen L. Richards, E. A. Walton and others.

The American Bar Association has decided to hold its next annual meeting at Chattanooga, Tenn., Aug. 30–31 and Sept. 1. Among the interesting features of the meeting will be the presentation of a silver service to Mr. John Hinckley, for almost twenty years secretary of the Association.

The Kansas State Bar Association held its 27th annual meeting in Topeka Jan. 27–28. The president, Professor J. W. Green of the law school of Kansas State University, chose for the subject of his opening address, "The Three Departments of Government." Professor Roscoe Pound of Chicago University delivered a paper on "Puritanism and the Common Law." W. S. Fitzpatrick of Independence made an address on "Criticism of Courts by Lawyers and Laymen", and other interesting papers were read, while some discussion was given to the new Civil Code of Kansas.

The annual meeting of the New Hampshire Bar Association will take the form of an outing to be held probably at the Hotel Wentworth, Newcastle, the latter part of next June. The program will include these features: president's address, by Hon. William M. Chase; the annual address, by Judge Alton B. Parker of New York; a paper on "Admiralty Jurisdiction and Admiralty Courts of New Hampshire during the Revolutionary Period," by Judge Edgar Aldrich; and a paper on "The General Regulations for the Gentlemen of the Bar of New Hampshire, as Set Forth in a Pamphlet Published in the Early Part of the Nineteenth Century," by Hon. Wallace Hackett.

It is somewhat surprising that Massachusetts, a state conspicuous for the ability of its bench and bar, has till lately had no state bar association. Now that Massachusetts has established a state association, there remain only two of the forty-six states without them, namely, Nevada and Wyoming. Even the territories of Arizona and New Mexico have their own bar associations. The Massachusetts Bar Association was organized at the Hotel Somerset, Boston, at a dinner held Dec. 22, by four hundred and fifty of the leading lawyers of the Commonwealth. Richard Olney presided and was elected president. Officers of the association chosen are: President, Richard Olney; vice-presidents, William H. Brooks of Springfield, Charles W. Clifford of New Bedford, Samuel K. Hamilton of Wakefield, John C. Hammond of Northampton, Alfred Hemenway of Boston and Moorfield Storey of Brookline; secretary, Robert Homans of Boston, and treasurer, Charles E. Ware of Fitchburg.

Meeting of the National Civic Federation

The three-day conference of the National Civic Federation in Washington, D. C., beginning Jan. 17, was attended by many distinguished delegates representing different professional, commercial and labor interests in all parts of the United States. President Taft, in opening the meeting, urged uniformity of state legislation as a remedy for over-centralization in the national government, and favored uniformity in judicial procedure.

Seth Low compared uniformity of legislation to standardization in mechanical construction, and Judge Alton B. Parker favored the adoption of such workmen's compensation laws as those of England and Germany.

On the second day, Senator Root suggested the creation of a Commissioners' Court to draft uniform laws, along the lines recommended in the conference of the Federation. Samuel Gompers, John Hays Hammond, John Mitchell, August Belmont and George M. Gillett favored such workmen's compensation legislation as that urged by Judge Parker the day before. Edward Burnell Phelps insisted that a law should be enacted, as in European countries, prohibiting the employment of child-bearing women for a certain period after and in some cases before their confinement. Professor Samuel McCune Lindsay of Columbia spoke on interstate competition and industrial legislation, and Ex-Senator John F. Dryden, president of the Prudential Insurance Company, said that if the various states failed to codify their insurance laws uniformly the only alternative would be federal control of the business. Isaac N. Seligman made an urgent plea for uniform state laws regulating child labor.

On the third day resolutions were adopted recommending to the Governors uniform laws for the protection of children employed in industries, a uniform insurance code among the several states, uniform legislation on gathering and reserving vital statistics and the conservation of American forests, which were all referred to the committee on uniform state laws.

The conference adopted a resolution recommending that workmen's compensation acts, fair to the employer and the employee and just to the state, be uniformly substituted for the present system of employers' liability for injuries received in and arising out of the course of employment. A resolution was adopted recommending to the respective states consideration of the development of water power and the regulation of non-navigable streams.

The First Conference of Governors

Simultaneously with the meeting of the Civic Federation, Governors of thirty states, accepting the invitation of Governor Willson of Kentucky, began a session of three days in Washington Jan. 18. Governor Willson, at the opening session, expressed his conviction that no better means could be found to devise improved and uniform state legislation than by holding a conference which had no legal standing whatsoever. The Governors were welcomed by President Taft at the White House, who expressed approval of the English system whereby the executive is made responsible for legislation, and suggested that our own system presented opportunities for the

executive to argue out questions for the legislature and to give them information on subjects as regards which they are not advised.

Seth Low suggested to the conference the need of speedy co-operation to suppress the white slave evil, so that no state could become a harbor of refuge, and Governor Hughes urged the importance of efficient state governments as a complement of federal power.

On the second day, state rights was the subject of most of the addresses, with special reference to the conservation of resources and the regulation and supervision of public service corporations. Governor Quinby of New Hampshire urged that Congress act on conservation of the forests. Governor Willson said that the federal government did not have a bit of right to control water power, and Governor Draper of Massachusetts said that the states should own and control the water power of their streams and Governor Hughes advocated the development of state control of water power. Governor Fort of New Jersey, speaking particularly of public utilities, urged more state control of things which had been passed over in silence, including water power. Governors Brooks of Wyoming and Shafroth of Colorado both maintained that the control of water power rested in the state, not in the nation. Governor Hadley discussed railroad rate legislation, and Governor Draper automobile legislation.

Ambassador Bryce believed the conference would emphasize the importance of the Governorship. Governor Eberhardt of Minnesota introduced resolutions defining state and federal court jurisdiction in matters involving interstate commerce, and Seth Low introduced resolutions adopted by the Civic Federation.

On the third day, Governor Brady of Idaho addressed the conference on "Irrigation." Governor Ansel followed with an address on "Extradition," while "Mining" was the topic of Governor Sloan of Arizona. Governor Davidson told of Wisconsin's efforts to conserve its natural resources. Governor Draper of Massachusetts spoke on developing a discussion of wide range in regard to good roads. Ex-Senator Dryden of New Jersey read a resolution advocating uniformity in state insurance laws. Governor Carroll of Iowa read a paper on "Divorce."

No action was taken on the resolution introduced by Governor Eberhardt regarding jurisdiction of state and federal courts in interstate commerce matters, nor on the resolution submitted by Governor Shafroth of Colorado declaring the states to have exclusive control of water powers.

A plan for a permanent organization was unanimously adopted. It provides for annual conferences, the next one of which is to be held at a state capital between Thanksgiving and Christmas in the present year. The plan follows closely the recommendations of William George Jordan, to whom the conference unanimously voted its thanks for his enterprise in initiating the movement and carrying it to an organization.

Crime and Criminal Law

During the year 1909 but seventy-eight lynchings were reported in this country as compared with one hundred during 1908. All but five occurred in southern states and all but thirteen of the victims were black men.

That the recent remarkable increase in prison population in New York State is due largely to the influx of immigrants into the state is the conclusion of C. V. Collins, Superintendent of State Prisons. In his annual report to the Legislature, he suggests that the federal government should assume the burden of maintaining these aliens until they have served their sentences, when they should be deported and never allowed to return. A census of the 4,320 prisoners in Sing Sing, Auburn, and Clinton prisons on Sept. 30 last, showed that 1,091, or twenty-five per cent were aliens.

Heavy penalties were imposed by Judge R. W. Tayler in the federal court at Toledo, O., Jan. 29, upon the principal members, all Italians, of the Ohio band of the Black Hand found guilty of conspiracy to use the mails to extort money from Italians living in Ohio and Indiana. Of the fourteen defendants, however, three were allowed new trials. Counsel for the sentenced prisoners gave notice of a bill of exceptions. The government believes that these convictions will break the backbone of the Black Hand system throughout the country. On the same day, in Brooklyn, N. Y., Pisano, known as the "King of the Black Hand," was sentenced by Judge Fawcett to twenty-five years imprisonment for assault following an attempt at extortion.

Miscellaneous

Professor Samuel Williston was nominated by the Governor of Massachusetts on Jan. 12 to succeed the late Dean Ames of Harvard Law School, on the board of Commissioners on Uniform State Laws. Professor Williston since Dean Ames' death has been acting dean of the Harvard Law School.

Joaquim Nabuco, Brazilian Ambassador to Washington, a profound scholar, and one of the foremost statesmen of Latin America, died Jan. 17 at Washington, D. C., aged sixty. He took his degree in law in 1871. His father, grandfather, and great-grandfather were Senators, and in 1878, on the death of his father, he was elected to Parliament, and for years devoted himself to the cause of the abolition of slavery. The accomplishment of the latter attached him to the imperial dynasty for which he risked all. When, on November 15, 1889, the republic was proclaimed, he kept apart from the new regime. In 1895, however, the republic accepted his allegiance. He was the author of several books dealing with constitutional subjects and history. He also represented Brazil in

the arbitration of the boundary dispute with Great Britain, served as Minister to England, was president of the third international conference at Rio de Janeiro in 1906, and was a member of the Hague Court of Arbitration.

Secretary of State Knox attracted the attention of the world not only by his proposal for the neutralization of the Manchurian railways, which was declined by Russia and Japan, but also by the proposition that the jurisdiction and character of the Prize Court provided for by one of the conventions of the Second Peace Conference at the Hague be enlarged so that it may become a permanent international court sitting for the adjudication of controversies arising in peace as well as in war. If this excellent plan were adopted by the powers, two beneficent results could be accomplished. In the first place, the International Prize Court, the treaty for which the powers refused to ratify on technical grounds, will be established, technical objections no longer standing in the way. In the second place, the other court contemplated by the Second Peace Conference, the Court of Arbitral Justice, will be constituted, the same judges sitting in both courts. An account of the project will be found in *American Journal of International Law*, v. 4, pp. 163–6 (Jan. 1910).

Necrology—The Bench

Aldrich, Judge James.—At Charleston, S. C., Jan. 23, aged 60. Born in Barnwell, S. C.; graduate of Washington University; practised in Aiken, S. C.; served in state house of representatives, 1879–1882, 1885–1892, and on the bench in the second circuit, 1892–1908.

Belford, James B.—At Denver, Colorado, Jan. 7, aged 83. Former Associate Justice of the Supreme Court of Colorado; also Congressman from that state; born in Pennsylvania, partly self-educated, settled successively in Missouri and Indiana, becoming member of lower house of Indiana legislature; took stump for Grant and Colfax in 1868 and outshone great orators in eloquence at Cooper Union; elevated to Colorado Supreme bench in 1870.

Bell, Judge Martin.—At Hollidaysburg, Pa., Jan. 2, aged 62. Served two terms as District Attorney; elected to Pennsylvania Court of Common Pleas in 1893.

Bright, Judge S. H.—At Logan, O., Jan. 17, aged 69. Born in Hocking county, O., 1841; revenue collector, 1869–1871; admitted to bar, 1870; appointed to Common Pleas bench, 1887; elected state senator, 1899.

Bynum, Judge William Preston.—At Charlotte, N. C., Dec. 31, aged 88. Famous for his work in Reconstruction days; Colonel of Second North Carolina Regiment in Civil War; Associate Justice of the state Supreme Court in 1873.

Campbell, Judge C. D.—At Polo, Ill., Jan. 14, aged 79. Dean of Ogle county bar; twice county judge and twice State's Attorney.

Carpenter, Judge C. H. At Dunlap, Tenn., Dec. 29, aged 67. Former county judge in Sequatchie county.

Chandler, Judge George.—At Goutan Bridge, Va. Served several terms as district judge at Topeka, Kans.; First Assistant Secretary of the Interior under President Harrison.

Dana, Judge Sylvester.—At Concord, N. H., Jan. 4. aged 94. Judge of Concord Municipal Court more than twenty-four years; oldest graduate of Dartmouth College; also oldest member of the New Hampshire bar.

Gaslin, Judge William H.—At Alma, Neb., Jan. 14, aged 82. Oldest practising attorney in Nebraska; formerly district judge, his district covering half the area of the state.

Holden, Judge Nathaniel J.—At Salem, Mass., Jan. 2, aged 82. Occupied bench of first district court at Salem since 1874.

Hunt, Judge A. B.—At Alameda, Cal., Jan. 15, aged 73. Came to California from New York in 1863; represented his county in the legislature of 1865–6; registrar of the United States Land Office 1898–1907.

Leavell, Judge Buckner.—At Hopkinsville, Ky., Jan. 10, aged 58. Formerly City Judge of Hopkinsville.

O'Gorman, Judge Henry.—At Sioux Falls, Minn., Jan. 22.

Patterson, Justice Edward.—At New York City, Jan. 28, aged 71. For many years Presiding Justice of the Appellate Division of the Supreme Court of New York; born in New York City; studied at Columbia and the University of New York; admitted to the bar in 1860; practised with success in New York City, 1860–1886; served as Supreme Justice, 1886–1895; in Appellate Division from 1895 until Jan. 31, 1909, when he retired on account of illness; former president of the Law Institute of New York; active in organizing the Bar Association of the City of New York; received degree of LL.D. from Williams College, 1893; Hobart College, 1898; and Columbia University, 1906, a judge of noble and exceptional qualities.

Reed, Judge John Calvin.—At Montgomery, Ala., Jan. 12, aged 73. Lawyer, author and scholar; served through Civil War in Eighth Georgia Volunteers; Ku Klux leader; wrote "American Law Studies," "Georgia Criminal Law," and other books.

Stuart, Judge J. A.—At Austin, Tex., Jan. 19, aged 73. For many years justice of precinct no. 3 of Travis county, Tex.; Civil War veteran.

Taylor, Judge Frank.—At North Baltimore, O., Dec. 28, aged 47. Formerly Common Pleas judge.

Thompson, Judge Albert Clifton.—At Cincinnati, O., Jan. 26, aged 68. Served in Civil War; received a bullet wound at Bull Run, the bullet not being extracted, ultimately causing his death; served as Probate Judge and Judge of the Common Pleas Court

at Portsmouth, O.; member of Forty-ninth, Fiftieth, and Fifty-first sessions of Congress; wrote part of the McKinley tariff bill; appointed United States District Judge for the southern district of Ohio in 1898; one of the ablest lawyers and jurists Ohio has ever produced.

Trimble, Judge H. H.—At Keokuk, Iowa, Jan. 9, aged 85. Democratic candidate for Governor of Iowa in 1879; general counsel for the Keokuk roads of the Burlington system since 1881; served in Mexican and Civil Wars; state senator in Iowa from 1855 to 1859.

Truax, Judge Charles H.—At New York City, Jan. 14, aged 63. Born in Oneida county, N. Y., of old American stock; attended Hamilton College, but left in his junior year; received honorary M.A. thirteen years later and LL.D. fourteen years after that; came to New York in 1898 to study law in the office of his uncle, Chauncey W. Shaffer; admitted to bar within a year; practised first with his uncle and later as member of firm of Truax & Doscher; elected to Superior Court bench in 1880, and served till 1894; elected a Justice of the Supreme Court in 1895, and served till Jan. 1, 1910, when his term expired; member of New York Constitutional Convention; rendered many wise and important decisions, being earnest, prompt, and firm in his rulings; of great learning as a jurist; one of the most loved and revered of the Supreme Court Justices.

Vovis, Judge John C.—At Georgetown, Ky., Jan. 2. Committed suicide after the failure of his memory in delivering a speech at a dinner; police judge at Danville.

Williams, Judge Louis I.—At St. Louis, Mo., Jan. 23, aged 56. Judge in Alaska during the Cleveland administration.

Necrology—The Bar

Allen, Frank Dewey.—At Boston, Mass., Jan. 32, aged 60. Born in Worcester; was graduated from Yale in 1873, from Boston University Law School in 1875; admitted to Suffolk bar in 1878; representative in state legislature 1881–2; appointed United States Attorney for the district of Massachusetts in 1889.

Boyd, E. Holmes.—At Winchester, Va., Jan. 19, aged 69. Confederate veteran; for more than thirty years a member of the firm of Barton & Boyd in Winchester.

Dana, I. C. Bates.—At Great Barrington, Mass., Jan. 2, aged 63. Retired lawyer.

Davis, Henry M.—At Lockport, N. Y., Jan. 26, aged 74. One of the oldest lawyers in Niagara county, N. Y.

Dillard, J. R.—At Houston, Tex., Jan. 18. Well-known colored attorney.

Doyle, Austin, J., Jr.—At Chicago, Ill., Jan. 11, aged 35.

Dryden, Leonatas, J.—At St. Louis, Mo., Dec. 28, aged 78. Formerly member of Missouri legislature; member constitutional convention of 1875.

Dubose, John E.—At Bowling Green, Ky., Jan. 10, aged 62. Confederate veteran; attorney for Louisville and Nashville Railroad; one of the oldest attorneys of Kentucky.

Farson, John.—At Chicago, Ill., Jan. 18, aged 55. Banker and lawyer; handled loan when Cuba, as a new republic, needed money; director in many traction companies; former president of American Automobile Association.

Flegenheimer, William.—At Richmond, Va., Jan. 27, aged 78. Born near Heidelberg; came to America in 1851; practised in Richmond for forty years; as a penman wrote many important documents, including as the Ordinance of Secession for the Virginia convention and the bail bond of Jefferson Davis.

Gardiner, Col. John Lyon.—At Easthampton, L. I., N. Y., Jan. 21, aged 69. Was graduated from Columbia Law School in 1863; admitted to the bar in 1866; Civil War veteran; owner of Gardiner's Island, which has been in possession of the Gardiner family since 1639.

Gordon, Eugene Corry.—At Morristown, N. J., Dec. 31, aged 71. Graduate of Columbia Law School; practised in New York.

Grant, R. E.—At Goldthwaite, Tex., Jan. 20. City attorney of Goldthwaite.

Grau, Frederick William.—At Corona, N. Y. Jan. 21.

Gregory, Joseph Minter.—At Memphis, Tenn., Jan. 7.

Griswold, Freeman C.—At Boston, Mass., Jan. 30, aged 45. Born in Greenfield, Mass.; graduate of Yale University and Harvard Law School; represented the Greenfield district in the legislature; practised in Boston and New York.

Harris, A. J.—At Belton, Tex., Jan. 11. Well-known Texas lawyer; member of state senate for several years.

Hayes, Ambrose E.—At Brooklyn, N. Y., Jan. 20, aged 39. New York newspaper man; later member of law firm of McKenzie & Burr.

Howard, T. S.—At Des Moines, Ia., Jan. 22. Former state land commissioner.

Jeffries, James J.—At Shreveport, La., Jan. 18, aged 74. Born in Texas; practised many years in Alexandria, La.; twice Lieutenant-Governor of Louisiana.

Langbein, Julius J. C.—At New York City, Jan. 28. Born in Germany; served in Civil War as drummer boy; elected to the New York Assembly in 1877 and 1879; became justice of the Seventh Judicial District Court.

Leisenring, Jacob S.—At Detroit, Mich., Jan. 23, aged 63. Born at Selin's Grove, Snyder county, Pa.; served in Civil War; District Attorney at Hays City, Kansas; returned to Pennsylvania and practised in Altoona, Pa.; author of "Leisenring's Book of Forms."

Lindley, H. Bartlett.—At Chicago, Ill., Jan. 1. Graduate of United States Naval Academy; formerly a contributor to Encyclopedia Britan-

nica; at one time a successful attorney; died in abject poverty in Cook County Hospital.

Locke, Ira S.—At Portland, Me., Jan. 28, aged 57. Born in Biddeford; graduated from Bowdoin College in 1874; retired from practice on account of ill health in 1904.

Lowndes, Col. James.—At Augusta, Ga., Jan. 15, aged 75. Served in Civil War; practised law in Washington up to five years ago, when he retired on account of ill health.

Lowry, Brigadier-General Robert.—At Jackson, Miss., Jan. 19, aged 78. Twice Governor of Mississippi; born in Chesterfield district, South Carolina; Confederate officer in Civil War; wounded in battle of Shiloh; practised law in partnership with Hon. A. G. Mayers; twice served as state senator; author of a popular history of Mississippi.

McIntyre, D. H.—At St. Louis, Mo., Jan. 1, aged 76. Captain in Confederate Army; formerly representative and senator in state senate; Attorney-General of Missouri in 1880.

Payne, Col. James G.—At Washington, D. C., Dec. 28, aged 77. Born at Erie, Pa.; admitted to bar in that city and practised till 1862, when he assisted in organizing a regiment; auditor of Supreme Court of the District of Columbia in 1879–1910; an authority on evidence and procedure.

Pickard, Alonzo G.—At Jamestown, N. Y., Jan. 12. Officer in Civil War; for many years a leading criminal lawyer of western New York.

Pond, Ashley.—At Detroit, Mich., Jan. 12, aged 83. Engaged in active practice until 1892; for over twenty-five years general counsel for Michigan Central Railroad.

Powell, George K.—At Wilkesbarre, Pa., Jan. 13, aged 65. Practised in Wilkesbarre for the last thirty-eight years.

Raynolds, Prof. Edward Vilette.—At New York City, Jan. 26, aged 51. Born in Grand Rapids, Mich.; graduated from Sheffield Scientific School in 1880 and from Columbia Law School in 1882; practised in Grand Rapids, 1882–1883; received his LL.M. from Yale Law School in 1884, and his D.C.L. in 1885; lieutenant-commander of the United States Naval Militia, 1898–99, afterwards lieutenant-commander of the State naval forces in Spanish-American War; lecturer on political science and constitutional law; held chair of comparative law at Yale School at the time of his death.

Ritter, Theodore.—At Brooklyn, N. Y., Jan. 19, aged 74. Born in New York City; graduated from Columbia Law School in 1869; book reviewer on *New York Tribune* under Horace Greeley.

Schell, Edward Heartt.—At New York City, N. Y., Jan. 25, aged 62. Born in Troy, N. Y.; graduated from Yale in 1870; studied at Columbia Law School; formerly a member of the firm of Hellows, Hoyt & Schell.

Middleton, Henry O.—At Paint Creek, W. Va., Jan. 16, aged 50. Born at Paint Creek, W. Va., held county, state and federal offices during his lifetime.

Moore, William W. H.—At New York City, Jan. 4, aged 85. Formerly president of the Life Saving Benevolent Association of New York and the Port Society, and vice-president of the American Geographical Society; lawyer and business man.

Morgan, Ernest I.—At Worcester, Mass.; Jan. 19, aged 40. Practised in Gloucester and Worcester, Mass.; former assistant city solicitor and assistant district attorney.

Nast, Samuel B.—At Chicago, Ill., Jan. 8, aged 83. Register in bankruptcy in Iowa for many years preceding the repeal of the bankruptcy act.

North, John C.—At London, England, Jan. 11. Resided in Los Angeles; one of the foremost attorneys in California; practised largely in federal courts; an authority on water questions; died while representing California Bank of San Francisco before the British courts in the case of the *Bank* v. *Matthew Gage*.

Patterson, C. Godfrey.—At Orange, N. J., Jan. 5, aged 76. Corporation lawyer; graduate of Columbia Law School in 1865.

Scribner, Gilbert Hilton.—At Yonkers, N. Y. Jan. 5, aged 78. Admitted to bar in 1856; member of New York state legislature in 1869; Secretary of State in New York from 1870 to 1873; author of "Where Did Life Begin?" and contributor to *Popular Science Monthly*.

Seaman, Frederic C.—At Wilmington, Del., Jan. 12, aged 30. A New York attorney with offices in the Equitable Building.

Wagner, J. Frank.—At Fremont, O., Jan. 17, aged 42. Born in Lindsey, O.; graduated from Ohio State University Law School in 1902; practised in Fremont.

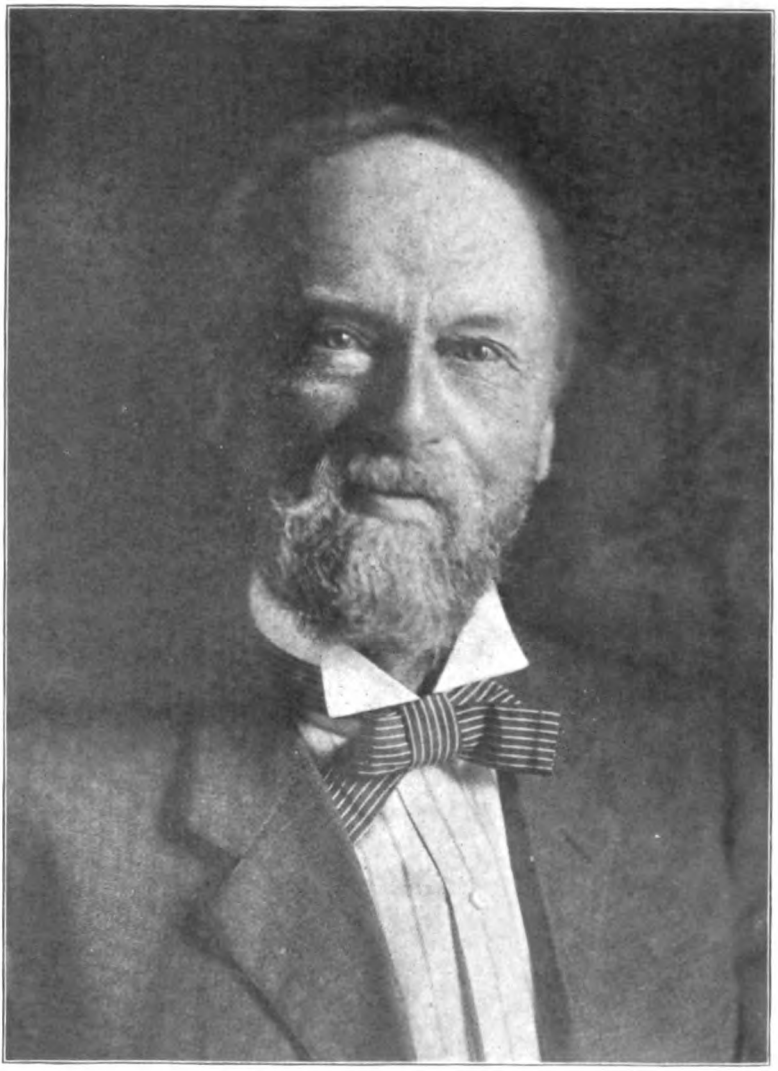
Whitcomb, George P.—At Chicago, Ill., Jan. 28, aged 83. Graduate of Dartmouth College in 1853; practised in Chicago 1870–1902.

Wilson, Percy Ripley.—At Los Angeles, Cal., Dec. 30, aged 56. Former president of California Club.

Winters, Riley D.—At Lakeport, Cal., aged 49. Born in Illinois; admitted to bar and practised for several years in Salt Lake City.

Wood, Walpole.—At Altadena, Cal., Jan. 9, aged 48. Former president of Chicago Bar Association; served a term as president of the Chicago Law Institute; also prominent in Los Angeles; almost totally blind for two years.

Zacharie, Col. Frank C.—At New Orleans, La., Jan. 6, aged 71. Constitutional lawyer and politician; served several terms as representative from Louisiana at Washington; latterly attorney of the State Board of Health; carried before Supreme Court the case of the *State of Louisiana* v. *State of Mississippi* to determine the water boundary of the two states, and won the case.



HON. SIMEON E. BALDWIN

LATELY CHIEF JUSTICE OF THE CONNECTICUT
SUPREME COURT OF ERRORS

Who retired from the Bench February 5, having reached the constitutional age limit

The Green Bag

Volume XXII April, 1910 Number 4

Chief Justice Baldwin's Retirement

THE personnel of the Supreme Court of Errors of Connecticut has undergone important changes. Chief Justice Simeon E. Baldwin was retired in accordance with the constitutional provision that no judge shall hold office after arriving at the age of seventy. He was succeeded Feb. 7 by Chief Justice Frederic B. Hall of Bridgeport. The vacancy occasioned by Judge Baldwin's retirement was filled by the elevation to the Supreme bench of Judge Silas A. Robinson of the Superior Court. Justice Robinson, after six months of service, will also have to retire on account of the age limit.

Judge Baldwin's retirement has been marked as is not often the case when the leader of a state judiciary leaves the bench by general recognition, from all parts of the state, of the loss the Commonwealth has thus sustained and of his many virtues of character and personality. He evidently has the affection of the people not less than of the bar. As he is in the full vigor of an indomitable energy and an admirable mental endowment, there has been a general disposition to complain of the operation of the constitutional age limit under circumstances which it was never designed to meet. Now that Judge Baldwin is in private life, he is deemed eligible for all sorts of honors. It has been proposed that he be made Governor, or that he be sent to Congress. The newspapers have thought that he would make a splendid Democratic candidate for Governor. But doubts are expressed whether his election could be hoped for in a state overwhelmingly Republican. He has said that he is not a candidate for any political office:—

"The next campaign is a long way ahead. I follow Sydney Smith's philosophy and take short views of life. I don't cross bridges until I come to them. My present view ahead is to write a book, and not to hurry myself in doing it."

Ex-Chief Justice Baldwin was the chief guest of honor at a banquet of the Connecticut State Bar Association in New Haven on Feb. 7, the date of Chief Justice Hall's entrance upon his new duties. The object of the dinner was also to recognize in a suitable manner the promotion of the other two Justices.

Judge Baldwin was given a hearty ovation. He said that he had spent the best years of his life on the bench, for while he had not gone on the Supreme Court bench until he was fifty-two years old, a man in the legal profession, in his opinion, did not do his best work until he was over fifty. Some one here drew forth a rousing cheer by saying, "Not until seventy."

"I lose power," he continued, "but I gain freedom and leisure, not leisure

to do nothing but to choose what I would wish to do."

Chief Justice Hall said:—

"Justice Baldwin retires in perfect mental and physical health. His only weakness is a constitutional weakness. The constitution says that he is no longer capable of holding the office. But the constitution is very much mistaken."

Simeon E. Baldwin was born February 5, 1840, at New Haven, educated at the Hopkins Grammar School and Yale College (A. B. 1861), and afterwards studied law in the Yale and Harvard Law Schools. In 1893 he was appointed a member of the Supreme Court of Errors of Connecticut, and since 1907 had been the Chief Justice.

Before going on the bench he was in active practice at the bar, both in the state and federal courts, and occasionally appeared in important cases in those of New York, Massachusetts and Rhode Island, as well as before the Supreme Court of the United States.

He had from time to time served on state commissions for the revision of the education laws, of the system of taxation, of the General Statutes, and to simplify and reform procedure in civil actions.

Since 1869 he has been one of the Faculty of the Yale Law School, and has given several hours a week to class room work. This he was able to begin and keep up on Saturdays and Mondays, by declining engagements in the Court of Common Pleas; the higher courts not sitting on those days.

He has been President of the New Haven Colony Historical Society, the American Historical Association, the American Bar Association, the Association of American Law Schools, the American Social Science Association, and the International Law Association of London.

He is now President of the Connecticut Academy of Arts and Sciences, of the Connecticut Society of the Archæological Institute of America, of the Trustees of the Hopkins Grammar School of New Haven, and Director of the Bureau of Comparative Law of the American Bar Association.

He is a member of the American Antiquarian Society and the National Institute of Arts and Letters, and a corresponding member of the Massachusetts Historical Society, the Colonial Society of Massachusetts, and the *Institut de Droit Comparé* of Brussels. Harvard gave him the degree of LL.D. in 1891.

Besides having been a frequent contributor to the transactions of various societies and to legal or historical periodicals, both in the United States and abroad, he has published a Digest of the Connecticut Reports, "Modern Political Institutions," "The American Judiciary," "American Railroad Law," and was a co-author of "Two Centuries' Growth of American Law."

Chief Justice Hall, who succeeds Judge Baldwin, was born in Saratoga Springs, N. Y., Feb. 20, 1843, the son of Jonathan and Livonia (Hayward) Hall. He worked his way through Brown University, from which he was graduated in 1867 and last June received the degree of LL. D. Yale has also conferred the degree of A. M. upon him. He enlisted in the Seventeenth Connecticut Regiment of Volunteers in 1862, and was admitted to the bar of Fairfield county in 1870. He was made judge of the Court of Common Pleas for Fairfield county in 1877 and held that post till 1889, when he became a judge of the Superior Court. From this tribunal he was advanced to the Supreme Court in 1897.

The Divorce Situation in England

By E. DeForest Leach

[Many English lawyers and judges realize that the divorce laws of England are anything but satisfactory. Lord Gorell, who, as Sir Gorell Barnes, had much experience with divorce litigation on the bench of the High Court of Justice, is presiding over a Royal Commission now at work, which is the outcome of his motion in the House of Lords last July, "That it is expedient that jurisdiction to a limited extent in matrimonial causes should be conferred upon County Courts in order that the poorer classes may have their cases of that nature heard and determined in such Courts." The new commission is making a comprehensive study of the whole subject, and will report on desirable changes in the law of divorce. While its composition appears to be somewhat diversified, including, as it does, distinguished representatives of the church and laity (women as well as men), the law (Scottish as well as English), and the press, still the result may be recommendations leading to the correction of some of the unfortunate conditions outlined in the following article.—Ed.]

THE divorce problem is receiving more serious consideration among all classes of people in England to-day than in any other country. In the United States the agitation is kept up by sporadic attacks upon our divorce legislation by ecclesiastical gatherings and the occasional *ex cathedra* utterances of some High Church dignitary, while the ordinary citizen seems to be quite well satisfield to let matters remain as they are. In England, however, the conditions are reversed. There the mass of the people are very much in earnest in demanding more equitable and humanitarian laws for dissolution of the marriage contract, while the Church party, on the other hand, appears to be quite unconcerned over the whole matter. The agitation, nevertheless, is assuming a character which will soon compel all parties to place themselves upon record on this question.

A mere glance at their present statute will at once cause every American to wonder how any liberty-loving people could possibly be made to live for more than half a century under a law which the majority of our English cousins now believe ought to be amended. Although it must be admitted that the existing Act is more suitable to a civilized society than its immediate predecessor, its inequality and unreasonableness cannot help but foster immorality and an increasing disregard for the sanctity of lawful marriage.

It seems almost incredible that Protestant England should continue to remain subject to the Roman Catholic idea of marriage after the Reformation, and even down to the year 1857. During this period the Ecclesiastical Courts granted large numbers of divorces *a mensa et thoro*, which was the Roman Catholic decree for separation, and by a cunning evasion of the spirit of the law, which later grew up, those who could afford it and had sufficient influence in Parliament, might use this decree as a first step in a series towards obtaining an absolute divorce. After the decree *mensa et thoro* in the Ecclesiastical Courts, the plaintiff had to bring an action for damages against the adulterer in the Civil Courts, and if he was successful there he might institute proceedings in the House of

Lords asking for an absolute divorce. These proceedings at last became merely a matter of form and several hundred of "Acts of Divorce" were passed. Naturally none but the very rich and determined could obtain relief from an intolerable matrimonial alliance, and, in consequence, morality reached a very low and disgraceful condition. W. H. Bishop, one of the most authoritative writers on the subject, says that during this period "second marriages without divorce, adultery, and illegitimate children were of every-day occurrence, while polygamy was winked at, though a felony on the statute books."

In 1857 an Act was passed governing divorce and separation which was thought to be quite revolutionary in character. Then by a subsequent Act of 1873–75, the jurisdiction in divorce causes was transferred from the Ecclesiastical Courts to a branch of the Civil Courts which was then created and known as "The Probate, Divorce, and Admiralty Division of the High Court of Justice." These Acts, with slight amendments, constitute the present law, the main provisions of which may be summarized as follows:—

1. All jurisdiction in matrimonial matters is exercised by the Civil Court of Divorce.

2. The cause for divorce against a woman is adultery. The husband may claim pecuniary damages against a corespondent for the loss of his wife.

3. The cause for divorce against a husband is adultery, coupled with cruelty or desertion for more than two years; bigamy and adultery; incestuous adultery, or rape, alone; and unnatural offenses. The wife cannot claim pecuniary damages for the loss of her husband, but the Court may order the husband to pay maintenance.

4. The old ecclesiastical separation, *a mensa et thoro*, is abolished under that name; but a new remedy, of like effect, is introduced, and is called "Judicial Separation." This may be obtained by either husband or wife on the ground of the adultery of the partner; or cruelty; or desertion without reasonable excuse for two or more years. Since 1895 it may also be obtained by the wife, but not by the husband, in cases of aggravated assault; of serious assault for which the husband has been fined $25 or imprisoned for two months; desertion, persistent cruelty, and willful neglect.

5. No divorce is granted where collusion between the parties is proven to have existed.

6. In case of divorce, alimony is provided for children; and power to vary settlements on the wife is given to the Court in the case of her offense.

7. No decree of divorce is to be made absolute till after six months from the decision of the original case; during the passing of this time any person may give information to the King's Proctor of collusion between the parties, or that material facts have not been brought before the Court; and the Proctor may, if he thinks advisable, oppose the decree absolute.

8. No remarriage is permitted to judicially separated persons, but they may resume cohabitation without any formalities.

9. Remarriage after divorce is permitted, but no clergyman of the United Church of England and Ireland is compelled to solemnize the marriage of divorced persons.

10. Nullity of marriage may be decreed for various prenuptial failings, omissions or commissions; *e. g.*, consanguinity, or marriage of a minor without parent's consent.

11. Either husband or wife may sue for restitution of conjugal rights, if one has withdrawn from the society of the other without sufficient reason. The Court can order the delinquent to return to live under the same roof; and in case of his refusal to comply with this decree, shall deem him to have been guilty of desertion without reasonable cause, and a suit for judicial separation—but not for divorce—may thereupon be initiated forthwith, on this ground alone.

Numerous objections may be urged against this law, the principal of which are:—

1. It makes divorce a luxury which only the affluent may enjoy, as the approximate cost of obtaining a final decree is about $1,000. The fact that

the Divorce Court sits only in London adds greatly to the hardship of those who live outside of the metropolitan district.

2. It fosters immorality, because it pronounces adultery as indispensable to remarriage.

3. In allowing a separation, without the right of remarriage, for the offense of cruelty, adultery, or desertion, and divorce, with the right of remarriage, for the offense of adultery, combined with cruelty and desertion, it inflicts the greater punishment for the lesser offense.

4. But, of course, the worst feature is in attempting to establish an unequal and unnatural standard of morality between the sexes, thereby compelling woman to bear burdens to which man will not submit, for no matter how immoral a husband may be, his innocent wife has absolutely no remedy, unless she gets a judicial separation, which will make her condition even worse than before, as she can then never obtain an absolute divorce, though *the least indiscretion upon her part will permit her immoral husband to secure a divorce with the right to remarry.*

The Civil Courts, until quite recently, followed the interpretation of the law laid down by the Ecclesiastical Courts, and did not recognize the doctrine known as "moral cruelty," and held that the cruelty must be physical. So, where a husband treated his wife with neglect and indifference, ceased to have matrimonial intercourse with her, and carried on an adulterous intercourse with a servant in the same house where he and his wife were residing, it was held that, in the absence of any threats, or acts of positive violence, his conduct did not amount to legal cruelty. (Brown & Powles' Law of Divorce, page 125.) So, also, a husband's attempt to debauch his own female servants, and the bringing by him of groundless and malicious charges against his wife's chastity were only held to be acts of legal cruelty to the extent that it was said of them that they would weigh with the Court in conjunction with other charges. (*Id.*, page 123.) This doctrine has recently been partially abandoned, for in *Walmesley* v. *Walmesley*, heard in 1893, the Court broke away from the theory so long followed, and "neglect, coldness and insult, producing an attack of melancholia" were held to amount to legal cruelty. A still more liberal interpretation now seems to be favored.

Indeed, the legal profession as well as the Courts have come to so thoroughly realize the unsuitability of the present law to modern social conditions that the spirit and, in many instances, the letter of the law is violated and justice dealt out to the litigants in spite of the Acts of Parliament. An American, upon a visit to the English divorce courts, is at once impressed by the ease and rapidity with which divorces are granted. The chief opposition to any new or more liberal legislation is, that it will bring about a condition "as bad as exists in the States." This, like many English ideas concerning things not English, is founded upon an amazing lack of knowledge of real conditions. After observing the practice in divorce proceedings in quite a number of the states, and among them some of the most lenient, as well as the proceedings in the English courts, I think I can safely say that there is not a state in the Union where divorces are granted with greater facility, or upon less specific evidence, than in England. Especially is this true in cases where the husband is plaintiff. In fact, the practice is so marked that the writer inquired of a barrister how

such a condition grew up, and received this reply: "We all recognize the harshness of our present law, and when a man sues his wife for a divorce, if she is young and at all attractive, about all that is necessary to establish his case is to prove that she has a gentleman friend, that they have exchanged a few letters, attended the theatre, or dined together. The jury presumes the rest and returns a verdict accordingly." It is quite different, however, when a wife seeks a divorce from her husband—the charges must then be proven. Of course, we have more legal causes for divorce in most of our states, but one is inclined to think that the present situation in England is due largely to the paucity of legal grounds.

The agitation for new legislation is being fostered and directed in England by the Divorce Law Reform Union, an organization which is receiving the support of many liberal-minded people. The chief aim of the reformers seems to be to secure the passage of an act which will enable husbands and wives who are living apart under Separation Orders, or one of whom is undergoing a long term of penal servitude, or is incurably insane, to obtain, subject to certain safeguards, a dissolution of their marriages. While the National Congress on Uniform Divorce Laws did not recommend that incurable insanity should be a ground for divorce in this country, it, nevertheless, is one of the most reasonable, and in England, where there is so large an increase of insanity, especially among the prominent families, it is one of the most popular reasons for demanding reform.

Insanity and prostitution, which flourish in communities where it is difficult or impossible to secure a release from an unendurable matrimonial alliance, are found to exist to an alarming extent—the latter being very conspicuous. These, however, are not the worst results of the English system. Many young men and women, especially among the poorer classes in the cities, are living together and rearing children, without going through the formality of a marriage ceremony. A conversation with these women is pathetic indeed, for it reveals the fact that they do love the fathers of their children and are true to them and are treated by them with kindness, but are afraid to marry for fear their happiness may end as soon as their husbands know that the women no longer have a right to leave them if treated unkindly. This condition has been commented upon by many writers, and is well understood by religious workers. The practice seems to be increasing. A similar condition exists in Jamaica, for a well-known author, who resided there for several years, told the writer that he did not believe that more than three per cent of the natives were living in lawful wedlock, owing to the fact that it was expensive to get married and impossible to get divorced.

Moundsville, W. Va.

The Jury Had the Last Say

MUCH ADO ABOUT LITTLE, OR LITTLE DONE ABOUT MUCH

By Judge A. G. Zimmerman

of the Dane County Court of Wisconsin

THE case had been continued at least a score of times. It had been running along for several years. It was all about an alley, or rather a twelve-foot strip through the middle of one of the principal business blocks, which the city wanted to make a public alley.

The strip was and for many years had been an eyesore and a dumping ground for all sorts of rubbish back of the stores. It was hardly passable, and had become a dangerous menace from a fire and police standpoint. The title-deeds of all the owners (save one) along the strip showed that at some time in the past some sort of reservation, or easement, or dedication for alley purposes in a private desultory way had been made.

In a manner, it had been used as an alley for half a century.

But one end of it, by the various owners of the one exception, had been closed from time to time. This was back of the Kicker block, and these owners always had and claimed the full private ownership of the twelve by forty-four feet back of their block. Nothing was ever given away or clouded in any of their deeds.

Moreover, the owners of this lot did not need the alley or the use of it as such. They had plenty of room and opportunity on the side street of this corner block for ingress and egress. The last owners had but recently bought the block and had paid therefor four hundred dollars a foot on the side street, including this twelve feet. That would make nearly five thousand dollars for the alley part. They were willing to have the strip dedicated as a public alley, but they wanted reasonable compensation.

In the course of time it had come to be called the Kicker Alley, because the Kicker block part of it had become the storm around which the controversy raged.

Everybody really wanted it made a public alley. But some wanted compensation and some did not. Nobody appeared to have any legal chance left for compensation, except the Kicker block people. The matter was threshed out for some years, in the newspapers, in the council, among the business men, and by the general public.

So the city council finally passed a resolution for condemnation proceedings before a judge of one of the various courts.

The corporation counsel took charge, drew the necessary papers, had a plat made, served notice on the twenty-odd abuttors, and a day was fixed for a hearing. The hour set for trial eventually arrived and with it members of half a dozen firms of attorneys representing various abutting property owners.

The corporation counsel, alert, vigorous, always with a chip on each shoulder, was there for the public. Lawyer Reuben Smiley, suave, courteous, able and vigilant, appeared for the Kicker block people. He was there ready for a fight, and willing to concede—nothing. His

people wanted substantial compensation, knew they had a good case, and weren't surrendering anything.

But with a score of independent interests represented by numerous attorneys with other cases on in the different courts, and the corporation counsel with a multitude of important affairs pressing, it was of course impossible to go on with the trial then.

Consequently the case was adjourned by agreement. Lawyers quite generally can agree about postponing things.

Before the next date arrived, the lawyers had agreed to another continuance. This time somebody had a sore toe or something and couldn't be on hand.

Again it was continued.

Then, either because the judge was getting impatient, or some lawyer or lawyer's client was inflicted with a sudden spurt of energy or for some other unexplainable reason, it was necessary that some progress be made, so a jury of twelve men good and true was drawn and sworn.

Next, the judge, and the lawyers, and the jury put on hats and coats, lighted up cigars, went up the street for several blocks, in solemn procession, the observed of all observers, and viewed the remains—of the proposed alley—of so much of it as was not covered with boxes and barrels, and cans, and bottles, and garbage.

After such splendid progress of course another adjournment was necessary. Impossibility of getting important witnesses was the excuse given, whatever may have been the real reason. Naturally the lawyers, who appeared simply to get fees for time-service for clients not particularly interested because not likely to get damages, were always very complaisant about continuances.

The Kicker block people, the real contestants, who were vitally interested to the extent of some thousands of dollars, were not anxious to hurry matters, as there was more or less talk of a satisfactory settlement. So Lawyer Reuben Smiley always made a continuance easy.

And the corporation counsel was afraid of a heavy judgment for damages against the city, so he, too, was willing to keep up the continuances with the view of coming to an amicable adjustment that would be satisfactory to the city fathers.

The judge, well, he was always in favor of compromising differences and amicably settling controversies, if possible, so he made no objection, as long as everybody else was agreed. He had little to say in this contest anyway, as he was simply a sort of master of ceremonies to keep the program straight, according to established rules.

The jury had the whole say, and was the sole arbiter in this sort of a proceeding, if it could ever get hold of the case and out of the hands of the lawyers.

When the case was again called, a continuance had been agreed upon beforehand among the lawyers, but not in time for the clerk to warn the jurymen not to appear. The jury were on hand promptly, ready to finally dispose of the case and get it off their minds. They were business men of more or less prominence and had important private affairs of their own to look after. They were willing to do their duty as citizens, but things began to look to them as though they were being trifled with by the lawyers. They were getting impatient. Their interest lagged. Court proceedings were becoming irksome to them. Some of them were heard to express themselves more forcibly than elegantly on their way back to their places of business. They were getting "sore." Somebody would have to suffer for it some time.

So continuance after continuance was agreed upon until a dozen or so more were reeled off. Sometimes there were intervals of several weeks, or a month, at other times longer. The jury was told not to appear again until specifically called. Occasionally a juryman would appear to find out when "that case" was going to be tried, if ever. It was an unfinished job that got on the nerves. The matter ran along. Some of the jurymen wanted to go away for a long period or indefinitely, and were permanently excused. It had come to be a *bête noir* to everybody who had either interestedly or disinterestedly any connection with the case.

In the meantime, the real contesting parties—the Kicker block people, and the corporation counsel, mayor and councilmen for the city—were presumably, and no doubt really, in a desultory bargain-and-sale way, trying to get together.

After a couple of years or so everybody had practically come to a common agreement as to terms. Then one of the presumably little interested property owners got a new lawyer, who kicked over the whole business. So there were more continuances until this lawyer could thoroughly investigate the case for his client. But he finally found his client had nothing to contest.

Then the old "practical agreement" of the parties was resumed, and after a few more continuances for good measure, a day was actually fixed for the real final conclusion of the trial. The long suffering jury—what was left of them—they were seven—were summoned, together with five talesmen to complete the panel.

To be exact, it was the twenty-seventh continuance.

And the trial! Well, the case was coming to a climax. Or was it an anti-climax?

The jury panel was again completed. The judge and the rehabilitated jury again "viewed the premises." The numerous lawyers were on hand. There was an array of witnesses. The court room was filled to overflowing. While waiting to get started, the judge, to impress the multitude, ordered about the dapper clerk whose dandified appearance betrayed his French origin. The real "oldest inhabitants," of prominence, too, were present to tell about the time-honored use of the "alley."

There was Uncle Jonathan Mason, tall, powerful, unwrinkled, clear eyed, who had been a leading citizen for sixty-five years and was now bordering on ninety, though apparently hardly in the three-score-and-ten class.

And Deacon Franklin Leisure, not far behind Uncle Jonathan in years, sturdy and hale, living up to his name since his retirement, though "of counsel" in the case at bar in which he was also a party as an abutting owner.

Colonel Ezekiel Strong, also in the four-score class, vigorous and keen apparently as when a gladiator and rival of the commonwealth's foremost statesmen who crossed the river a generation ago.

And Elder David Kent, another retired barrister, who left his home city for a score of years to accumulate that wherewithal which he now so liberally distributes as public benefactions. With him was Judge Harmon Lucas, yet lacking a few months of eighty but still in the harness.

Last but not least, except in age, was General D. D. Growem. Though a veteran of the Civil War, years sat lightly on him, no doubt because of his medicinal interests, which perhaps contributed also to the longevity of his compatriots.

All these were leading citizens since

the forties and early fifties of the last century.

Other witnesses were the chiefs of police and fire departments, and the mayor of the city.

But there was no fight or legal contest. Everything was harmonious. The array of legal counsel, including the corporation counsel, was assisting genial Reuben Smiley to make his case. It was carefully explained to the jury by the lawyers and the judge that there was no controversy, now that everything had been satisfactorily agreed upon.

The testimony made it clear that the Kicker block people were damaged considerably over three thousand dollars. It was shown that there was no objection in any quarter to the payment to them of this sum and that this had been agreed upon.

But, it was necessary *pro forma* for the jury to find the verdict of damages by a majority vote and to find the necessity for a public alley by a unanimous vote. And the jury were so charged and given a long typewritten verdict carefully describing the property of each owner, giving each damages of one dollar (with which they were content), except that for the Kicker block owners damages for three thousand dollars as agreed upon were inserted.

And the jury took the prepared verdict and departed in charge of an officer for a supposedly brief consultation.

The lawyers waited. So did the judge. Time was passing. There must be trouble in the jury room. But what could there possibly be trouble about? There was only one thing to do. That was to sign the typewritten verdict that everybody had agreed to.

Presently the officer returned, saying the jury wanted further information. He was told to bring the jury back to the court room. The jury came. They wanted to know if they were to decide the question of damages!

Well, rather. The majority must agree. The matter had been practically accomplished for them. Everything was harmonious. A disagreeing minority could be ignored. They were satisfied and were sent back for further consultation.

Again everybody waited. Meanwhile the lawyers joked and told stories. Lawyer Smiley was humorously twitted at the possibility of being beaten. However, nobody thought of such a thing.

The story was told about Lawyer Harvey Butterfield trying a breach of promise case before a jury, the defendant failing to appear. As Harvey told the story on himself, he put in his testimony and was about to submit the case without argument, certain of a verdict for the full amount. The judge, however, suggested that he had best make his argument and explain the situation to the jury. He did so, and the jury brought in a verdict for the absent defendant.

Other stories were told, some not overnice. But it was a hopeful sign that the most objectionable stories were told by the oldest lawyers—those retired from practice.

The jury sent word that they wanted to come back for further instructions. But the judge was getting impatient at the delay and apparent perverseness, so he had the officer tell the jury he would not let them come, that he had given all the information he could. The officer was told they wanted to know about the signing. They were told.

Again there was waiting. It was past the dinner hour. So everybody went to dinner, and the jury in charge of the officer had its dinner at public expense.

After dinner the jury took another hour for consultation. There was apparently a warm controversy in the jury

room. Finally the jury came in. Everybody was relieved.

"Gentlemen, have you agreed upon a verdict?" quoth the judge.

"We have," said several jurymen.

The officer brought up the typewritten verdict. All had agreed on the necessity of taking the strip for alley purposes. Eight had signed the long verdict awarding damages to the various owners.

It was satisfactory. The judge announced the fact, and the jury acquiesced. So the Kicker people got their three thousand dollars! There was general relief and relaxation. Lawyer Reuben Smiley smiled—but was the smile premature?

Then the foreman of the jury rose and remarked that they had made some change in the typewritten figures! Oh, ah, um! That was different again. The judge glanced over the typewritten pages of the verdict. The lawyers stared expectantly.

"The only change you have made in this verdict relates to the amount of damages for the Kicker block?"

The jury nodded affirmatively in a body, and some answered.

"You changed the figures for damages for the Kicker block people from three thousand to one dollar?" continued the judge.

Again there was acquiescence by the jury and consternation among the lawyers. Lawyer Smiley's smile faded away.

"Is there anything else, gentleman?" said the judge pleasantly, addressing the lawyers.

There was no response. There was nothing to say.

Then, "You are discharged, gentlemen," and the jury scattered and left the court room. The court adjourned.

This was beyond any experience of the astonished lawyers. It was worse than the Butterfield breach of promise case.

"There is one thing left that can be done," gravely remarked the judge to the group of discussing lawyers, as he was putting on his hat and coat.

"What is that?" quickly spoke up the corporation counsel, as hope sprang up in the breasts of all.

"We can all go out in the rotunda and listen to Mr. Smiley's real opinion of the jury."

"It certainly wouldn't be proper to express it in this court room," answered Lawyer Smiley as he bravely tried to smile.

And the long-suffering jury had the last say.

Addendum (three months later). The jury chuckled and scattered. Lawyer Reuben Smiley set his jaws and appealed. Then he became pleasant again and smilingly inveigled the other lawyers into stipulating to have the superior court re-try the case *without a jury*. All the lawyers again solemnly agreed that three thousand dollars would be a fair settlement for the Kicker block people. As the proof showed damages in double that amount, judgment was entered by the superior judge for three thousand dollars without opposition.

Query: Where was the joke finally? On the jury, Reuben Smiley, the other lawyers, the superior court, the Kicker block people, or the system?

Madison, Wis.

Football and the Law

By C. D. Capelle

REMEMBERING that the revision of football rules is now being considered, it is not altogether without point to recall the case of the Queen against Bradshaw, reported in volume 14, page 83, of Cox's Reports of criminal cases in England. The case arose over a game of football in which one player was killed. To be sure, no one was convicted of anything, but, for all we know, some one might have been near to conviction or might have been convicted if there had been another trial.

If any public prosecutor in any of the bailiwicks of the land allows the duties of his office to weigh right heavily upon him, or—perish the thought—if he longs to bask a little in the calcium of the public show, it is barely possible that the case of the Queen against Bradshaw might put an idea into his head. If it does, and he should put it into execution, the cries of the packs will soon no doubt be heard on every hill, as they close in on another bit of well-harried game.

Then, finally, Mr. Walter Camp and the rules committee and the presidents-of-the-leading-universities may quit giving their time to the revision of the rules for the game of football. They can cease with easy consciences from trying to make the game less dangerous, for the great old common law (aided and abetted by the public prosecutor aforesaid) and, perhaps, a dozen or more statutes, will have taken the game in hand. They—common law, statutes, and public prosecutor—will revise the rules and reform the game and make it less dangerous to life and limb. Will they? Well, if you have any doubt, just look how they reformed the good old games of horse-racing, dueling and witchcraft.

At any rate, the game of football will ever after be a tedious thing and much lacking in zest. For the very first kick-off will be followed by an injunction, and all plays thereafter will be too well interspersed with exceptions, challenges to the array and the legal like. Of course, too, there will be investigations into probable causes and natural and probable consequences and the law of slander, as well as writs of *ad quod damnum*, followed inevitably and as a matter of course by appeal upon appeal —Heaven only knows when a game would end. True, the game might even then be fine mental exercise and it might cost as much money to support as it costs now, but—it wouldn't be football.

Something like this, you know.

"Are you ready, Captain Smith?" "Yes, sir." "Are you ready Captain Jones?" "If the court please," says Captain Jones, "we have filed, through our attorney, duly empowered thereunto, a demurrer to our opponents. We think they do not constitute a cause of action," etc., etc., etc.

Would any one ever eat any Thanksgiving dinner, or would there be intermissions for meals?

The case of the *Queen* v. *Bradshaw* is reported, in part, as follows:—

"William Bradshaw was indicted for the manslaughter of Herbert Dockerty, at Ashby-de-la-Zouche, on the 28th day of February, 1878.

"The deceased met with the accident which caused his death on the occasion

of a football match played between the clubs of Ashby-de-la-Zouche and Coalville, in which the deceased was a player on the Ashby side and the prisoner was a player on the Coalville side. The game was played according to certain rules known as the 'Association Rules.' The deceased was dribbling the ball along the side of the ground in the direction of the Coalville goal, when he was met by the prisoner, who was running towards him to get the ball from him or prevent its further progress; both players were running at considerable speed; on approaching each other, the deceased kicked the ball beyond the prisoner, and the prisoner, by way of charging the deceased, jumped in the air and struck him with his knee in the stomach. The two met, not directly, but at an angle, and both fell. The prisoner got up unhurt, but the deceased rose with difficulty and was led from the ground. He died next day, the cause of death being a rupture of the intestines."

Witnesses differed as to the particulars. Some said the prisoner's charge was contrary to the rules of the game and made in an unfair manner. Others said it was not, and one of the umpires said that, in his opinion, nothing unfair had been done.

Lord Justice Bramwell, in summing up the case to the jury said, "the question for you to decide is whether the death of the deceased was caused by the unlawful act of the prisoner. There is no doubt that the prisoner's act caused the death, and the question is whether that act was unlawful. No rules or practice of any game whatever can make that lawful which is unlawful by the law of the land; and the law of the land says you shall not do that which is likely to cause the death of another. For instance, no persons can by agreement go out to fight with deadly weapons, doing by agreement what the law says shall not be done, and thus shelter themselves from the consequences of their acts. Therefore, in one way you need not concern yourselves with the rules of football. But, on the other hand, if a man is playing according to the rules and practice of the game and not going beyond it, it may be reasonable to infer that he is not actuated by any malicious motive or intention, and that he is not acting in a manner which he knows will be likely to be productive of death or injury. But, independent of the rules, if the prisoner intended to cause serious hurt to the deceased, or if he knew that, in charging as he did, he might produce serious injury and was indifferent and reckless as to whether he would produce serious injury or not, then the act would be unlawful. In either case he would be guilty of a criminal act and you must find him guilty; if you are of a contrary opinion you will acquit him."

The judge then stated (and it isn't a bad statement for such a considerable personage as a real judge) that no doubt the game was, in any circumstances, a rough one; but he was unwilling to decry the manly sports of the country, all of which were no doubt attended with more or less danger.

The prisoner was acquitted, as has been said, but the rules of law laid down could be invoked in many vexatious ways by one inclined to meddle.

Jefferson City, Mo.

An Attempt to Demolish the Doctrine of *Stare Decisis*

By James T. Harrison, of Columbus, Miss.

In an action brought against the Mobile & Ohio Railroad Company by one Skipwith, a negro, for injuries due to the defendant's negligence, the railroad company lost, and taking exception to the court's rulings, filed a suggestion of error, which the Supreme Court of Mississippi overruled. Counsel for the successful plaintiff thereupon filed the following ironic reply to the court's answer to the suggestion of error. It is not the custom of the *Green Bag* to publish briefs, but in this particular case counsel for the plaintiff-appellee advances a unique argument which if concurred in would lead to results sensational in the extreme.—*Ed.*]

SUPREME COURT OF MISSISSIPPI,
APRIL TERM, A.D. 1909

M. & O. R. R. Co. Appellant, v. *Answer to Suggestion of Error.*
Jesse Skipwith, Appellee.

It will be noticed, in the above caption, that we have reversed the style of this cause—for the Supreme Court has reversed it, hence, it is, the paradox of an appeal *from* the Court *to the Court*. As it is nothing unusual for the defendant to *switch off on a siding*, comment is unnecessary.

As the mortality of martyred Stephen was about to be resolved back into its original elements,—as the result of the murderous attack of fanatical Jews,—and his sainted soul prepared to plume its flight to the orient meadows above, he asked our heavenly Father to permit him to enter a plea of ignorance (which he hoped would be received at that Court as valid) for his enemies; and the nobility of the sentiment has immortalized his memory—a lesson learned by him from both the words and example of our blessed Redeemer, in His culminating act of salvation on the cruel cross of sacrifice.

Since that fateful hour centuries have glided down the river of time and been engulfed in the ocean of eternity; nations have risen and fallen on the earth like turbulent billows that frown the face of the deep; there have been signs in the air and wonders in the sky—electricity has turned night into day and wireless telegraphy has obliterated distance; but, it has remained to this unblessed day as the marvel of the hour for an artificial person, without a soul to save or place to kick, to stalk unblushingly into the *sanctum sanctorum* of Themis and yell into the ear of the High Priest words to this effect:

Thou hast entered judgment against me simply because I destroyed *willfully* the property of a citizen and attempted to take his life—and would, but for his cry for help to the Lord, who snatched him from the arms of the angel of *Death*, where I had thrown him. 'Tis true I made no defense, though opportunity was offered me, for, I would not recognize your authority by an appearance, and I do now, only to say "man, proud man, drest with a little brief authority, most ignorant of what he's most assured." What, if by my acts of commission I violated the law? What, if by my acts of omission I ignored the statutes?

I admit that, when I ploughed through the wagon of that citizen, I ran rough shod over the Code of Mississippi.

'Tis also a fact that when, without sound of bell or whistle, I ran a wild-cat train without time or schedule round a curve in a skirt of woods, I frightened his horses and saw him jump out and try to hold them,—which I saw he was unable to do,—but I did not stop my iron horse, or even attempt to; though it could have easily been accomplished, but so regulated his speed, by first slowing up and then releasing the brakes, that I thus calculated to a mathematical certainty on killing both the horses and the man at their head (for I saw they were dragging him in reach) and did succeed in killing one horse, wounding the other and knocking the man senseless and had the pleasure of hearing him cry out in great pain, "Oh! Lordy," as I hurled him with great force back across the track. It will teach him to keep out of the way next time. 'Tis true he did all he could to avoid the injury and I did nothing—except to create it. He stopped, but I did not. I so frightened his horse that he lost all control of him, while mine was under perfect control all of the time. You are bound to admit that I had the advantage of him, in that respect.

But, why all this "much ado about noth-

ing?" Was it not I? Do you not know that the saying of President Lincoln that this is a "government of the people, for the people, and by the people" is "but a schoolboy's dream, the wonder of an hour" to us corporations? Have you forgotten what brother Vanderbilt said in reference to that matter (the rights of the public)? Well, those are my sentiments. Did I not, in open defiance of law and against the express wish of the people make my notorious "merger" with the Southern Railway Company? Did it not work all right? Is not the combination still on? As Alexander Selkirk said, "There is none my right to dispute."

'Tis true that my suggestion of error may be looked on merely as *error of suggestion* by the citizen who has had the audacity to complain of the destruction of his property and the folly to rely on what he foolishly deems his "Bill of Rights" as defined and expressed in the constitution—which he mutters through his bruised lips as the "organic law"; but "let the heathen rage."

'Tis true that I call on you to say that the law of today shall not be the law of tomorrow; that the doctrine of *stare decisis* be but the ghost of a dead past; that you shall *decide* to be *undecided* and that your opinions shall be entitled "Mississippi Supreme Court *Indecisions*."

What if Blackstone did say "A law is better for its certainty than anything else"?

What if those semi-barbarians—the Medes and Persians—had the same idea centuries before?

'Tis true that all courts have held heretofore that "ignorance is no excuse at law," but I desire to make you make your decisions as unstable as the uncertain glory of a woman's smile—that wins but to wander—that none may know what to know and thus what they know. In other words, make them only certain of their uncertainty.

You will understand, of course, that my "suggestion" is in the nature of a motion for a change of *venue* to remove the practice of law from the lofty pedestal of legal knowledge to the low *status quo* of a guessing contest—to make ignorance the standard of excellence.

It might strike a mind afflicted with a sheer negation of thought that we are making our dictum a little too strong for the Court, but, it would be well to remember, in this connection, that it seemed to puzzle Shakspere to find out where Cæsar got his meat (that made him so great), but we, the most mighty Mobile & Ohio Railroad Company, can inform him (or rather his descendants, for it has come to our ears that probably the old gentleman is dead), that we run the market where he got it, and can be a disseisor of five pounds while he is seisor of one.

We would further inform the Court that we have employed two learned lawyers, who live on the banks of the suffering Tombigbee, which by the oversight of the federal Government in the way of necessary appropriations is compelled to plead *nil debet* to the claims of commerce, as presented by the Mexic sea. One of them (Orr) has a name that is *idem sonans* with a disjunctive conjunction, and we ask the Court to disjoin the conjunction of its decision.

The other is younger, but Fame has informed us that she is putting in all of her spare time weaving a chaplet for his noble brow—which would have been finished ere this if the aforesaid brow had not been so large, for it requires more, in the way of a chaplet, to go round. We believe that she is going to make quite a pet of him, for she laughed and called him "baby mine."

These have filed a brief, as a background for my suggestion of error, and rely upon two decisions to support the same, to wit:—

"*Jackson* v. *M. & O. R. R. Co.*, 89 Miss. p. 38."

The Court says: "The replication shows that there was an *unobstructed* view for *a mile and a half* or *two miles*, and, if Jackson had *glanced* in the direction from which the train was approaching, he must *necessarily* have seen the train." It also says that the track was "*straight*." We admit that our case presents an entirely different state of facts, for the uncontradicted testimony is that the view was obstructed by woods, the track was curved, and appellant could not therefore have "necessarily" "seen the train had he glanced in the direction from which it was coming." Besides, appellant did all he could to avoid the injury and my agents did all they could to cause it—and succeeded, as they generally do under such circumstances.

He obeyed and we disobeyed the law.

The next case they quote is:—

"*Jackson* v. *Railroad Company*, 10 Miss. p. 38."

We fear that their zeal has outstripped their judgment in this matter, for, upon a

closer examination than they seemed to have had time to give, we find it to be but a Bill in Chancery in the cause of *Willis Banks* v. *Richard Evans*.

To quote from the Court, "This is a bill filed in the vice-chancery court by Evans to *have a deed canceled* which is alleged to constitute a cloud upon his title."

We find a similarity in the cases in this: that cause was reversed—so was this. A suggestion of error was also filed—and overruled, as we are bound to admit.

We are inclined to the belief that our *legal* employees did as our *train* employees, erred as to the law, for the citation has no more application to this case than a red-cross porous plaster, and the only service it renders in connection therewith is as a reminder of the incident mentioned in "Roughing it," where the man who shot at a mark and killed a mule remarked, with some show of satisfaction, "Well, if I didn't hit *what I shot at I fetched something*." Said decision was rendered in 1848, which shows that they took the back-track of the ages to find an authority and went so far they *forgot what they went after*. A candid mouth might utter the sentiment that they are like the men who got back half a mile for a running start, to jump a big ditch, and got out of breath before they got back. We offer as an apology for this evident inaptitude the excuse proffered by the young woman who produced an animated evidence of amatory activity anterior to moral sanction, "Please excuse me this time for it is such a little one." So, line up our *mental misconception* with her *physical mistake* and "pass our imperfections by."

But our above-mentioned attorneys, with that modesty that is the valet of true greatness, *discounted their hopes of success in advance* by engaging the services and assistance of two other lawyers, "whom not to know argues oneself unknown," whose habitat is on the banks of a little stream with a big name, to wit, the Pearl, which, if the federal Government dispenses *with* the large amount asked for its so-called improvement, will be in truth, as well as name, a "pearl of great price." And, as a well-trained setter will make a point on a point,—technically termed a "back-set,"—not seeing the covey but only pointing the pointer, so, these very highly distinguished gentlemen are now actively engaged in back-setting the aforesaid also very highly distinguished gentlemen in their inaccuracies, mistaking a little wood sparrow for the covey.

We have here afforded us a beautiful example of the rubber-like attribute of professional courtesy, because it is stretched so far.

These also very highly distinguished gentlemen have also filed (fooled with) a "brief," as they are pleased to term it, and it is not a misnomer, so far as its nature and substance is concerned. We thank them for the knowledge thus imparted by the name, for had they not given it that name we had not known it as such, for we have heretofore been led by lawyers to believe that a "brief" contained at least some allusion to the law, but this does not even pretend to a passing acquaintance with Themis. It is possible that they are at outs, for Blackstone, who was her prime favorite, hence enpowered to speak from knowledge, says that she is "A jealous mistress." *It may be that she is not willing to espouse their cause in this instance* but, *per contra*, smiling on apellee, whose "cause is just." Since they do not invoke the law to sustain their contention there is no *legal* reason why the court should reverse its action.

It gives a woman's reason only, to wit: "because," forgetful that simply to say "because" will not *be cause* for action on the part of the court.

It claims to rely solely on facts, but does not look them squarely in the face, but is *blind* as to some and *cross-eyed* as to others.

We know that they must have had something in mind, so, for sweet charity's sake, let us suppose they were thinking of the familiar doggerel, which runs thus,

> "The bumble-bee has the golden wing,
> The lightning-bug the flame;
> The b—— has no wing at all
> But gets there all the same."

So, they trusted that, though they have no law "at all," they might be able to get there "all the same"—which might obtain, but for the fact that they are not only in a court of law, but, indeed, the highest in the land. Now, if it was only a justice of the peace court, then, indeed, they might "sit up and take a hand," as that is purely a court of fact.

Sifted from the chaff of its verbiage, it is assertion based on assumption, "only that, and nothing more." We find from this that they have read Shakspere, for, he says, "Assume a virtue, if you have it not," and

they start off on their lonely journey (as absolutely without chart or compass as a balloon) by assuming that appellant was "deaf," which is simply a product of the imagination, except when he was knocked "senseless," for he was not only "deaf" but dead, to all appearances, for the time being.

"A change comes over the spirit of the dream," and appellant will now, as Jake Isaacs said, at the Charleston convention, make a "few unnecessary remarks."

The testimony of Eli Adams, brakeman, is such that one is reminded of that passage of scripture which says, "Out of thine own mouth will I condemn thee."

The other brakeman, A. McRae, is also against appellee, his employer.

The engineer, F. L. Topia, gives the case away.

All these witnesses (of appellee) say that appellant did all in his power to avoid the injury and admit that defendant (appellee) did not.

They admit that the horses were beyond the control of appellant, after being frightened by appellee, who had notice, and neither stopped nor tried.

That there was an obstruction to the view of appellant (woods); that the track was curved and that there was neither sound of bell or whistle, which was required by statute, as is fully set out in the twenty-two-page brief filed by appellant on the original appeal from the peremptory (empty) instruction of the Circuit Judge, as also the other statutes and Supreme Court decisions there cited, which, with the facts, caused the Court to reverse and remand said cause, to which this "suggestion of error is made."

Pardon a momentary digression for the suggestion—*en passant*—that it seems strange that this Italian (Topia) should be so regardless of the rights of his kinsman, the African ('tis true one's avocation in life was but to engineer a plow and talk business to a mule, while the other engineered an iron horse of great magnitude and power and ploughed over anything that got on the track, whether man or beast), for it is a well-known historic fact that during the palmy days of Rome over a million Africans were *imported* into Italy, and none *deported. They are not there today nor their descendants*, except as the Latin race, for they *merged*, which was no sooner done than the Roman soldier, who, to that time, had been both the terror and conqueror of the world, lost courage, by this inferior mixture, and fled from the yellow-haired barbarians who flocked out of the snow-covered forests of Germany and overran the fertile fields of sunny Italy. In this connection, permit us further to remark that the truth that "history repeats itself" was exemplified during the Franco-Prussian war, when the descendants of these same Germans left their pipes in beer gardens of Berlin and opened the wine presses of France (same Latin race) with the points of their swords. The conclusion leads us to remark that, as Moses was only permitted to look at the promised land from Pisgah's height, then doomed by only one sin of commission to descend into the valley of disappointment, so, in this instance, appellee having caught one sight of the "happy land of Canaan" that lies, not beyond the Jordan, but the Pearl, by the misdirected efforts of his guide in the inferior court, must now descend the bean stalk of his expectation (we will not say erected by a Jack) and wallow in what Milton calls the "Slough of Despond," which the unlettered African terms with equal aptitude, though less elegance of expression, "The low grounds of sorrow."

When the aforesaid "suggestion of error" (or, to be more exact, in the nature of a bill of particulars, the *error of suggestion*) was filed appellee did but "listen with credulity to the whisperings of fancy and pursue with pleasure the phantoms of hope"—a hope, however, that died as soon as it left the arms of its wet-nurse, to wit, the Circuit Court of Lowndes County.

Although our Constitution says that justice shall be had "without delay," yet an exacting conscience compels us to admit that appellee cannot be else but slow, of which we hereby and herewith make profert of one of its "passenger trains," which to leave and join a funeral procession is but to invite an attack of vertigo. One has to take morphine after traveling on one to restore his normal activity. Its conductors die of old age between stations. Those who are fortunate enough to begin young and "by reason of strength" live beyond the span of man—"three score years and ten"—are not recognized by their families on return (if any be living) and are the Rip Van Winkles of the twentieth century. It was the misfortune of appellant that he was not traveling in the same direction with

appellee's train, for, in that event, there would have been no injury, but, his road was at right angles, and he had to cross the track, and it so happened that said train was in the neighborhood at the time.

As Solomon has previously remarked, "Let us hear the conclusion of the whole matter."

We hereby make profert of this artificial creation of commerce in all of its absolute and peculiar entirety, as the self-advertised *ne plus ultra* of human conception, in that it claims that its *right of way* gives it the right to run over anything in its way, and the only protection that a citizen is entitled to is *an accident policy*. So far as civility is concerned, it does not even concede that of the commonest kind.

The plain unvarnished fact is that these *a priori negations*, which egotism has daubed with the paint brush of fancy as "suggestions of error," always remind us of the turtle that continued to kick after its head was cut off, to the amazement and disgust of a passing Irishman, who remarked "You darned old fool, you ain't got sense enough to know when you are dead!"

We offer the case of this poor African with all confidence that it will not require a whitewash brush or a bottle of kink extractor to properly present him to a Court whose head is the seat of learning and heart the home of Justice.

Candor compels us to assert that the "suggestion" aforesaid (which, though by four said, had better been unsaid) is at best but a simple invitation to the court to make out a schedule of its mental and faith assets and retire into voluntary bankruptcy.

This certifies that I have mailed McWillie & Thompson a copy of the above and will let Orr & Harris read it, but appellee has so many free pass representatives that it will be impossible to give a copy to all, unless I had a printing press, the expense of which this case is too small to justify.

I do not desire to discuss the case *ore tenus*.

JAMES T. HARRISON,
Counsel for Appellant.

The Juvenile Offender at the Bar of Justice

TWO types of children's courts seem to prevail in this country. In one the child is brought into a court room which may be crowded with spectators and arraigned before a begowned and frowning magistrate in the same manner as any hardened criminal. In the other, the judge and the boy sit in a plainly furnished room, with no spectators present, except, perhaps, the child's parents and a probation officer.

The Children's Court of Manhattan, New York City, is an example of the former type, while those at Brooklyn, N. Y., and Boston, Mass., illustrate the opposite one. Judge Lindsey of Denver and others describe the progressive aims of the juvenile court in a recent number of the *Survey*. In Denver Judge Lindsey hears most of his cases in the open courtroom; in the Boston Juvenile Court Judge Harvey H. Baker hears all his in the judge's private chambers, rigorously excluding reporters and the general public, often having the youthful offender entirely alone.

"The officials of the court," says Judge Baker, "believe it is helpful to think of themselves as physicians in a dispensary," a figure which is helped out by the placing of the juvenile court's quarters in the quietest part of the courthouse.

"There is no regular dock or detention enclosure connected with the general outside waiting room," he goes on, "and the children generally sit with their parents in chairs placed along the sides of the room. Occasionally a boy who is under arrest and likely to yield to the temptation to leave without permission is placed behind the railing. There are no uniformed officials."

The stage-setting is carefully thought out, too, with the utmost quiet, the utmost privacy, the utmost bareness in the hearing room, that the child may be neither frightened nor inattentive. The judge is on a platform only six inches high, and there is no more formality of arrangement or attendance than there is in a physician's examination room.

Retiring President of Connecticut Bar Advocates "American *Corpus Juris*" Project

AT the annual meeting of the Connecticut State Bar Association, held at New Haven Feb. 7, Hon. George D. Watrous, president of the Association and Professor of Law at Yale, strongly supported the *Corpus Juris* project of Messrs. Alexander, Andrews and Kirchwey in his annual address. Professor Watrous drew attention to the excellent opportunity offered the members of the Association to aid by voice and pen the performance of a colossal undertaking, the need of which has been steadily increasing for upwards of a century. After setting forth some of the particulars of the plan, Professor Watrous concluded his address with the following words:—

There is practical unanimity with respect to the urgent need of such a statement of the entire law. I am well satisfied that if it is, as I believe, within the reach of human achievement, it can be brought about by the gentlemen who have undertaken it. The Chief Justice of North Carolina said to them, "You are proposing to do for this country what Justinian did for Rome and Napoleon for Western Europe. It is, for many reasons, a far greater work and more difficult. Of its value and of its necessity, there can be no two opinions. Fame and fortune will wait upon those who shall confer such a boon upon the present and future millions of our country."

A COMPOSITE PRODUCT OF THE BEST MINDS

For more than a hundred years there has been a call for an orderly statement of the *Corpus Juris* in America. The need has become greater and the demand increasingly insistent during this period. Attempts to meet the demand by digests, and digests of digests, treatises, etc., have been inadequate, and such a work, if it is to meet the demand and command universal respect, must be the most carefully matured product of the most thoroughly trained and educated intellects. It is too vast a subject for any one brain, and must be the composite product of the best brains obtainable. In brief, the following method is suggested. It is proposed "to block out with the ablest expert advice obtainable the entire field of the law under a logical system of classification, so that when the work is published the law on any particular point may readily be ascertained." It is proposed to have a Board of Editors not exceeding seven men in number; the ablest to be found in America, and each should receive whatever compensation is necessary to command his best services. This Board is to have final and authoritative control over every editorial matter as to which differences of opinion may arise. There is then to be an Associate Board of Editors,—about twenty in number,—representing the best that the law schools have, as experts in particular departments of the law. These men are not to be expected to give up their entire time to the subject, though many of them might deem it wise to obtain leave of absence for a year or more for this purpose. In addition to this, an Advisory Council of twenty or twenty-five is suggested, made up of men who would do little actual work either as authors or editors, but would give their advice, from time to time, as it might be needed. In addition to all this, a Board of Criticism is planned, of from one to two hundred lawyers and judges, whose function would be advisory criticism.

I cannot further pursue this topic here. The February number of the *Green Bag* will fill in this mere outline and present to you the highest expert evidence in this country and abroad as to the need and feasibility of achieving this result, and should this subject appeal to us—as I think it should—each one of us may, by his voice, his pen, give aid and comfort to the brave men who have undertaken this colossal task. The man has not yet stepped forth to establish the longed for 'Foundation of Jurisprudence.' If there be such a man in this body, who would aspire to have his name go down in history with that of Justinian and Napoleon, never again is he likely to have so excellent an opportunity.

There was a large attendance at the meeting, called out partly by the banquet given in honor of Ex-Chief Justice Baldwin and Chief Justice Hall.

ASSOCIATION ADOPTS CODE OF ETHICS

A code of professional ethics was adopted without argument. The draft had been prepared by a special committee, and was based upon the American Bar Association code, being a re-arrangement of the text in a slightly shortened form.

The following resolution was adopted:—

Resolved, That the president be authorized to bring to the attention of the judges of the Superior Court and of the members of the state bar examining committee in such manner as he may deem appropriate, the expediency of some modification of the rules of court or of the regulations of the state bar examining committee for the purpose of securing an adequate understanding by those admitted to the bar of the principles and recognized rules of professional ethics.

Edward M. Day delivered at the afternoon session an able sketch of the history of employers' liability and workmen's compensation legislation. Prof. Theodore S. Woolsey delivered an address on "International Arbitration."

The following officers were elected: president, George E. Hill, Bridgeport; vice-president, Hadlai A. Hull, New London; secretary-treasurer, James E. Wheeler, New Haven.

Review of Periodicals*

Articles on Topics of Legal Science and Related Subjects

Aërial Navigation. "Du Traitement Juridique Appliqué aux Aérostats Etrangers Voyageant ou Atterissant en France." By Gaston Bonnefoy. 37 *Journal de Droit International Privé* 59.

"We can desire but one thing, and that is that this international regulation may be conceived and above all applied in a liberal sense, and that it may be inspired by the first of the resolutions expressed by the Fourth International Aeronautic Congress held at Nancy in September, 1909:—

"'The Congress resolves that the states, renouncing prohibitive measures, should agree to regulate aërial navigation in a liberal sense, protecting their rights of defense by all useful precautions, and ensuring the observation of their customs laws by appropriate measures, as has been done in the case of automobiles.

"'The Congress recognizes that the registration of airships would be the best and perhaps the only way of assuring the efficacy of liberal regulation.'"

"American Corpus Juris." "An American *Corpus Juris*—A Criticism and a Suggestion." Editorial. 70 *Central Law Journal* 127 (Feb. 18).

Our contemporary makes a distinction between a synthetic and an analytical treatment in the proposed statement of American law. It considers that we have enough fundamental principles of law already, and that what we need is chiefly to analyze and apply them, rather than to restate them synthetically. It thus treats analysis as the opposite of synthesis. It believes that an analytical statement of the law would be of inestimable utility, but it considers that a synthetical one would not be efficacious in remedying a deplorable situation. But there is no occasion for such a contrast between the analytical and synthetical methods, unless one adopts the idealistic point of view and considers a synthesis of legal principles to imply the erection of a system upon a speculative rather than a scientific foundation. To a practical American lawyer a synthetic statement of the law means simply an orderly arrangement of the law by putting together *disjecta membra* into a logical whole. Scientific exposition of law is at once analytical and synthetical. In the chorus of hearty endorsement of the project coming from leaders of the bench and bar whose opinions were printed in the February *Green Bag*, there was not a single voice echoing that supposed discord between the analytical and synthetical methods which troubles the mind of this critic.

There is no occasion for the fear that the proposed undertaking would be carried out in a speculative spirit, in an attempt to do over again what has already been done, in the Code of Justinian and the Pandects, as it will never be done again. It is certainly to be hoped that there is nothing misleading in the modern use of the Roman law term *corpus juris*, as applied to American law. What Mr. Alexander and his associates contemplate is a statement of the body of law, and not of the body of right in a sense which is obsolete.

Another misinterpretation is found in the view of our learned contemporary that this project will necessarily be opposed by that school which declares all rules of law to be "arbitrary, transitory and temporary." The late James C. Carter opposed legislative codification on similar grounds. He was, however, an earnest supporter of tacit codification, as appears from the quotation at the beginning of Mr. Alexander's Memorandum (22 *Green Bag* 59). There are likewise in this school of legal thought many who would cordially welcome the attempt to present any system of law, albeit transitory, in a more logical and condensed form in order to satisfy a large group of practical needs.

"The American *Corpus Juris*." Editorial. 20 *Bench and Bar* 43 (Feb.).

"The 'living body of the law' should be something more than a name. It should have a concrete embodiment, a living organism capable of assimilating this mass of decision, and, in turn, of being nourished, and growing to greater proportions, by means of it,—capable also, to carry the simile further, of rejecting what is poisonous and incapable of assimilation. . . .

"It is not characteristic of the American people to be appalled by obstacles, however great. In such a work as this, however, they undertake something fairly comparable in difficulty with any engineering feat in the history of the country. . . .

"Mr. Alexander estimates that the work could be embraced in about twenty volumes of a thousand pages each. . . . Until some one subject in the law has been adequately treated in accordance with the scheme contemplated, any estimate either of length or cost cannot have much value. . . .

"What an object for the benefactions of some of our latter-day philanthropists! A permanent Foundation of Jurisprudence, supporting a corps of the greatest legal experts

*Periodicals issued later than the first day of the month in which this issue of the *Green Bag* went to press are not ordinarily covered in this department.

of the country, first to bring this great work into being; then continuously to superintend its future growth,—building into the structure from year to year, patiently and scientifically, the material furnished by courts and legislatures. A dream at present; but every achievement must originate in a dream."

Ames, James Barr. "James Barr Ames." By J. H. W[igmore]. 4 *Illinois Law Review* 509 (Feb.).

"As an historical scholar, Ames represented in America what Maitland represented in England—a search for beginnings, a careful instinct for verified details, a complete familiarity with the sources. One of the typical sights at a Harvard Law School examination in the old days was Professor Ames at the desk, whiling away the time with a volume of the black-letter Year Books, turning over the pages with absorbed interest and perusing the arguments upon essoins, charters and uses, with a (to the student) mysterious ease and rapidity. With the exception of Justice Holmes he was probably the first legal scholar in this country to read the Year Books through from cover to cover. His revelations in tracing the history of trespass, trover, assumpsit, and the other forms of action, preceded, in time of publication at least, the work of Maitland. . . .

"It has been said, and doubtless with truth, that he had never once tried a case in court[?]. This would indeed be a proof that law is genuinely a science, not merely an art, and that the highest attainments in it may be reached by strictly scientific study alone. The life of James Barr Ames is a perpetual memorial of the best in American legal science."

"James Barr Ames." By Dean William Draper Lewis. 58 *Univ. of Pa. Law Review* 289 (Feb.).

"Mr. Ames was one of the foremost living students of English legal history. It is a matter of sincere regret that the immense labor which he expended on his case books, while it insured the rapid success of a scientific method of law teaching, prevented him from giving to the world but a fragment of the result of his labors in this field. . . . He was ready to be the helpful comrade of all who made the teaching of law their life work. Those who obtained his friendship prized it as a great privilege."

"James Barr Ames." By J. H. B. 8 *Michigan Law Review* 314 (Feb.).

"His work has been well done and will live, but he will probably be best remembered by all who knew him for what he was, rather than for what he did."

Bank Guaranty Laws. "The Insurance of Bank Deposits in the West, II (Conclusion)." By Thornton Cooke. *Quarterly Journal of Economics*, v. 24, p. 327 (Feb.).

Continued from the November number (see 22 *Green Bag* 18). Conditions in Oklahoma, Kansas, Nebraska, South Dakota, Texas, Colorado, and Missouri are dealt with. The author's conclusions are then stated at length. He believes that—

"This has been a remarkable economic experiment, projected in time of panic, taken up as a national political issue, and carried on under the fire of hostile litigation. If successful, it would serve high social purposes. . . .

"It must not be thought, however, that the introduction of private insurance, as distinguished from that administered by the state, will be rapid. . . . Bankers are the most conservative of men. . . . But, if the limited observations here set down are valid over a wide area, and the writer believes they are, it will gradually and beneficially become the custom to insure bank deposits."

"Oklahoma's State Guaranty Law." By Adelbert Hughes. 70 *Central Law Journal* 111 (Feb. 11).

"Now, the banking business being a right common to every individual, subject to the police power only, and a corporation being a creature of the law with the rights of a natural person, and an entity separate and apart from its stockholders, is the individual who is already in the private banking business deprived of his property without due process of law by being denied the right to continue therein, and is the individual who wishes to embark in the private banking business and who is excluded from the right so to do, denied the equal protection of the laws?"

Banking and Currency. "Proposals for Strengthening the National Banking System." By O. M. W. Sprague. *Quarterly Journal of Economics*, v. 24, p. 201 (Feb.).

"The burden resting upon the New York banks should, if possible, be lightened and, above all, their ability to endure severe strain should be increased."

Bankruptcy. "The Abuses of Receiverships." By Judge Jacob Trieber, United States District Court. 19 *Yale Law Journal* 275 (Feb.).

"The remedy lies primarily with the courts. They can refuse to appoint receivers when it is not absolutely necessary for the protection of the parties or when they can be protected without resort to this expensive remedy; they can exercise the same care in the selection of receivers that they would exercise in the selection of an executor to carry out the provisions of their will; they can reserve to themselves the right to determine when a receiver needs the aid of counsel and appoint them for him with such compensation as would be allowed for similar services when performed for individuals or corporations, and they can see to it that the compensation of receivers and their counsel is no greater than what would be allowed for like services under employment from individuals."

Carriers. "The Law as to Left Luggage

at Railway Stations." By G. Addison Smith. 35 *Law Magazine and Review* 177 (Feb.).

"The point is one of great interest and importance, and with two apparently conflicting decisions of the Court of Session, although twenty-nine years apart, it seems to be one eminently suitable for decision by the House of Lords."

Codification. See "American *Corpus Juris*," Uniformity of Laws.

Contract. "What Law Governs the Validity of a Contract?" By Prof. Joseph H. Beale. 23 *Harvard Law Review* 260 (Feb.).

In this third installment the author takes up theoretical and practical criticisms of the authorities, reaching the conclusion that "the principle which is both sound theoretically and most practical in operation is the principle that contracts are in every case governed as to their nature and validity by the law of the place where they are made."

"Assignment of Contract." By Clarence D. Ashley. 19 *Yale Law Journal* 180 (Jan.).

"It is a characteristic of commercial paper that legal title can pass, which is not possible where contracts are of common law origin. The latter are said to be assignable and not negotiable. An assignment does not pass legal title, negotiability does. . . .

"In some jurisdictions statutes enable the assignee to bring the action in his own name. These statutes affect procedure only, and the legal title is not affected and still remains in the assignor. Thus suppose a New York contract assigned in New York. Should the assignee, in such a case, bring an action in a state adhering to the common law he must sue in the name of his assignor. The New York statute affects procedure only, and hence does not make any change in the legal title. Such a statute does not change the substantive law."

Corporations. "Purchase of Shares of Corporation by a Director from a Shareholder." By H. L. Wilgus. 8 *Michigan Law Review* 267 (Feb.).

In *Walsham* v. *Stainton* (1863, 1 De Gex, J. & S. 678, 66 Eng. Ch. R. 527), where two confidential agents of the partnership, Joseph Stainton and Henry Stainton, conspired together to obtain fraudulently for themselves the shares of the partners in the concern, by so keeping the accounts as to conceal the true value of the shares, and by this means forty shares were obtained by Henry Stainton at a price far below their real value, it was held that "though J. S. got no benefit of the sale to H. S., yet he stood in a fiduciary position toward the shareholder and was a party to the fraud." After reviewing a large number of cases presenting a similar point to be ruled upon, the writer says:—

"That the director may take advantage of his position to secure the profits that all have won, offends the moral sense. . . . Would it not be well to go back to the original theory of *Walsham* v. *Stainton*, followed by several later cases and ably contended for by Judge Johnson in the Philippine Supreme Court? The writer believes it would."

Courts. "Contributions of the State Judiciary to the Federal Bench." By Gardiner Lathrop. Read before Chicago Bar Association, Feb. 15, 1910. *Chicago Legal News*, v. 42, p. 230 (Feb. 26).

Contains a mass of statistical matter gathered by the librarian of the United States Senate, showing how many have had experience on the state bench before their appointment to the federal bench.

"A Court That Does Its Job: How the Municipal Court of Chicago Has Met 'The Greatest Need in our American Institutions.'" By William Bayard Hale. *World's Work*, v. 19, p. 12695 (Mar.).

"In the course of the day, a judge might find that he was through with his docket. He didn't adjourn. He reported to the Chief Justice's clerk that his call was exhausted, and cases were immediately withdrawn from other judges who had been able to work less rapidly, or from the calendar. Last year an average of twenty-five cases per day were thus transferred.

"In the same way, jurors are so employed that their full time is used. . . . Under the Chicago Municipal Court plan, each jury judge is provided with a jury as he needs it, from a general assignment room, where one set of jurors for each jury judge, together with five or six extra sets, are kept on call. On discharge, each jury returns to the general assignment room and is ready to go out to any other court room when needed. The economy of time and expense is evident."

Criminal Procedure. "Private Prosecution." By W. Guy [G. W. Wilton]. 21 *Juridical Review* 348 (Jan.).

The writer commends certain features of the recent Scots private prosecution of *Coats* v. *Brown* (High Court of Justiciary of Scotland, Oct. 27, 1909) in which the accused was found technically guilty of fraud, without proof of any injury to the prosecutors; and the hope is expressed that this case may bring about a regulation of procedure under private prosecution "which will make this ancient right consistent with modern notions."

This article really continues the discussion of the same writer in the October, 1909, number of the *Juridical Review* (see 22 *Green Bag* 28).

Declaration of London. "La Déclaration de Londres de 1909 sur Divers Points de Droit Maritime." By N. Politis, Professeur à la Faculté de Droit de Poitiers. 37 *Journal dé Droit International Privé* 35.

Defamation. "Absolute Immunity in Defamation: Legislative and Executive Pro-

ceedings." By Van Vechten Veeder. 10 *Columbia Law Review* 131 (Feb.).

"Absolute immunity is confined to members of Congress and of the state legislatures. The public policy which requires the utmost freedom of action in the conduct of these independent departments of government does not apply to inferior bodies exercising certain legislative functions, such as city councils, boards of supervisors, etc. Members of such bodies are sufficiently protected by their exemption from liability in the exercise of good faith."

Drugs. "The Law of Poisons and Pharmacy." By W. Wippell Gadd. 35 *Law Magazine and Review* 170 (Feb.).

A review of the recent work of W. S. Glyn-Jones of the Middle Temple on this subject.

Employer's Liability. "Employers' Liability in England Prior to the Act of 1880." By James T. Carey. 58 *Univ. of Pa. Law Review* 259 (Feb.).

"The extent of the employer's duties at this time may be stated to have been: (1) in case of personal interference with the work, to be careful of the safety of the workman; (2) to warn the servant of defects in the machinery and plant of which he knew, and of which the servant was ignorant and with which the latter could not, by the exercise of reasonable care, acquaint himself; (3) in the absence of personal attention, to take reasonable care to employ a competent man to provide a safe place to work and suitable appliances, the employer being allowed either to furnish to said appointee sufficient materials for these purposes or adequate means of providing same; (4) to take reasonable care to select one competent to retain careful servants with whom the employee would be associated.

"Such a small measure of obligation resulted in throwing on the workman risks of danger to life and limb which he was unable to prevent, and, in view of his dependent situation, had to assume as incident to the employment. This effect had been brought about by the tendency of the courts, through a long series of cases, to consider the facts, not as presenting single instances of a broad economic situation, but as disputes between employers and workmen which were to be settled on the theory that the parties had 'impliedly contracted' concerning the subjects in dispute; the incidents implied from the contract relation were defined with the result that not only were these resolved for the most part in favor of the master, but the basis of decision was fictional.

"It was with a view to bettering the workman's position in the law that the Employers' Liability Act was passed, and it is interesting to note that the jurisdiction in which it was adopted is today one of the most advanced in its methods of adjusting the relations of workmen and those for whom they labor, recognizing the status of employer and employed as presenting social and legal problems of vast importance."

Equitable Assignments. "Notice of Assignments in Equity." By Edward Q. Keasbey. 19 *Yale Law Journal* 258 (Feb.).

"There is no doubt that it is the established rule, applicable to equitable interests as well as to legal titles, that in the absence of controlling equities the title that is prior in time must prevail. It is also well settled that an equitable assignment as well as a legal assignment of a debt is complete as between the assignee and the assignor, although no notice of the assignment be given to the debtor or trustee. It is generally agreed that if no notice of an assignment be given to the debtor, the assignment is not complete as against him, and he may safely pay a second assignee. The only question is whether the rule shall be applied also to the protection of a second assignee who is an innocent purchaser without notice from the debtor or depositary, especially if he has made inquiry of the debtor with regard to his knowledge of a prior assignment.

"It is this question that has been answered in the affirmative in *Dearle* v. *Hall* (3 Russ. 1, 1827), and the English and American cases in which the rule adopted in England in 1827 has been followed. . . . It may be said that the rule of reason and sound policy supported by the weight of authority is the rule declared by Sir Thomas Plumer and approved by Lord Lyndhurst in *Dearle* v. *Hall*."

Ethics. "Christian Morals and the Competitive System." By Thorstein Veblen. *International Journal of Ethics*, v. 20, p. 168 (Jan.).

"It appears, then, that these two codes of conduct, Christian morals and business principles, are the institutional by-products of two different cultural situations. The former, in so far as they are typically Christian, arose out of the abjectly and precariously servile relations in which the populace stood to their masters in late Roman times, as also, in a great, though perhaps less, degree, during the 'dark' and the middle ages. The latter, the morals of pecuniary competition, on the other hand, are habits of thought induced by the exigencies of vulgar life under the rule of handicraft and petty trade, out of which has come the peculiar system of rights and duties characteristic of modern Christendom. Yet there is something in common between the two. . . . The principle of fair play appears to be the nearest approach to the golden rule that the pecuniary civilization will admit. . . .

"There are indications in current events that these principles—habits of thought—are in process of disintegration rather than otherwise. . . . The principles of fair play and pecuniary discretion have, in great measure, lost the sanction once afforded them by the human propensity for serviceability to the common good, neutral as that sanction has been at its best. Particularly is this true since business has taken on the char-

acter of an impersonal, dispassionate, not to say graceless, investment for profit. . . .

"Except for a possible reversion to a cultural situation strongly characterized by ideals of emulation and status, the ancient racial bias embodied in the Christian principle of brotherhood should logically continue to gain ground at the expense of the pecuniary morals of competitive business."

"The Present Task of Ethical Theory." By James H. Tufts. *International Journal of Ethics*, v. 20, p. 141 (Jan.).

"It is the privilege and duty of ethical theory to contribute conceptions which will aid legislatures and courts in their task—to take the words of the federal Supreme Court—of 'so dealing with the conditions which exist as to bring out of them the greatest welfare of its people.' "

"The Theory of Evolution and Mutual Aid." By Prince Kropotkin. *Nineteenth Century and After*, v. 67, p. 86 (Jan.).

"We shall see how, after having himself indicated the three different aspects which Struggle for Life may take in Nature, he [Darwin] gradually came, in an indirect way, to attribute less and less value to the *individual* struggle inside the species, and to recognize more significance for the *associated* struggle against environment; and next we shall have to see how the mass of experimental researches made within the last twenty-five years about the influence of surroundings upon the forms if plants and animals, has modified opinion in favor of the direct action of environment, which lays much less stress on struggle for life as a species-producing agency than is required by the theory of Natural Selection."

"Australian Morality." By Prof. Irving King. *Popular Science Monthly*, v. 76, p. 147 (Feb.).

"All things considered, we are obliged to say that their [the aborigines'] life was moral in a high degree, when judged by their own social standards, and not even according to our standards are they to be regarded as altogether wanting in the higher attributes of character. Dawson holds that, aside from their low regard for human life, they compared favorably with Europeans on all points of morality."

Evidence. "Expert Testimony, Its Abuse and Reformation." By Lee M. Friedman. 19 *Yale Law Journal* 247 (Feb.).

"Today in any large city if an attorney calls to retain a physician in a personal injury case, the first question which the physician will probably ask is by which 'side' of the case he is retained. If the physician is one who is constantly appearing in court, he will refuse to accept a retainer from a plaintiff if his appearance has been generally on the defendant's behalf, and *vice versa*. From his point of view to mix 'sides' is bad business. So the regular court experts not only come to be tagged in court as 'plaintiff's experts' or 'defendant's experts,' but they come in their practice more or less unconsciously to get into a chronic one-sided medical point of view."

Expert Testimony. See Evidence.

Foreign Relations. "American Affairs." By A. Maurice Low. *National Review*, v. 54, p. 996 (Feb.).

"Mr. Root, as Secretary of State, laid great stress on securing the friendship and confidence of the Latin American Republics; and so far as Central America was concerned the keynote of his diplomacy was the co-operation and confidence of Mexico. . . . The *entente* that existed under the Root *régime* has been weakened, if not destroyed, and Mexico is now viewed with some suspicion. Even more important is the semi-official announcement that Brazil is to take the place formerly occupied by Mexico."

"Imperial and Foreign Affairs: The Elections and Their Meaning." By J. L. Garvin. *Fortnightly Review*, v. 87, p. 189 (Feb.).

"If British sea-power breaks down and the British Empire breaks up, it is as certain as anything in the future can be that the United States will be controlled by Germany in the Atlantic and by Japan in the Pacific, that South America will pass beyond the influence of Washington, and that the Panama Canal will not remain in American hands. To some of us, both in the Mother Country and in Canada, it appears quite clearly that the cause of British Imperialism is the cause of the United States. . . . To get any very serious consideration for these ideas in the United States at present seems impossible. All that can be said is that Anglo-American relations in the last few years have themselves gone from bad to worse in the direction of a 'silent dissolution' of effective friendship."

Freedom of the Press. "The Press Law in India." By Sir Andrew Fraser, K. C. S. I. (late Lieut.-Governor of Bengal). *Nineteenth Century and After*, v. 67, p. 227 (Feb.).

"It is most undesirable to make the law more strict than is necessary; for it is very desirable in India to have the means of ventilating grievances, exposing abuses, and giving expression to the opinion even of a small section of the community. But it is, on the other hand, as experience has now fully shown, absolutely essential to restrain the licentious section of the press from the dissemination of such literature as has poisoned the minds of considerable sections of the people."

Government. "German Constitutional Law in its Relation to the American Constitution." By Otto Gierke. 23 *Harvard Law Review* 273 (Feb.).

This is the Lowell Institute lecture given by Dr. Gierke in Boston, Oct. 4, 1909, when the distinguished jurist was in this country as the delegate of the University of Berlin

to the installation of Mr. A. Lawrence Lowell as president of Harvard University. (Summarized 21 *Green Bag* 608.)

"The German Doctrine of the Budget." By Walter James Shepard. 4 *American Political Science Review* 52 (Mar.).

"Most German writers regard the budget as only formally a law; materially, they insist, it is an ordinance. It embodies no general form or rule of conduct, no broad principle of action. It is merely the government's financial estimates and proposals for the ensuing fiscal period. . . . By its very definition, as materially an ordinance, the budget is incapable of annulling material laws.

"The refusal of the legislature to vote the budget does not, it is maintained, put an end to previous laws which depend for their execution upon financial support. . . . The passing of the budget, containing the necessary credits for the execution of the laws and the maintenance of the government, is a duty of the legislature which it must not fail to perform."

"The House of Lords: Its History and Constitution, V." By Charles R. A. Howden. 21 *Juridical Review* 358 (Jan.).

Continued from the April, 1909, number. This installment is chiefly given up to such subjects as the qualifications of Scottish peers, and some aspects of the House as a court of law.

"Wanted: A Government for Alaska." By Atherton Brownell. *Outlook*, v. 94, p. 431 (Feb. 26).

"Throughout Alaska may be found the feeling today that the physical needs of the Territory have not been sufficiently considered by Congress in the way of appropriations. . . . A commission created by Congress might easily be expected to create a close tie between Washington and the Territorial capital."

British Constitution. "The Struggle Over the Lloyd-George Budget." By Edward Porritt. 24 *Quarterly Journal of Economics* 243 (Feb.).

"Balfour has been occupied, since he ceased to be premier, in catching up with his party, rather than in giving it an efficient and determined lead. . . .

"When at second reading stage of the Finance bill on June 8th, Lloyd-George was defending the tax of a half-penny in the pound on the value of undeveloped urban land, and the tax of twenty per cent on unearned increment accruing at the sale of such land, he contented himself with recalling the recommendation of this Royal Commission of 1885, and the similar recommendations of the Royal Commission on Local Taxation of 1898–1902."

"The General Election—And the Next." *National Review*, v. 54, p. 917 (Feb.).

"The House of Lords needs to be reformed. Let it be reformed by consent. Let Mr. Asquith abandon once for all the attempt to load the dice in the interest of one party. Let statesmen of both parties meet in conference upon the constitutional question. By no other method has a question of that character been satisfactorily settled in any free country."

"The Morrow of the Battle." By Harold J. Howland. *Outlook* v. 94, p. 383 (Feb. 19).

"The land taxes in the Budget and our own movement for the conservation of natural resources have their foundation on the same principle. It is the principle . . . that since the only natural right to property is the right of every man to the product of his own labor, natural wealth belongs of right to the whole people."

The popular referendum is at present eliciting some discussion in England. The following article devotes much attention to the practical working of the referendum in different countries:—

"The Referendum." *Edinburgh Review*, v. 211, no. 431, p. 131 (Jan.).

"The only form in which the referendum is likely to recommend itself to responsible English statesmen is as an exceptional remedy to be strictly held in reserve for exceptional emergencies. The questions involved cannot be lightly passed over, for they touch the gravest issues of political science and the national well-being."

Further facts regarding the referendum can be gleaned from the following useful contribution to political science:—

Switzerland. "Democracy in Switzerland." By W. S. Lilly. *Quarterly Review*, v. 212, no. 422, p. 180 (Jan.).

"What we call popular government in England is really not popular government at all; it is party government, or, to speak more correctly, government by factions masquerading as parties. There is not the slightest vestige of this system in Switzerland. . . . In Switzerland there is really government of the people by the people."

See Interstate Commerce, Scientific Methods, Taxation.

History. "The Scientific Presentation of History." By Lynn Thorndike, Ph.D. *Popular Science Monthly*, v. 76, p. 170 (Feb.).

"We shall come, not merely to the historical terminology which Robinson desires, but also to standards of historical measurement, modes of historical reckoning, historical symbols, curves, charts and other graphic means of presenting briefly and accurately what prose could compass only in many pages or fail to express with requisite precision and discrimination."

Husband and Wife. "Right of Wife to Pledge Husband's Credit." 20 *Bench and Bar* 56 (Feb.).

Treating the subject solely from the point of view of New York law.

International Arbitration. "The Proposed High Court of Nations." By James L. Tryon. 19 *Yale Law Journal* 145 (Jan.)

A review of Senator's Knox's proposal for the constitution of a permanent Court of Arbitral Justice at the Hague by investing the Prize Court with an enlarged jurisdiction.

International Relations. "Diplomatic Affairs and International Law, 1909." By Prof. Paul S. Reinsch. 4 *American Political Science Review* 16 (Mar.).

"The solidarity of international life is asserting itself more and more. . . . An intricate web of world-wide interest and activities of a peaceful and progressive nature is being woven which nations find it more and more difficult to tear asunder for reasons of political hostility.

"The reverse of this picture is the continued increase of armaments. It is quite paradoxical that the growth of co-operation throughout the world is accompanied by this increase in the energy and acuteness of international competition which expresses itself ultimately in national armaments. . . . Yet it must be remembered that in an energetic age, such as that in which we live, nations will inevitably desire to measure themselves in active competition, and they see in their armament the index of national strength and proficiency. Such an index effectively maintained will give to nations relative position, which in itself will dispose of many possible conflicts and controversies."

Interstate Commerce. "Federal Control of Interstate Commerce." By Attorney-General George W. Wickersham. 23 *Harvard Law Review* 241 (Feb.).

This article is a revision of a portion of an address before the Commercial Club of Kansas City, Mo.

"The power to regulate interstate commerce," said Chief Justice Marshall, "is co-extensive with the subject on which it acts and cannot be stopped at the external boundary of a State, but must enter its interior (*Brown* v. *Maryland*, 12 Wheat. 419, 446–447). . . .

"No doubt, the Sherman Act is sufficiently comprehensive to reach and destroy such monopolies as these [those built up by means of the holding company], but at the same time that the national government forges a weapon to destroy such abuses it must provide a substitute for those legitimate enterprises which are equally dependent for their existence upon the system so abused. It must therefore provide a means of enabling co-operative enterprise to engage freely and openly in interstate and foreign commerce without the interferences by state action which fetter, confine, and destroy the possibility of such free pursuit. This can only be done by the enactment by Congress of a law providing for the formation of corporations to engage in trade and commerce among the states, protecting them from undue interference by the states, and regulating their activities so as to prevent the recurrence, under national auspices, of those abuses which have arisen under state control. . . .

"It should protect the corporations organized under it from undue interference by state authorities, subjecting its real and personal property only to such taxation as is imposed by the state upon other similar property located therein. . . .

"Such corporations should be prohibited from acquiring or holding stock of other corporations. The power to regulate interstate commerce is believed to be broad enough to authorize such legislation. It has been upheld when directed to corporations carrying on other forms of interstate commerce, transportation, navigation, etc."

"Excluding from Intra-state Business Foreign Corporations Engaged in Interstate Commerce." Editorial. 70 *Central Law Journal* 109 (Feb. 11).

Reviewing the recent decision of the Supreme Court of the United States in *Western Union Telegraph Co.* v. *Kansas* (22 *Green Bag* 192), declaring the Kansas statute imposing the payment of a given per cent on the total authorized capital of a foreign corporation, engaged in interstate commerce, as a condition of its right to do local business, unconstitutional.

"While the opinion of Mr. Justice Harlan might seem, at first blush, like a further advance on the road of federal encroachment upon state autonomy, examined closely, it appears to us to help more surely than do the opinions of Mr. Justice White and Mr. Justice Holmes toward an accurate defining of the boundary lines between state and federal power. Just as strongly as Justice Harlan here marks the limit of state control, so his opinions generally in defining the shadowy boundaries of the so-called 'twilight zone,' where federal and state jurisdictions are supposed to meet, have been like as a 'pillar of cloud by day and a pillar of fire by night' to point us the strict and safer path of national power under the federal constitution."

"Federal Railroad Regulation." By Prof. William Z. Ripley. *Atlantic*, v. 105, p. 414 (Mar.).

"The Interstate Commerce Commission is limited in its scope to the consideration only of specific complaints. It cannot of its own initiative pass upon the reasonableness of an entire new schedule of rates in advance of its taking effect. It must take the matter up, if at all, bit by bit, as individual shippers chance to complain, after the rates have become operative. . . .

"The result, as was predicted, is that little protection is afforded to the public in any large way. Judging by results the railroads are as free as they ever were to increase their tariffs whenever they see fit so to do.

"There is imperative need of amending the law, and of granting power to suspend such

rate-advances, not as now in particular cases on complaint, but as to entire schedules of rates, prior to their taking effect. The experience of the last few years has amply proved the need of some such amendment; and it is gratifying to note that President Taft, judging from his public utterances, seems likely to favor the proposal. . . .

"Eminent railway counsel avers that this is no time to reopen the issue of federal railroad legislation; that, in fact, we are only just recovering from an era of political hysteria on the subject; and that legislative tinkering thould be postponed until the Hepburn Act has at least had a fair trial. The answer is that the present Administration is pledged to this policy,—to the perfecting of the program of President Roosevelt in this regard. . . .

"In time of peace prepare for war. The surest protection against the shafts of the demagogue will be found under the ægis of publicity and ample federal supervision."

"Fair Regulation of Railroads." By Samuel O. Dunn. *North American Review*, v. 191, p. 185 (Feb.).

"A law of Massachusetts provided for fifteen years that securities might not be issued except at their market price; what the market price was, to be determined by the state railroad commission. Texas prohibits the issuance by any railroad of stocks and bonds having a par value more than fifty per cent in excess of the value of its property as fixed by the state railroad commission; and the commission has fixed the "true value" of Texas roads at only forty-eight per cent of their assessment by the State Tax Board, at fifty per cent of their capitalization and at little less than the amount of their outstanding bonds, thereby making the issue of new securities practically impossible. Railroad officers of the highest reputation contend that the administration of these laws has hindered railroad development in both Massachusetts and Texas; and the legislature of Massachusetts in 1908 amended the law in that state. . . .

"Congress and the legislatures of the states should not act until they are sure the laws regulating security issues that they shall pass will not so hamper legitimate business as to do more harm than good."

"How to Regulate Corporations." By James J. Hill. *World's Work*, v. 19, p. 12730 (Mar.).

"We have been as a nation too ready to look to state and federal legislation for remedies beyond their power to give. You may obstruct and delay for a time, but in the end the inexorable law of experience and the survival of the fittest will prevail. . . . Such combinations as are evil, and some there are, will be found self-destroying."

"The Great Railway Rate Battle in the West." By Samuel O. Dunn. *Scribner's*, v. 47, p. 364 (Mar.).

Mr. Dunn carefully sums up all the evidence and concludes that the carriers may have erred or sinned in detail, but the principles for which they contend seem right.

See Monopolies.

Legal Evolution. "Law in Books and Law in Action." By Prof. Roscoe Pound. 44 *American Law Review* 12 (Jan.-Feb.).

[1] "Case law has been found unable to hold promoters to their duty and to protect those who invest in corporate enterprises against mismanagement and breach of trust. It has failed to work out a scheme of responsibility that will hold legal entities, or those who hide behind the skirts of such entities, to their duty to the public. . . . Judicial decision is doing little or nothing for improvement of procedure in the face of insistent popular demand. On all these points we have had to turn to legislation. Juristically, then, we are in a period of stability and the growing point of law is in legislation. . . .

"I have discussed at length the effect of stability of juristic thought and the nature of American juristic thought because those are the subjects which the lawyer must ponder. It is there that the divergence between law in books and law in action has a lesson for him. The other two causes may be looked at only in the briefest way.

[2] "Rigidity of legislation is best illustrated in the codes of procedure and practice acts, so common in the United States, which in large measure have defeated their own ends by going too much into detail. Legislation must learn the same lesson as case law. It must deal chiefly with principles; it must not be over-ambitious to lay down universal rules. We need for a season to have principles from which to deduce not rules, but decisions. . . .

[3] "The third cause mentioned, defective administration, perhaps more than any other cause, is immediately responsible for making law in action different from law in the books. . . . We have preserved an etiquette of justice, devised in large part in a past age of formal over-refinement, no small part of which is as out of place in a twentieth century American court of justice as gold lace and red coats upon a modern skirmish line. It is chiefly, however, in executive administration that laws fail of effect. . . . Puritan jealousy of the magistrate too often results in a legal paralysis of legal administration. Effective administration is perhaps the great problem of the future."

"American Case Law: A Consideration of Certain Factors Bearing on the Development of American Jurisprudence." By Thomas A. Street, Professor of Equity in the School of Law of the University of Missouri. Delivered before the Kansas City Bar Association, December 4, 1909. 13 *Law Notes* 205 (Feb.).

"The statutes of Massachusetts and Maine made no provision for any court exercising full chancery powers, and consequently the

development of equity in these jurisdictions was highly imperfect and unsatisfactory. . . . On the contrary, the Chancery Court was cherished in the South from the beginning; and in fact the even and intelligent development of the doctrines of equity may be said to be a characteristic excellence of the jurisprudence of the South during its entire history. . . . If it were not for the weakness of its equity jurisprudence, we do not believe the title of Massachusetts could be questioned on the point of having the best rounded system of judge-made law that is to be found in this country. . . .

"The existence or non-existence in any state of a shapely and intelligible body of statutory law cannot but be a factor that will in the end prove a potent one in its effect for good or ill on the judiciary laws of that state. . . . The best illustration that occurs to the writer of the good consequences following from the existence of a healthy and intelligent body of statutory law is found in the law of the state of Alabama. . . .

"While the new procedure may be all right from the point of view of the administration of substantive law, it is certainly justly chargeable with evil results upon the form of our law. It undoubtedly leads to lengthy and discursive pleadings and to verbose and long drawn out opinions. . . . While the reformed procedure may be all right in theory, the practical and successful adoption of it requires the existence of a strong bar and an able bench. . . .

"One of the worst vices that appear to infect the body of law built up by the Supreme Court is a lack of candor on the part of the court in dealing with its own material. . . . It would sometimes appear that the more decisions they make on a particular topic, the greater is the difficulty of discovering what the law really is. . . .

"Judicial opinions in this country are loaded with far too many details and are for the greater part too much lacking in the qualities of force and vigor. The judge who writes the opinion too often supplies us, or leaves behind, not only the finished product but all the waste material left over from his mental processes. . . . Our case law in this country does not compare very favorably, as regards its external form, with the case law of England. Opinions delivered in English courts may be relied on generally to be sprightly and intelligible, and they will also be frequently found to exemplify the inestimable virtue of terseness. . . .

"We need never expect . . . to see a body of case law in this large country as homogeneous as the English law is with itself. But it is possible that, notwithstanding local differences, each system should be consistent and reasonable in itself; and there is every reason to believe that as time goes on this better condition will be realized."

Legal History. "Early History of the Serjeants and Their Apprentices." By Hugh H. L. Bellot. 35 *Law Magazine and Review* 138 (Feb.).

"These scanty notices of the serjeants and their apprentices enable us to trace back with some confidence, to an earlier period than has commonly been assigned, the higher branch of the legal profession as an organized body."

Legal Literature. "The Lives of Law Books." By C. E. A. Bedwell. 35 *Law Magazine and Review* 129 (Feb.).

"The writing of law books seems to become either an occupation in itself or else the joint undertaking of several hands rather than the expression of one master mind, who had a complete grasp of the theory and practice of the subject. The objection felt by many to the change has been expressed by Professor Dicey [in article in *National Review*, Dec. 1909; see 22 *Green Bag* 183].

" 'In the world of letters you cannot substitute co-operation for individuality. The united labors of a thousand lawyers may create, and I trust will create, an Encyclopædia of English law, but they will never, even though they have a Lord Chancellor at their head, give birth to a work which will rival the *Commentaries on the Laws of England*.' "

Marriage and Divorce. "Shall Congress be Given Power to Establish Uniform Laws Upon the Subject of Divorce Among the States of the Union?" By Jennings C. Wise. 70 *Central Law Journal* 93 (Feb. 4).

"A careful study of the various grounds of divorce recognized in the different states will lead us to the conclusion that uncertainty of status does not result to such a degree from this as from the other forms of variance. . . .

"No argument should be required to impress upon an intelligent mind the expediency of unification as to matters of jurisdiction and defense, for the abuses which the existing variance here leads to are manifest. . . . If divorce, as a legal institution, is to exist in one form or another amongst our people, is it not desirable that a common and well-defined channel be staked out for those seeking its haven? Is it not eminently wise that the divorce court be circumscribed by uniform safeguards among our people, and shall we not establish a supreme tribunal to pronounce the sanction of dissolution from that most sacred of all our relations?

"Surely the great weight of reason leads us to regard with favor the unification of our laws on the subject of *divorce*."

"The Royal Commission on Divorce Law." By D. Oswald Dykes. 21 *Juridical Review* 313 (Jan.).

"Rejecting desertion, the English law has only adultery as a ground of divorce. It may be doubtful whether there will be any strong movement in England to persuade the Commission to recommend divorce for desertion. But it is almost certain that an attempt will be made to amend the law of divorce for adultery. The present inequality consists in the fact that a wife can be divorced

for infidelity, while she is not entitled to that remedy against her husband unless he be guilty, in addition to adultery, of desertion or cruelty or certain indecent crimes. This English rule is not perhaps difficult to understand when considered historically, but it seems much less consonant with modern feelings than the impartiality of the Scots Law."

"Le Divorce au Japon." 37 *Journal de Droit International Privé* 106.

"From 1892 until 1897, during a period of six years, the average of marriages is about 355,000 per year, and that of divorces 115,000. Approximately this is one divorce for every three marriages."

"Marriage with a Deceased Wife's Sister and the Cry of 'Disestablishment.'" By Rev. A. H. T. Clarke. *Nineteenth Century and After*, v. 67, p. 257 (Feb.).

"Holy Scripture positively allows marriage with a deceased wife's sister. The English state allows it. The Pope always allowed it (with regular dispensation). Bishop Gore alone champions a cause befriended by neither Scripture, the Pope, nor the state."

Monopolies. "'Big Business' and the Sherman Law: Which Shall be Modified, Business Ways or the Law?" By Oscar King Davis. *Century*, v. 79, p. 748 (Mar.).

"It needs no argument to show that the Sherman law denunciation of 'every contract and every combination' is too broad. . . . Many propositions for amending the Sherman law have been made, all aimed at the same result. . . . But every such proposition yet advanced has been found, upon careful study, to be defective. . . . The result is the conviction on the part of the Administration that the better way would be to leave the Sherman law as it is, and by a new piece of constructive, positive legislation provide the relief which it is desired to give to legitimate business. . . .

"It is possible, of course, that federal incorporation may not afford the measure of relief expected, and may even create a situation worse generally than that of the present through unshackling the very forces of combination inimical to free competition which it is desired to hold in check. . . .

"The corollary of federal incorporation is federal supervision. . . . Federal supervision is not yet accepted with heartiness. . . . But federal incorporation has never had as much official support as now, and there is every prospect that before Congress adjourns there will be a new incentive to 'big business' to accept it."

"Experiences of a Cabinet Officer Under Roosevelt." By Charles J. Bonaparte, Late Attorney-General of the United States. *Century*, v. 79, p. 752 (Mar.).

"My predecessor, now Mr. Justice Moody, when he left office, advised me to give as much time as possible to the Supreme Court. He had argued more cases than had been customary for an Attorney-General in recent years, and said he thought it might have been well had he tried even more. . . . To my mind, Mr. Justice Moody's advice was thoroughly sound. Our Supreme Court possesses greater power and enjoys higher dignity than any other tribunal in the world, and the chief law officer of our government is appropriately employed when he defends before it in person the great common interests of the American people."

Of his experience in attempting to enforce the Sherman act, Mr. Bonaparte says: "In general I expected more satisfactory results from civil than from criminal proceedings. I was, and am still, convinced that the present method of attempted control through the courts over our vast aggregations of capital is altogether too cumbrous, dilatory, expensive and uncertain to be satisfactory, and that some time we must substitute for it a system of administrative control at once fair, simple, summary and drastic. To secure the necessary legislation for this purpose, however, I thought, from what I knew of conditions in Congress, a construction of the existing law must be obtained which might lead the 'interests' to accept and even welcome the change. I hoped this might be, perhaps, the outcome of certain equity suits I caused to be instituted, notably those against the Standard Oil and the Tobacco Trust."

Mr. Bonaparte also makes some interesting remarks about the subserviency of the press to powerful combinations, which may profitably be read in conjunction with Professor Ross's article on "The Suppression of Important News" in the *Atlantic* (see p. 242 *infra*).

"Labor Unions and the Anti-Trust Law: A Review of Decisions." By C. J. Primm. *Journal of Political Economy*, v. 18, p. 129 (Feb.).

"Three facts are to be noted in regard to the relations of the labor unions and the federal Anti-Trust law. First, nothing in these cases indicates that the union itself is illegal, but the inference is that through the union organization and agencies a conspiracy or an action in restraint of trade can readily be fostered. Second, in the application of the Sherman Anti-Trust act to labor unions in the two groups of enterprises, manufacturing and transportation—productive and distributive—the courts have made it applicable to any union, whether intra-state or interstate, which directly and specifically affects interstate commerce to restrain it. Third, the logical and consistent holding, by the courts, to the general principles of interpretation of the Sherman act, already outlined, allowed of no other result in these labor cases."

"The Standard Oil Case." By Herbert Noble. 44 *American Law Review* 1 (Jan.–Feb.).

"It is impossible to state in general terms what associations or combinations are legal, but each case must be decided upon its particular facts, just as the decided cases must be limited to their particular facts and the generalizations considered with regard to such facts. These generalizations may be good law, they may be bad law; they may be good economics, they may be bad economics, and must therefore, in view of the great importance of settling the law under this act, be disregarded except in so far as they are an essential part of the actual decision in each case."

See Interstate Commerce, Restraint of Trade.

Nuisances. See Public Health.

Penology. "The Punishment of Crime and the Indeterminate Sentence." By Hugh R. P. Gamon. 35 *Law Magazine and Review* 191 (Feb.).

"Reformatories and Borstal institutions will flourish in the place of prisons; and the unregenerate convict, who will respond to no treatment, and cannot be safely released, will be kept under a strict, but not harsh, control for the rest of his life. As the very indefiniteness of the sentence will strike awe into the man who is conscious of his own depravity, and so act as a potent preventive of crime, it will animate with hope a convict who is resolved to amend his ways; and with the protracted detention of the hardened offender, it may be confidently expected will go the curtailed detention of the less hardened, except at least in those cases where time is required for the purpose of reforming a character.

"But the principle of protection as embodied in the indeterminate sentence must be embraced whole-heartedly, if at all; and it is impossible, with any chance of success, to engraft it upon a scheme of treatment which is primarily punitive and deterrent."

"Society and the Criminal." By Edward T. Devine. *Outlook*, v. 94, p. 307 (Feb. 5).

"There are already many fragmentary indications of what the new penology will be like. John Howard and the sentimental reformers may not have understood it clearly, but the abuses which they scourged were certainly at war with it, and the humanity for which they stood is one of its foundation stones. Lombroso and his associates in a more scientific scheme of criminology may be one-sided and eccentric, but it is their merit that they have at least conceived the problem seriously and are ready to take the consequenecs of their radical theories."

"A Reformatory Which Reforms." By Frank Hunter Potter. *Outlook*, v. 94, p. 303 (Feb. 5.)

"Two principles underlie all of the reformatory work at Bedford [N. Y.]: grading into classes, with promotion from one to another, and release on parole in case of good behavior as an ultimate reward."

"Prison Life as it Affects Women." By O. M. B. *Contemporary Review*, v. 97, p. 177 (Feb.).

"In Holloway each visitor is supported by a whole army of workers. The governor, the chaplain, the matron, the agents for the Prisoners' Aid Society, the officials—one and all are trying to benefit the prisoners. One woman after another has told me how kindly they are treated. 'Everything is done for our comfort,' said one poor girl of seventeen. 'I had no idea there would be such privileges,' said another girl, amazed at having a story-book lent her, in which she could lose the memory of her troubles after the day's work was over. 'I haven't had a cross word spoken to me since I came in,' said a third. Considering how provoking these girls can be, this is strong testimony to the kindness of the wardresses."

See Probation.

Police Power. "The Offense of Disorderly Conduct." By Frederick B. House, City Magistrate. *New York Law Journal*, v. 42, p. 2251 (Feb. 28).

Written to dispel uncertainty with regard to the nature of this offense under New York laws, and to show more clearly the powers of magistrates in New York City. Many leading authorities are digested.

Probation. "The Probation System of Massachusetts." By Justice Charles A. De Courcey. 19 *Yale Law Journal* 187 (Jan.).

A Justice of the Superior Court of Massachusetts here contributes an interesting review of the working of the probation system in his own state, together with a conservative estimate of its value.

"Not only is there already an approach to uniformity in the work of the lower courts and officers but, most important, the officers themselves have been instructed and stimulated to better work. Conferences of the judges, called by the commission, have awakened their interest in probation, and resulted in the formation of organizations among the judges themselves to advance the efficiency of the system."

Whether the system should be extended is a question upon which Judge De Courcey is hardly yet prepared to commit himself. He says that the feasibility of such a course "must be decided by the practical experiences of judges and officers, rather than by the theories of doctrinaires, who are wedded to the 'criminal type' theory and exaggerate the influence of heredity and environment to the exclusion of the whole notion of personal responsibility." He thinks, however, that probation will be improved and developed in a practical and sane way "as we shall solve the kindred problems of the indeterminate sentence, reformatory discipline and needed reforms in criminal procedure and prison discipline." For the awakening that may bring this about he thinks no man more entitled to credit than President Taft.

Procedure. "Some Principles of Procedural Reform." By Prof. Roscoe Pound. Read before the Chicago Law Club, December 3, 1909. 4 *Illinois Law Review* 388 (Jan.), 491 (Feb.).

In the course of a singularly enlightening discussion the author proposes these principles:—

"I. It should be for the court, in its discretion, not the parties, to vindicate rules of procedure intended solely to provide for the orderly dispatch of business, saving of public time, and maintenance of the dignity of tribunals; and such discretion should be reviewable only for abuse.

"II. Except as they exist for the saving of public time and maintenance of the dignity of tribunals, so that the parties should not be able to insist as of right upon enforcement of them, rules of procedure should exist only to secure to all parties a fair opportunity to meet the case against them and a full opportunity to present their own case; and nothing should depend on or be obtainable through them except the securing of such opportunity.

"III. A practice act should deal only with the general features of procedure and prescribe the general lines to be followed, leaving details to be fixed by rules of court, which the courts may change from time to time, as actual experience of their application and operation dictates.

"IV. The function of a judicial record should be to preserve a permanent memorial of what has been done in a cause; the court should be able at all stages to try the case, not the record, and, except as a record of what has been done may be necessary to protect substantive rights of parties as the suit progresses, the sole concern of the court with respect to the record should be to see to it that at the termination of the litigation it records the judgment rendered and the causes of action and defenses adjudicated.

"V. The office of pleadings should be to give notice to the respective parties of the claims, defenses and cross demands asserted by their adversaries; wherever that office may be performed sufficiently without pleadings, pleadings should be unnecessary, and where pleadings are required, the pleader should not be held to state all the legal elements of claim, defense or cross demand, but merely to apprise his adversary fairly of what such claim, defense or cross demand is to be.

"VI. No cause, proceeding or appeal should be dismissed, rejected or 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.

"VII. The equitable principle of complete disposition of the entire controversy between the parties should be extended to its full content and applied to every type of proceeding." To give effect to this principle, five propositions are suggested.

"VIII. So far as possible, all questions of fact should be disposed of finally upon one trial." This principle is also elaborated in a series of special propositions.

"IX. No judgment should be set aside or new trials granted for error as to any matter not involving the substantive law or the facts, that is for error as to any matter of procedure, unless it shall appear to the court that the error complained of has resulted in a miscarriage of justice.

"X. The trial judge should be permitted to charge the jury orally, to sum up fairly and accurately the evidence upon each side of the issues submitted, and to make fair comments thereon.

"XI. Exceptions should be abolished; it should be enough that due objection was interposed at the time the ruling in question was made.

"XII. An appeal should be treated as a motion for a rehearing or new trial or for vacation or modification of the order or judgment complained of, as the cause may require, before another tribunal. . . .

"As a corollary:—

"Upon any appeal, in any sort of cause, the court should have full power to make whatever order the whole case and complete justice in accord with substantive law require, without remand, unless a new trial becomes necessary."

"A Comparative Study of English and American Courts." By William N. Gemmill. 4 *Illinois Law Review* 457 (Feb.).

"It is my purpose in this paper to make a summary, as briefly as possible, of the courts of England and their work, and the courts of the United States in general, and of Illinois and Cook county in particular. . . .

"An examination of the judicial statistics of England and Wales, and such investigation of the work of our courts as I have been able to make, has led me to the following conclusion, namely, that the judges of the English courts do not severally dispose of more work than the judges of Illinois or Cook county, but on the contrary each one of our judges tries more cases and disposes of more business, and does it more efficiently, with less expense to the litigant and taxpayer, and with less regard for the technicalities of the law than do the judges of England."

"Reform of Legal Procedure." By Lynn Helm. 44 *American Law Review* 69 (Jan.–Feb.).

"We do not need . . . more courts or more judges to transact the judicial business of the country, but we need judges better equipped for transacting business under a reformed and better system of legal procedure. We need a revolution of the entire judicial establishment. . . .

"A system of appeals whereby only errors so substantial as to raise a presumption of prejudice are to be regarded, does much to expedite the final settlement of litigation. . . ." So far as the litigant is concerned, one appeal

is all that he should be entitled to. The community at large is not interested in his having more than one. Many appeals are not in the interest of the poor suitor, but only of the litigant having the longest purse. . . .

"Courts of Last Resort." By Judge William L. Carpenter. 19 *Yale Law Journal* 280 (Feb.)

"Judging from my limited experience as a member of a court of last resort, the mistake most frequently committed . . . is a failure to understand the case; a misconception of the controlling issue, resulting not, it is true, in unsettling the law, but none the less in an erroneous decision. This consequence is, however, serious enough, for I imagine it would afford little consolation to a defeated suitor to be told that the erroneous decision which denied him his right left the rights of his neighbors unimpaired."

New York. "Simplification of Procedure." (Communication.) By Henry A. Forster. 20 *Bench and Bar* 77 (Feb.).

Mr. Forster is the secretary of the committee of the Association of the Bar of the City of New York which prepared the proposed code amendments.

"The safest form of language to use to enable all appellate courts to ignore harmless technical errors is the pioneer provision to that effect that has been in the Code of Criminal Procedure since its adoption in 1881. The Bar Association simply added the phraseology of this section (542) of the Code of Criminal Procedure to section 1317 without any change. It has been repeatedly construed, and has been uniformly held to cure harmless technical errors even in capital cases. . . .

"The well-drawn recommendations to the same effect made by Presidents Roosevelt and Taft and approved by the American Bar Association have never been judicially construed in this state; and until their meaning is authoritatively determined it is safer to adopt our own provision that has been before the courts for twenty-nine years and whose meaning is now settled."

See Courts, Criminal Procedure.

Proximate Cause. "Proximate Cause in the Law of Torts." By A. A. Boggs. 44 *American Law Review* 88 (Jan.–Feb.).

This paper, which was read before the Florida Bar Association, has already been published in the *Lawyer and Banker*, and was noticed in 22 *Green Bag* 125 (Feb.).

Public Health. "The Relation of the Law to Public Health." By Alfred Hayes, Jr., College of Law, Cornell University. *Popular Science Monthly*, v. 76, p. 280 (Mar.).

"The ingenuity of lawyers has been taxed to the utmost in devising remedies for nuisances. So difficult is it at times to succeed in ending a nuisance that the law provides as many remedies for nuisance, perhaps more remedies, than for any other form of injury, an entire arsenal of weapons, some public, some private, civil and criminal, judicial and non-judicial, legal and equitable, and sometimes all are required."

Quasi-Contracts. "Waiver of Tort and Suit in Assumpsit." By Arthur L. Corbin. 19 *Yale Law Journal* 221 (Feb.).

"This . . . is a subject in which there has always been great confusion of thought, and the decisions are in hopeless conflict. This is due to the fact that the substantive principles of the common law were developed as mere incidents to forms of action and procedure. . . .

"A great many of those rights now usually referred to as *quasi-contractual* are among these newly recognized rights. But they have long been described in the terms applicable to real contracts and enforced as if they were really contractual. . . .

"There is grave doubt as to the propriety of the whole doctrine of waiver of tort and suit in *assumpsit*, a doubt that has been expressed by many judges. Perhaps the best thing that can be said of it is that it was a step in the breaking down of the common law forms of action. The injured party certainly already had an adequate remedy at law. The actions of trespass, trover, detinue, and replevin were open to him. This was not true of other large classes of quasi-contracts, so that the extension of *assumpsit* to them was necessary.

"However, the doctrine has been permanently engrafted on the common law, and it should now be applied along consistent lines with a correct understanding of the nature of the cause of action and the character of the remedy. In jurisdictions where the old forms of action have been totally abolished, there should be nothing whatever left of the whole doctrine excepting a few historical echoes."

Real Property. "The King's Kindlie Tenants of Lochmaben." By John Carmont. 21 *Juridical Review* 323 (Jan.).

"The Kindlie Tenants of the subject-landowner may be taken as the normal representatives of the Scottish Rental System. They were in origin tenants-at-will, and eventually acquired a legal right to their holdings, which endured at longest for two successive lives *in line*. . . . Although the Scottish Courts only recognized the Kindlie Tenants' right as a mere life-rent, and most landlords availed themselves of this judicial attitude to turn the Rental roums into feus, all landowners did not avail themselves of the opportunity."

Religious Freedom. "Is Christianity Part of the Law?" By G. S. H. 46 *Canada Law Journal* 81 (Feb. 15).

"As was said by Bramwell, B., in *Cowan* v. *Milbourn*, L. R. 2 Ex. 236: 'A thing may be unlawful in the sense that the law will not aid it, and yet the law will not immediately punish it.' . . .

"Freedom from penal consequences can hardly be rightly construed as indicating any real alteration in the fundamental rule witnessed to by so many legal sages of the past, to the effect that Christianity is a part of our law, and is still a veritable and effective part of it; but it rather indicates that the law deems it to be a saner method of maintaning the Christian faith, to reason with, rather than punish, those who have the misfortune to be unconvinced of its truth, or inclined to controvert it."

Restraint of Trade. "The New Doctrine Concerning Contracts in Restraint of Trade." By Jerome C. Knowlton. 8 *Michigan Law Review* 298 (Feb.).

"Is a covenant in restraint of a particular trade and unlimited as to space against public policy and therefore void and unenforceable? . . .

"The new doctrine, recognized as an abandonment of an old rule of law, is based on new industrial and trade conditions, but it is doubtful whether the new conditions lessen or increase the evils which the rule is intended to prevent. . . .

"There is occasion for regret that the new doctrine has secured so firm a hold in the jurisprudence of our country. The only remedy, unsatisfactory as it is, must be found in statutory regulation."

Roman-Dutch Law. "Roman-Dutch Law." By James Williams. 19 *Yale Law Journal* 156 (Jan.).

"The best modern authorities are the judgments of Sir Henry de Villiers, late Chief Justice of the Cape, the greatest modern master of Roman-Dutch law, and certain text-books, almost all from South Africa. . . .

The reports are voluminous. They are fullest in South Africa and would bear favorable comparison with those of the United Kingdom and the United States."

Sales of Goods. See Criminal Procedure.

Scientific Methods. "The Physiology of Politics." By A. Lawrence Lowell. 4 *American Political Science Review* 1 (Feb.).

This is the paper delivered by President Lowell as his presidential address before the American Political Science Association at its sixth annual meeting in New York City, Dec. 28, 1909 (see 22 *Green Bag* 147). At the outset, he brings out the important point that politics is behind other sciences because of its lack of that first essential, an exact terminology. But this is not its only drawback. It suffers also from inability to grow by segmentation, like zoölogy and botany for example, where we hear of cytology, histology, morphology, and physiology. Politics really has divisions corresponding to these. The physiology of politics treats of the functions of the various organs of government. The distinction which Mr. Lowell makes between the morphology and the physiology of politics may be considered to correspond after a fashion to that advocated by Dr. Spiegel in a recent German work, between constitutional law as dealing with the structure of the organs of the state, and administrative law, in a novel sense, as concerned with the manner in which the functions of those organs are exercised.

President Lowell thinks the actual workings of the government need to be more carefully studied, and his address is really a plea for the more diligent application of laboratory methods to the investigation of the real world of public life. He urges the importance of observation of political phenomena for the purpose of throwing light on such questions as those of nomination reform, popular referendum and initiative municipal charters, and the terms for which public officers should be elected. He urges likewise and points out the need of approaching all these and similar problems with mind open and free from prejudice.

"Let no man grieve because the truth he reveals may not seem of direct utility. Truth always reaches its goal at last, although the world may not at once perceive its value. Still less let him fret that he cannot himself give effect to his ideas; that it is not his lot to wield the sickle in the ripened field. Bentham's influence on the course of English public life was not curtailed because he did not sit in Parliament, nor was John Stuart Mill's increased thereby; and what was true of Bentham's deductive reasoning is equally true of inductive political science today. It is our province to discover the principles that govern the political relations of mankind, and to teach those principles to the men who will be in a position to give effect to them hereafter."

Sherman Act. See Monopolies.

Speculation. "The Future of High Finance." By Alexander D. Noyes. *Atlantic Monthly*, v. 105, p. 229 (Feb.).

"The public mood is such that resumption of the process of exploiting corporation credit, on the scale and for the purposes of 1901 or 1906, will almost certainly encounter obstacles in the courts and the legislatures. . . .

"In theory at least, the directors of a great corporation are assumed to act with the widest knowledge and with the best interests of their properties in view. But the 'Harriman episode,' taken along with the other tendencies of the day which we have reviewed, does not show that the theory can be safely left to operate alone."

Taxation. "Landowners and Local Taxation." By J. Anderson Maclaren. 21 *Juridical Review* 338 (Jan.).

Exhibiting the tendency in Scottish burgh legislation to equalize taxes so that landlords and tenants may contribute in equal shares, and the disregard of the principle in the case of county taxation, the landlords patiently submitting to being overtaxed at the rate of £500,000 annually.

Taxation (Federal Corporation Tax Act). "The Federal Corporation Tax." Editorial. 70 *Central Law Journal* 91 (Feb. 4).

"By the federal statute . . . property is sought in a 'twilight zone' between capital and earnings, the former being corporate assets, the latter shareholders' assets. If the corporation can be said to have any title to the latter, it is fugitive, and perishable of its own instability. . . .

"A summary of the situation is, that the right to tax corporations on their net income is based, if it exists at all, on mere technical ownership with the burden falling no more on it than on any other stakeholder or trustee, and this tax invades state policy in respect of something that has no federal aspect in any way whatever. As neither the burden nor the invasion seems constitutional, the statute ought to fall. The fight upon the law would appear more likely to succeed, if made by the owners of the profits than by their stakeholders—the corporations themselves."

Taxation (Proposed Income Tax Amendment). Speech of Hon. William E. Borah of Idaho, in the United States Senate, Feb. 10, 1910. *Congressional Record*, v. 45, no. 44, p. 1843 (Feb. 14).

Senator Borah's argument was carefully elaborated for the purpose of showing, by referring to leading authorities, that the income tax amendment, if adopted, would not authorize the taxation of incomes from state bonds and municipal securities, nor the taxation of the instrumentalities of the states. The speech was delivered in reply to Governor Hughes' objections to the proposed amendment.

"The Proposed Income Tax Amendment to the Federal Constitution, December 10, 1909." By Prof. Raleigh C. Minor. 15 *Virginia Law Register* 737 (Feb.).

"It may, I think, be assumed with certainty that, but for the troublesome question of slavery, the framers of the Constitution would have authorized Congress to levy direct taxes, as well as indirect taxes, according to the rule of uniformity. . . . Under present conditions the vicious rule of apportionment, applicable to direct taxes, blocks the way to such a reform, and the people and Congress must continue, even against their better judgment, to obtain revenue from a tariff on imports, with all its temptation to high protection extravagance on the part of government, and extortion on the part of the domestic manufacturer and the trust."

This writer considers the effect of the words "from whatever source derived" in the proposed constitutional amendment, "is clearly to abrogate the principle enunciated by Marshall, and enforced in the *Income Tax* case. If there were nothing else to condemn the proposed amendment, this should suffice. The legislatures of the states are asked to confide to that largely alien body, Congress, the power practically to wipe out or cripple the borrowing power of their states and cities, in order to relieve Congress of an embarrassing deficit induced by its own evil [protectionist] policy, and which it could easily remedy in a year or two, if it chose to recede from that policy. There is a certain impudent audacity in this request of the Republican leaders that throws the only gleam of humor over the situation that this paper has been able to evoke."

Title. "Titles Derived under Judicial Proceedings—Illinois Law." By Prof. Louis May Greely. 4 *Illinois Law Review* 472 (Feb.).

In this paper the law relating to the title acquired in Illinois in reliance on judgments and decrees of court is discussed with compendious citations, eleven leading principles being summarized in succinct and concrete form.

Uniformity of Laws. "A Revival of Codification." By Prof. Francis M. Burdick. 10 *Columbia Law Review* 118 (Feb.).

"The favor with which this bill [the Uniform Negotiable Instruments Act] was received by state legislatures induced the Commissioners to attempt the production of other bills. During 1902–3, Professor Samuel Williston of Harvard, at the request of the Commissioners, prepared a draft of an Act to make uniform the Law of Sales. It followed pretty closely the lines of the English Sale of Goods Act. In this form, it did not prove entirely satisfactory to the Committee on Commercial Law, who proceeded to make numerous changes in its provisions and to add a number of sections on the transfer of property in goods by means of documents of title. As a result of these changes, a bill was sent out which was not only at variance with the English Sale of Goods act, but with existing rules of law in most of our states. It has not met with the legislative favor which was accorded to the Negotiable Instruments Law, and has been adopted in but five states and one territory. Possibly this is due in part to the fact that the commissioners disregarded Judge Chalmers' advice and went 'above and beyond experience'. Legislators may agree with him in the belief that when codifiers do this, they 'are codifying in the air and will probably do more harm than good to commerce and mercantile law. . . .

"So far as certificates of stock are concerned, there is no statute in England or in any of our states which carries their negotiability to the extent now proposed, nor is there a decision of any court recognizing a mercantile usage of such negotiability. . . . The proposed bill does not profess to codify existing law, but to work a legal reform. It breathes the spirit of Bentham, not that of Chalmers. . . .

"There is a fascination, undoubtedly, in restating the law in accordance with one's own notion of what the law ought to be. . . . Whether the Commissioners ought to yield

to this fascination is a point upon which the present writer has grave doubts. In his opinion, better results will be achieved if the conference and its committees adhere strictly 'to the wise lines laid down by Lord Herschell,' and observed by Chalmers and Pollock. . . .

"The tendency towards Benthamistic codification, above described, seems to accord with the views of a considerable part of the legal profession. . . . On the other hand, not a few of the Commissioners on Uniform State Laws, who have voted in favor of reporting the bills herein referred to, believe that these productions are not Benthamistic, but have been kept quite within the lines drawn by Judge Chalmers and Lord Herschell."

War. "Nicaragua." By Th. B[aty]. 35 *Law Magazine and Review* 203 (Feb.).

"It may even, with justice, be questioned whether the recognition of belligerency, in a perfectly proper case, can ever confer on a state the right to protect its subjects who take service with the rebels. They have identified themselves with the foreign state and its domestic affairs so thoroughly and completely that their treatment ceases to be a matter of its concern. They have become *de facto* naturalized abroad. Their position is comparable to that of a ship which enters the enemy's service: if such a vessel is sunk by an enemy sailing under false colors, it is a subject for discussion between the belligerent nations alone. The alien loses his claim to protection by his own state the moment he takes service with a foreign force."

Miscellaneous Articles of Interest to the Legal Profession

Biography. *Aldrich.* "Aldrich: 'General Manager of the United States.'" By Edwin Lefèvre. *American Magazine*, v. 69, p. 622 (Mar.).

"His ruling passion is his joy in thinking, his intense desire to use his mind—the mind that God gave him. The consideration of any problem, financial, political or domestic, gives him the same joy that a game of chess gives to a Paul Morphy—that is, the mental process itself is to him exquisite pleasure."

Pinchot. "Gifford Pinchot, the Awakener of the Nation." By Walter H. Page. *World's Work*, v. 19, p. 12662 (Mar.).

"Mr. Pinchot has already made a great career, but a greater is before him. He is now forty-four years old. He has the biggest constructive public idea of our generation."

Robertson. "The Late Lord Robertson as an Advocate, Politician, and Judge. By Christopher N. Johnston, K.C., LL.D., Sheriff of Perth. 21 *Juridical Review* 289 (Jan.).

"Lord Bramwell explains somewhere that the general body of our law contains certain rules for which there is no more to be said than, *'C'est une ancienne et positive loi de Royaume.'* Now Robertson was, I think, quite satisfied to accept any rule on that footing. He asked nothing better."

Story. "Joseph Story: A Personification of Industry." By the Editor. 16 *Case and Comment* 213 (Feb.).

"There was no flattery in the famous toast, once drunk at a banquet where Justice Story was a guest: 'However high in the temple of Themis a lawyer may seek to climb, he will never get above one Story.'"

Climate. "Climate in Some of Its Relations to Man." By Professor Robert DeC. Ward. *Popular Science Monthly*, v. 76, p. 246 (Mar.).

"The seasonal changes of the temperate zones stimulate man to activity. They develop him physically and mentally. They encourage higher civilization. . . .

"Aliens have shown marked tendencies to settle where climate, soil and occupations are most like those of their old homes. . . . Scandinavians, for example, have gone largely into the northwest; and in the future, unless steps are at once taken to prevent it, the southern parts of the United States will doubtless have a population predominantly of Latin blood."

Cost of Living. "Gold in Relation to the Cost of Living." By Prof. Irving Fisher. *Review of Reviews*, v. 41, p. 190 (Feb.).

"There remains, therefore, only one possible explanation for the general rise in prices,—namely, an expansion of the volume of circulating money and deposits. It may be shown that the volume of deposits depends upon the volume of money. There must be always a money basis for credit, and the larger the basis the larger the credit structure possible. While it is true that the credit structure may temporarily expand beyond its normal ratio to the money basis on which it rests, yet even this abnormal expansion of deposits is always inaugurated by an expansion of money. It is probable that deposits in general are now expanding more rapidly than their monetary basis. But the source of this deposit inflation is money inflation, and the source of the monetary inflation is gold inflation."

"Why Should the Cost of Living Increase? A Survey and Analysis of the Assigned Causes." By Walter E. Clark. *Review of Reviews*, v. 41, p. 183 (Feb.).

A very illuminating and fair-minded estimate of the relative importance of various factors in the increase of prices.

"When the rising cost of raw materials and the average rise of wages per hour (reported as 28.8 per cent by the Labor Department) are considered, it must be admitted that the trusts, as represented by four of the greatest and the most abused of them all, do not appear to have forced their prices to arbitrary heights. Certainly there is no indication at all that the trusts are responsible for the general price rise."

"The Crisis in American Home Life." By Simon N. Patten, Ph. D., LL. D. *Independent*, v. 68, p. 342 (Feb. 17).

"It is no solution of the present problem to increase the incomes of some of those earning $1,500 to $2,500 or the earnings of those getting $2,500 to $3,500. The individual thus changed simply drops into a new class with a higher standard and finds the pressure of the new situation as great as before. The relief must be general to be effective, and it must include the possibility of saving as well as the possibility of living. Only a comprehensive social policy can accomplish this, and to show the direction along which the nation should move, I give the following figures of savings and gains in income that it would bring to a family at the minimum of comfort, say $1,000 a year:—

	Per cent.
"A rational tariff	10
The control of monopolies	15
Reductions in rent	10
Technical education	25
Co-operative buying	10
By doubling the nation's capital	
(a) Lowering prices	10
(b) Increasing income	20 "

"The Tariff and Cost of Living." By Byron W. Holt. *Independent*, v. 68, p. 392 (Feb. 24).

In the third article of a series written by well-equipped specialists, a leading member of the Tariff Reform Club of New York, analyzes the effect of the tariff on prices.

"The 'protection part of our tariff increases our cost of living more than 11 per cent and is responsible for about 10 per cent of the increase in the cost of living since 1896."

Elections. "English and American Elections." By Sydney Brooks. *Fortnightly Review*, v. 87, p. 246 (Feb.).

"A difference in the customs of the two countries so emphatic . . . must necessarily have its roots deep in national character. The comparative tranquility of political meetings in the United States is due, I think, in part to the American love of doing things according to rule and regulation, of always observing the letter even when they neglect the spirit of the game they are playing. . . . They have been educated on the same system and up to about the same level, and there most of them have stopped."

Fiction. "The Case of Horace Bliffington." By Ellis Parker Butler. *Cosmopolitan*, v. 48, p. 455 (Mar.).

The hero of this story, while he has been pronounced legally dead, is alive *de facto*, and is very much bothered by his legal ghost, whose company he cannot get rid of. A legal friend advises him that "a merely legal ghost is quite within its rights in haunting a legally dead man," and that he can get rid of it only by going into court and having his legal death annulled. A similar result is accomplished, however, by a proceeding somewhat different.

India. "Intellectual Leadership in Contemporary India." By Prof. Paul S. Reinsch. *Atlantic Monthly*, v. 105, p. 214 (Feb.).

"The intellectual leaders of India have gradually come to the conclusion that their leadership is exposed to sterility on account of the lack of a broad popular following. . . . Thus the ardor for social reform wanes, while political excitement is fanned to a white heat."

Irish Home Rule. "The Parliamentary Position and the Irish Party." By J. Ellis Barker. *Nineteenth Century and After*, v. 67, p. 238 (Feb.).

"Whilst economic Home Rule is clearly a chimera, political Home Rule, in a much wider sense of the term than is dreamed of by most Home Rulers, is perfectly possible, as soon as Ireland's loyalty to Great Britain and the Empire is beyond all doubt. At the same time, the complete loyalty of Ireland can be expected only when Ireland is happy and prosperous. Ireland's grievances, though apparently political, are in reality economic ones."

"Ireland." By E. B. Iwan-Müller. *Fortnightly Review*, v. 87, p. 305 (Feb.).

"I cannot believe that Ireland as a foreign nation is any more menace to Great Britain than Cuba is to the United States of America. A vigorous, rigorous watch upon the movements of the government—if there ever is one—of the Irish Republic would no doubt be a costly business, but the cost would be infinitesimal compared with the annual waste of money, time, and opportunity for serving great Imperial purposes which the perennial disloyalty, ingratitude, and barbarism entail upon the taxpayers and legislature of what is still ironically described as the United Kingdom."

Journalism. "The Suppression of Important News." By Prof. Edward Alsworth Ross. *Atlantic*, v. 105, p. 303 (Mar.).

"The immense vogue of the 'muck-raking' magazines is due to their being vehicles for suppressed news. . . . Congressional speeches give vent to boycotted truth, and circulate widely under the franking privilege. . . .

"When all is said, however, the defection of the daily press has been a staggering blow to democracy. . . . Endowment is necessary, and, since we are not yet wise enough to run a public-owned daily newspaper, the funds must come from private sources. . . . The endowed newspaper in a given city might print only a twentieth of the daily press output and yet exercise over the other nineteen-twentieths an influence great and salutary."

See also article by Mr. Bonaparte, under Monopolies, *supra*.

"The Value of Political Editorials." By Edward Porritt. *Atlantic Monthly*, v. 105, p. 62 (Jan.).

"Three events in the political annals of the Anglo-Saxon world, all occurring within the last four years, seem to warrant the inference that the partisan newspaper has sustained an enormous loss of power. Looked at from outside a newspaper office, and disregarding the long-standing traditions of the power of the press, the general election in England in 1906, the general election in the Dominion of Canada in 1908, and the revision of the Dingley tariff at Washington in 1909, are sufficiently significant to raise the question whether it is worth while for any daily newspaper to attach itself to a political party."

Legal Anecdote. "Reminiscences of an American Painter; II, Florentine Years in Retrospect." By Elihu Vedder. *World's Work*, v. 19, p. 12559 (Feb.).

The artist says of Walter Savage Landor:—

"The Savage in his name was very appropriate. They used to tell of his going into court, during some law trouble he was having, with a bag of gold, which he banged down before the judge, saying:—

" 'I hear that this is the place where justice is bought and sold, and I have come to buy some.'

"I believe it cost him a pretty penny, for contempt of court."

Maeterlinck. "The Aloofness of Maurice Maeterlinck." *Current Literature*, v. 48, p. 215 (Feb.).

"Admitted to the Ghentish bar, Maeterlinck practised law with so determined and consummate a detachment that even his family, who had destined him for a legal career, were fain to concede the wisdom of letting him live his life in his own fashion."

Pure Food Law. "What Has Become of Our Pure Food Law?" By Samuel Hopkins Adams. *Hampton's*, v. 24, p. 234 (Feb.).

"Victory indeed rests with the benzoate army. But it is a Pyrrhic victory, for the time, at least. . . . Only foodstuffs of the 'garbage' class need to be 'medicated.' Medical associations and medical men throughout the country have definitely rejected the findings of the Referee Board as interpreted by Secretary Wilson. Few and poor are the conquerors' spoils."

Radical Democracy. "The Old Order Changeth: What About Our Courts?" By William Allen White. *American*, v. 69, p. 499 (Feb.).

"The supreme court of prices which Mr. Andrew Carnegie says is bound to come, 'disguise it as we may,' and which our anti-trust laws make inevitable, will require a national efficiency, a national sense of justice, a national self-sacrifice that must come from a citizenship of a higher type than the world has ever seen before. For that commission—or whatever body, whether legal or extra-legal, which shall finally pass upon the equities of prices in our national workshop—will be chosen by the people, even as our Supreme Court is chosen, though indirectly, and will be responsible to the people. In the end the people will rule."

Servant Problem. "The Depth and Breadth of the Servant Problem." By I. M. Rubinow and Daniel Durant. *McClure's*, v. 34, p. 576 (Mar.).

"The passage of a law forbidding a servant to work more than eight hours a day . . . would strike the national funny-bone as nothing in the history of crank legislation has yet struck it. And yet—suppose some such law did actually get on the statute book and came to be enforced, what would actually happen? . . . The struggle would be short, sharp and decisive. Within a few years the most efficient and best selling would be perfected, cheapened, standardized, trustified. Another decade and the readjustment would be complete: every home would be supplied with a host of contrivances such as even the very rich cannot afford today."

Smelting. "The Guggenheims and the Smelter Trust: The Romance of Mining." Fourth Article. By Eugene P. Lyle, Jr. *Hampton's*, v. 24, p. 411 (Mar.).

"What the Guggenheims have done in Colorado, Nevada, Utah, Arizona, Montana, Idaho, California, and Washington they would certainly like to do in a far richer province—the wonderful treasure-house of Alaska. And they will do it if the people let them."

Sugar Trust. "The Annexation of Cuba by the Sugar Trust." By Judson C. Welliver. *Hampton's*, v. 24, p. 375 (Mar.).

"Menocal was overwhelmingly defeated. The 'best people' of Cuba lost control of their government. But the 'people' retained it. The Trust had failed."

Works of Art. "The Protection of Objects of Art and Antiquity in Italy." By H. St. John-Mildmay. 35 *Law Magazine and Review* 160 (Feb.).

"With the law of the 20th of June, 1909, for the protection of works of art and antiquity, Italy has taken a further and more decisive step in the direction of that policy of state interference with the rights of private property on grounds of public utility, which, not unknown in the past, is the chief characteristic of the so-called social legislation of to-day in most Continental countries.

"The avowed aim of the new law is to place an effectual check on the indiscriminate exportation of the artistic and archæoligical treasures of Italy, viewed as national assets of first importance."

Reviews of Books

THE AMERICAN POLITY

Readings in American Government and Politics. By Charles A. Beard. Ph. D., Adjunct Professor of Politics in Columbia University, The Macmillian Co., New York. Pp. xxiii, 620+index 4. ($1.90 *net*.)

Readings on American Federal Government. Edited by Paul S. Reinsch, Professor of Political Science in the University of Wisconsin. Ginn & Co., Boston, Pp. xii, 845+index 4. ($2.95, postpaid.)

The American Executive and Executive Methods By John H. Finley, President of the College of the City of New York, and John F. Sanderson, of the Pennsylvania bar. Century Co., New York. Pp. 328+appendix 14 and index 6. ($1.25 *net*.)

The Philosophy of the Federal Constitution. By Henry C. Hughes, Neale Publishing Co., New York and Washington. Pp. 164, no index. ($1.50.)

A logical and complete exposition of the American Constitution is a *desideratum*. The writer who is to achieve this will have to utilize contributions from a great variety of sources, but the result will need to be more than merely a reproduction of the opinions of previous writers. Our Constitution is by no means so simple in its nature as to be comprehensible without the aid of a keen analytical commentary. To begin with, no complete account of the Constitution can omit reference to the epoch-making decisions of the Supreme Court. It is a favorite assumption that we have in this country only a written Constitution, but the nature of constitutional law, as has been frequently pointed out, depends less upon its source than upon its content. While it is convenient to use the word Constitution as signifying the written document, it is idle to try to force any technical distinction between the Constitution and constitutional law. There is, then, an unwritten law of the Constitution, notwithstanding the validity of a distinction based upon a lower grade of formal solemnity and of enduring stability. Even then, however, when the student of the Constitution includes within his investigation its unwritten law, he has given no attention to its real foundations in the structure and habits of American society. Underlying the formal Constitution of law is the real political and social constitution to which the lawyer cannot be utterly indifferent, though he may treat it as of subordinate importance from the juristic standpoint.

Professor Beard has compiled a volume which, while it does not aim to include a complete presentation of the constitutional law of the federal and state governments, nevertheless sets forth leading principles in a satisfactory way. The scope of the book is broad. It begins with the Colonial period, and the historical development of the structure and *modus operandi* of the American polity is traced in the first seven chapters, serving as an introduction to an exposition to the principles of the federal government in Part II, and those of state government in Part III. In the historical portion the selections give a most readable account of the establishment of an independent nation, the adoption of the Constitution, the method by which it has been amended and expanded, and the development of political issues and of party machinery. Part I will be valued as an interesting epitome of leading phases of American history.

In the second part, the topics treated include the distribution of powers in the federal government, the mode of choosing the President, his powers, the practical workings of the administration, Congress, its powers, its practice, the federal judiciary, foreign affairs, national defense, taxation and finance, commerce, national resources, and the territories. It may readily be seen how symmetrical and comprehensive a portrayal of the political institutions of the United States is given. In the third part state government receives an equally well-balanced treatment.

The completeness of the selection is marred only by the omission of a chapter dealing with the general relations of the federal and state powers. The Nullification theory still survives in some quarters, and the indestructibility of the Union might well have been dealt with by extracts from a literature of much significance, including opinions of the United States Supreme Court.

The readings have been selected from public records, reports of debates, the *Federalist*, Congressional documents, opinions of the Supreme Court, writings and speeches of eminent statesmen and jurists, statutes of the nation and the states, and, to a more restricted extent, the articles of specially

qualified scholars. Much pregnant matter has been judiciously compressed within a volume of moderate size. The treatment by no means covers the entire subject of public constitutional law, but does cover the chief general principles.

Professor Reinsch has adopted a somewhat different plan of treatment. To begin with, he seems less concerned with the legal aspects of the American polity. As above intimated, the lawyer can consider underlying political and social conditions of secondary importance when he is simply studying the form of the Constitution under which we live. The government of the American state is primarily a matter of legality rather than of actuality. It is a concept which is to be realized, rather than the realization of a concept. The analytical study of the American government naturally relies largely on a legal treatment. Not so, however, in the case of Professor Reinsch. He deems it necessary in his preface to apologize for his extracts from Senate debates, on the ground that "in that body the legal and juristic side of public action is given perhaps too great a predominance." In accordance with this tendency, he pursues a radically different method from that of Professor Beard, in choosing his selections to a more restricted extent from documentary and law sources, and in giving greater prominence to public speeches of intrinsic interest and value, but without much historical significance. He thus shows himself to be more interested in the real political and social constitution than in the legal Constitution. One will look in vain in the collection for a presentation of those leading principles which must be set forth to disclose the *rationale* of the American state. One will rather find there a vast amount of illustrative as opposed to expository material, material of a lesser degree of authority and significance, but more copious in its information regarding every possible detail of applied politics.

Another respect in which the selection differs from that of the previous writer is in the narrower field covered. From the title it will be perceived that state governments are not treated at all. Moreover, there is no historical prelude, nor any attempt to portray the development of the federal government. The whole book, in fact, is devoted to present conditions, which it covers with a fullness bordering on diffuseness.

There is a chapter on the treaty-making power which contains no selection from a great decision, but is made up of speeches by four Senators. Much information is presented regarding engrossing public problems, and the procedure of Congress is set forth at length. Concerning the latter, Professor Reinsch says in his preface, "It is most desirable that the nation should thoroughly inform itself upon this matter," as it is "very questionable" whether the methods prevailing sufficiently approximate to "such as would facilitate the discussion of really important national problems, and would encourage and bring forward those men who are truly representative of the people and of their common interests."

The explanation in the preface, however, that the collection "has been confined to material illustrating the actual workings of the American government in our day," should meet any criticism of the exclusion of legal and historical matter. "But some discussions of a legal nature have been admitted, because they serve directly to illustrate the actual workings of the government." So able a scholar as Professor Reinsch of course could hardly have been indifferent to the importance of legal phases of the subject, and his chapter on centralization and changes in the Constitution has some excellent selections. The title of his book is not misleading if it is interpretated in the sense which he himself adopts.

Professor Beard and Professor Reinsch have both devoted considerable space to the Chief Executive of the United States, but could of course present this subject only in general outline. The American executive power, as constituted not only in the nation but in the states, receives in the monograph of President John H. Finley and Mr. John F. Sanderson comprehensive and scholarly treatment. We feared, before we examined this book, that it might show the influence of the current tendency to subject the powers of the executive to sharp controversy. Fortunately, however, it consists not of arguments or theorizing, but of a statement of historical facts and of present conditions. It is a work of admirable temper, reflecting the highest credit upon its two authors.

The estimate of the powers of the executive is conservative. "There is certainly," we read, "no menace in the power of the chief executive of the commonwealth; he has

too little." And Professor Burgess's opinion that "there is full constitutional warrant for the construction and presentation of regular bills and projects of law to Congress by the President," is cited with approval.

It would be expected that the book would open with a discussion of the federal executive, but the earlier chapters treat of the growth of the office of state executive from Colonial times. The purpose in placing the state executive first is historical. Its functions were defined by state constitutions before the federal constitutional convention. Moreover, the resemblance between the state and federal executive powers is so marked that the development of the latter may be seen to have been influenced by that of the former. In a book pursuing the historical method to such an extent, the evolution of the Presidential office in the constitutional convention might well have received treatment. In this respect the authors fail to fill in an important gap.

They say at the outset, "The American executive is not the successor of the British crown." This may refer to the state executive primarily, but appears to dispute Sir Henry Maine's contention ("Popular Government," Essay IV) that the powers of the President are copied after those of George III. The historical question thus raised is ineffectually met by a quotation from the *Federalist*. As a matter of fact, "the federal Constitution sets the example of a strong and simple organization of the executive power" (p. 44) and Sir Henry Maine is undoubtedly right when he says, "The original of the President of the United States is manifestly a treaty-making king, and a king actively influencing the executive government." There was nothing in the state executive to furnish a precedent for the treaty-making power exercised by the President with the advice and consent of the Senate. Neither was there a precedent for the power of appointing all the highest officials, as the states have generally provided for the election of their chief officers. Whether the deprivation of the ministers of state of seats in Congress is due to the example of George III, who desired to govern the country himself, or to the influence of the doctrine of the separation of legislative and executive functions, is debatable. It is undeniable, however, that the federal executive is in come respects the direct descendant of the English crown.

In most respects he is not, for the powers of the President were so limited by the Constitution that he could not grant privileges or franchises, he could not declare war or raise arms, he possessed no absolute veto, he was made subject to impeachment, his pardoning power did not include cases of impeachment, and he was without power to adjourn Congress for disagreement. Sir Henry Maine's contention, therefore, requires qualification. The President is only in certain respects the direct successor of the British king. For the most part, as Messrs. Finley and Sanderson do not take pains to show but as they imply, his powers are patterned after those of the state executive. But their assertion that "the American executive is not the successor of the British crown," so far as it applies to the President, would have to be modified. To a certain extent he is. In its application to the state executive it also requires slight qualification. The powers of the Governors are based upon those of the Colonial Governors, but ultimately such powers could find their prototype only in the crown, and the statement can hold true only as a denial of direct succession.

To turn from the powers of the executive to the general powers distributed under the Constitution, Mr. Hughes has devoted a small book to an elucidation of the text of the federal Constitution, intended primarily for popular circulation and especially for the education of the youth of the land in the principles of the government under which they live. It makes no pretension to being anything more, and is written in a clear, non-technical style, well adapted to the execution of its didactic purpose. In matters not requiring analytical treatment or a wide knowledge of constitutional law the book apears to be well informed and correct, its method being expository rather than analytical. In some other respects, however, it has defects the influence of which may be positively harmful. The writer is an adherent of the state's rights theory. As his book is written with a simple aim, and its title, "The Philosophy of the Federal Constitution," suggests a less matter-of-fact treatment than that which he evidently had in view, it would have been better had he suppressed opinions which seem too strongly partisan and somewhat out of place. His argument that the federal government is simply an agent of the state governments, and that the principal has power under the Constitution to revoke this agency at any time, is an assertion of the secession doctrine in an extreme form which will create astonish-

ment. The author commits an equally serious mistake when he attempts to show that the federal Supreme Court is subservient to the national administration, and his slur on the integrity and dispassionateness of the Court is unfortunate. He also attempts to prove the unconstitutionality of a protective tariff.

The publication of such books as the last one reviewed may perhaps serve to admonish the legal profession of the need of a good popular manual of the Constitution for the cultivation of American citizenship among those to whom legal aspects of the American polity can make no appeal. Such a book should not be written with a view to setting forth the letter of the American Constitution, without reference to the logic behind it. Its writer should be familiar with Supreme Court decisions and should be an intelligent and sympathetic interpreter of the spirit of the American commonwealth as revealed in law and in history.

A POCKET CODE OF EVIDENCE

A Pocket Code of the Rules of Evidence in Trials at Law. By John Henry Wigmore, Professor of the Law of Evidence in the Law School of Northwestern University. Little, Brown & Company, Boston. Pp. liii, 485 (alternate pages blank and not numbered)—index 80. ($4 *net*.)

PRACTITIONERS too busy to work out questions of evidence deliberately have criticized the large four volumes of Wigmore on Evidence. Though they admit that the latter treatise is invaluable in the preparation of a brief on appeal, they say that the very qualities that have given it the reputation it has attained make it unavailable for most questions of evidence which arise unexpectedly with little opportunity for investigation. The author has evidently felt the force of the criticism, and this little book is the result. It contains rules laid down in the text of his larger work, but without citation of authorities or historical or theoretical explanations. Typographical devices indicate the weight of authority, and alternate blank pages leave space for personal annotations with local cases. Thus the owner of this book may make it indispensable in his trial work. The book may serve one other valuable purpose. Should we ever attempt a uniform code of evidence in this country, we have here the basis for its preparation, and general use of this little book may bring nearer that result.

A REMARKABLE BRIEF

In the Supreme Court of the State of Illinois, December term, 1909, *W. C. Ritchie & Co., et al.*, appellees, v. *John E. W. Wayman and Edgar T. Davies*, appellants. Brief and Argument for Apellants. By Louis B. Brandeis, counsel for appellants, assisted by Josephine Goldmark.

IT is not our custom to review briefs, but in the present case the production is remarkable as a sociological treatise as well as a legal document. Mr. Louis D. Brandeis of Boston was retained as counsel in a case brought in the Supreme Court of Illinois to test the constitutionality of the statute of 1909 of that state limiting the hours of labor for women to ten hours a day. The case is similar to the Oregon case, in which Mr. Brandeis added to his reputation for unusual ability.

It is not as an argument on the law that this brief is notable, for the law portion is simple and to the point, being briefly to the effect that "liberty," in the Illinois constitution, has been construed to mean freedom in the use of one's powers and faculties, subject to the restraints necessary to secure the common welfare, and where the clearly defined limits of the police power are not exceeded, regulations enforcing the paramount right to life itself cannot be overruled by the right to "liberty" and "property." The brief is essentially one on the facts and presents an astonishing wealth and variety of information gathered from all parts of the world, selected from a great mass of official documents and scientific productions dealing with the effect of long hours for women on public health, safety and morals.

Mr. Brandeis' production, if published simply as a volume comprehensively dealing with the subject from the point of view of social science, would be of notable value. He has been ably assisted in the compilation of such noteworthy and copious materials by Miss Josephine Goldmark, Publication Secretary of the National Consumers' League.

A HISTORY OF LAW

The Evolution of Law; a Historical Review, By Henry W. Scott. Borden Press Publishing Co.. New York. [1908] 4th ed. Pp. xii, 120+9 (index).

THE author's plan is to give a brief account of the history of legal development from primitive times, avoiding tedious details and suppressing citations of authorities. The topic treated is one of vast scope, but the volume is printed in one large type throughout, and is

needlessly padded as regards both its subject-matter and its typographical form. Within the narrow confines of the text proper, it might conceivably be possible for a master mind to present leading ideas in symmetrical outline, but it is doubtful whether such a mind would have the hardihood to combine so wide a range of subjects as Plato, Primitive Man, Theocracy, Hereditary Rulers and Aristocracy, Origin of Village Communities, Egyptian Laws, Confucius, Demosthenes, Lycurgas and Magna Carta.

This work is based opon the author's forthcoming "Commentaries," dealing with the same subject. The information presented, he says, has been gathered partly from out-of-the-way sources. It does appear to be extraordinary. His researches appear to have been conducted in a more mechanical than constructive spirit, and he has failed to arrange his diversified topics in a logical order, or to set forth the process of legal development with the many-sided scholarship required of a work of such broad scientific and historical range.

The author is not sufficiently mindful of the great antiquity of civilization, nor sufficiently sympathetic with the temper of ages unlike our own, neither does he appear to possess skill in independent analysis, or to have delved deeply into the philosophy of social institutions.

NOTES

The volume of Proceedings of the Thirtieth Annual Session of the Ohio State Bar Association contains these addresses read at the annual meeting at Put-in-Bay, July 6–8, 1909: on "Coke Literature," by Hon. Thomas Beer of Ohio, and on "Employer's Liability and Compensation Laws," by Hon. James R. Garfield of Ohio. The annual address was given by Hon. Samual Walker McCall, Congressman from Massachusetts, who spoke on "The Importance of a Trained Bar in the Maintenance of Free Institutions." Hon. U. G. Denman, Attorney-General of Ohio, discussed "Our Present Problem in Taxation," and Hon. Walter George Smith of Philadelphia spoke on "Uniform Marriage and Divorce Laws."

The Report of the Twenty-first Annual Meeting of the Virginia State Bar Association, held at Hot Springs, Va., August 10-12, 1909, contains, in addition to the usual records and obituary sketches, papers read by the President, Hon. Micajah Woods, on "The Necessity for General Culture in the Training of the Lawyer," on "Who was Thomas Jefferson?" by William M Thornton, LL.D., on "Governmental Control of Railways and the Virginia Case," by Robert R. Prentis, on "The Trial of John Brown," by Hon. George E. Caskie, and on "Taxation in Virginia and Our Relation to the Subject," by William W. Old.

The Report of the Thirty-Second Annual Meeting of the American Bar Association, held at Detroit in August, 1909, contains a large number of papers of the greatest interest to the legal profession in America, and also the reports of various committees on subjects of vital importance to the American bar. An extended notice of this meeting appeared in the October number of the *Green Bag*. Among the papers here printed are those by Georges Barbey of Paris, France, on "French Family Law," by Julian W. Mack of Illinois, on "The Juvenile Court," the Annual Address, by Governor Augustus E. Willson of Kentucky, on "The People and Their Law," and a paper by William L. Carpenter of Detroit on "Courts of Last Resort." The reports of the Committees on Judiciary Administration and Remedial Procedure, on Legal Education and Admissions to the Bar, on Commercial Law, on Patent, Trade Mark and Copyright Law, on Insurance Law, on Uniform State Laws, Comparative Law Bureau of American Bar Association, on Taxation, International Law, and of a Special Committee to Suggest Remedies and Formulate Proposed Laws to Prevent Delay and Unnecessary Cost in Litigation, will all repay a reading.

The American Institute of Criminal Law and Criminology has issued the Report of Committee A, describing "A System for Recording Data Concerning Criminals." The plan and outline covers the eight divisions of family history, developmental history, environment, character, anthropometry, medical examination, psychological examination, and psycho-analysis. Under each of these divisions the points to be investigated are carefully worked out in detail. The result is a scheme for a complete system of criminological observations. While the method is elaborate, the Committee explains that the time and labor necessary for working up a single case is by no means prohibitive if a well-known person can have his whole time to devote to the work. "Only by investigation at least as thorough as this," it is pointed out," can we hope to make permanent contributions to the knowledge of causation of criminality and to the development of methods of prevention and reform." The adaptation of the plan in large cities is recommended. It is urged that workers along these lines take pains to check up each other's results, as only by putting together facts from many sources can safe conclusions be formed. The judges of the Municipal Court of Chicago have recommended the adoption of this system in their court. Copies of this important pamphlet may be obtained by addressing the Secretary of the American Institute, Northwestern University Building, Chicago.

NEW BOOKS RECEIVED

RECEIPT of the following new books which will be reviewed later, is acknowledged:—

The Development of Hungarian Constitutional Liberty. By Count Julius Andrassy. Translated from the Hungarian by C. Arthur and Ilona Ginever. Kegan Paul, Trench, Trübner & Co., Ltd., London. Pp. 465.

Roman Law in Mediæval Europe. By Paul Vinogradoff, M. A., D. C. L., LL. D., Dr. Hist., F.B.A., Corpus Professor of Jurisprudence in the University of Oxford, Honorary Professor of History in the University of Moscow. Harper & Brothers, London and New York. Pp. viii, 131 + appendices. (75 cts. *net*.)

Latest Important Cases

Bankruptcy. *Ancillary Jurisdiction of United States District Courts—Assignments Subsequent to Bankruptcy Proceedings.* U. S.

A Missouri corporation was adjudicated a bankrupt and a trustee was appointed in proceedings instituted in the District Court of the United States in and for the Eastern Division of the Eastern Judicial District of Missouri. Held, that the District Court of the United States in and for the southern district of New York has jurisdiction of an application upon the trustee's petition for an order directing officers of the corporation within the jurisdiction of the latter court to deliver to the trustee books and documents of the corporation there in their custody. This was the decision of the United States Supreme Court, Feb. 21, in *Babbitt* v. *Dutcher*, 30 Sup. Ct. 372.

Mr. Chief Justice Fuller, delivering the opinion of the court, said:—

"Judge Holt, after expressing an opinion upholding ancillary jurisdiction, felt compelled to decide otherwise in this case on the authority of *In re Von Harts* (142 Fed. Rep., 726), decided by the United States Circuit Court of Appeals for the Second Circuit. It appears from the statement of the case in the opinion of the court in the matter of *Von Harts* that the proceeding was a summary application in which the appellant had been directed to turn over to the trustee in bankruptcy a policy of life insurance upon the life of the bankrupt, which "had theretofore been assigned by Von Hartz to appellant." It was not stated in the opinion whether the assignment was prior or subsequent to the proceedings in bankruptcy. If prior thereto, then neither the court where the bankruptcy proceedings were pending nor any other court could grant a summary order disposing of the title of the adverse claimant claiming title to the policy by assignment. That could only be determined in a plenary suit, and would fall within the rule in the *Bardes* (178 U. S. 524) and *Jaquith* (188 U. S. 620) cases. But if the assignment was subsequent to the bankruptcy proceedings, then it would be a nullity and would be disregarded by the bankruptcy court and possession could be given to the trustee by a summary order, as in the *Bryan* (181 U. S. 188) and *Mueller* (184 U. S. 1) cases.

"There is no decision of this court adverse to the ancillary jurisdiction of the District Courts as asked to be exercised in this case."

Carriers. *Obligation to Furnish Satisfactory Service — Constitutionality of Kansas Statute Creating Railroad Commission.* U. S.

Upholding the constitutionality of the law creating the Railroad Commission of Kansas, the United States Supreme Court on Feb. 21, in *Missouri Pacific Railway Co.* v. *Railroad Commission*, 30 Sup. Ct. 330, upheld the Supreme Court of Kansas in issuing an injunction to compel the Missouri Pacific Railway Company to operate separate passenger trains instead of a mixed passenger and freight service from Madison, Kans., to the Kansas-Missouri state line. In this case the court announced a doctrine that will reach every state. It declared that even if this passenger train was operated at a loss the railroad was under a duty to perform such service as long as it retained its charter. The court refused to sustain the contention of the company that the revenues from the branch did not warrant separate service, and if the deficit in such a service was to be met by business elsewhere the property of the road would be confiscated, in violation of the Constitution.

Corporations. See Partnership.

Defamation. *Privileged Communications Between Stockholders—Burden of Proof.* N. Y.

The New York Court of Appeals held that a telegram sent to one stockholder by another criticizing the manager of the company to be presumptively a privileged communication, and the falsity of the statement or express malice must be proved. Only on the production of facts sustaining this burden of proof does the case become one for the jury. Per Cullen, Ch. J., in *Ashcroft* v. *Hammond*, 90 N. E. 1117.

Fourteenth Amendment. *Domestic Relations—Constitutionality of Statute Permitting Transfer of Children by a Father.* S. C.

The Supreme Court of South Carolina decided on Feb. 17 that a statute permitting a father to transfer the care of his children without the mother's consent was unconstitutional,

as an infringement of the rights and privileges assured by the State Constitution and by the Fourteenth Amendment of the Constitution of the United States. The action was brought by Mrs. Benjamin R. Tillman, Jr., the divorced wife of the son of Senator Tillman, to gain the custody of the children, who had been transferred to their grandfather by an instrument executed by Benjamin R. Tillman, Jr.

Interstate Commerce. *"Satisfactory or Reasonable" Through Route—Interpretation of Statute—Powers of Interstate Commerce Commission.* U. S.

In *Northern Pacific Railway Co.* v. *Interstate Commerce Commission*, the so-called "Portland Gateway" case, decided March 7, the United States Supreme Court annulled an order of the Commission requiring the railroad to join with competing railroads in establishing a through route and joint rates from the East to Puget Sound points by way of Portland, Ore. The court held that the railroad already maintained a "satisfactory or reasonable route" from the East to Puget Sound points, and as long as such a route was in existence the Commission could not require the road to join in another.

The court took the position that climate, scenery and a desire to visit along the routes south of the Northern Pacific did not make the latter's route "unsatisfactory or unreasonable," and to hold otherwise would be to give an artificial meaning to the words of the statute.

"The condition in the statute is not to be trifled away," said Mr. Justice Holmes in announcing the opinion of the court.

Interstate Commerce. *State License Tax on Privilege of Doing Business Within the State—Unconstitutional Burden on Interstate Commerce—Kansas "Bush" Act.* U. S.

The same line of reasoning as that followed by the Supreme Court of the United States in *Western Union Telegraph Co.* v. *Kansas* (216 U. S. 1, 30 Sup. Ct. Rep. 190; see 22 *Green Bag* 192) was adopted in *Pullman Co.* v. *Kansas ex rel. Coleman* (30 Sup. Ct. 232, L. ed. adv. sheets p. 232), the facts being similar. In this case, as in the former one, the so-called "Bush" act of 1898 was declared unconstitutional. This act imposes on foreign corporations what is substantially a license tax, levied as a condition precedent to engaging in business within the state. The Court, Mr. Justice Harlan delivering the opinion, proceeded upon the principle that the state had no authority to deprive the company of the right to do intra-state business in such a manner as would necessarily deprive it of the right to engage in interstate business, nor to burden the interstate business with a tax which was, in effect, levied on property outside the state. Mr. Justice Moody, though absent, approved of this opinion of the court, which is based on the much fuller opinion in the *Western Union* case.

Mr. Justice White concurred, not only on the narrow grounds on which he had based his concurrence in the *Western Union* case, taking the view that the levying of a tax on property within the state devoted both to intra-state and interstate commerce was confiscatory, but also on grounds similar to those expressed in the majority opinion, giving more extended consideration, however, to the rights of the states in matters of taxation.

Mr. Justice Holmes dissented on the same ground as in the *Western Union* case, saying that such an exclusion as that contemplated by the statute "is not a burden on the foreign commerce at all; it simply is the denial of a collateral benefit. If foreign commerce does not pay its way by itself, I see no right to demand an entrance for domestic business to help it out."

Chief Justice Fuller and Mr. Justice McKenna concurred in the dissent.

Legislative Appropriations. *Salaries of Public Officers—State Parole Act Unconstitutional.* Ill.

The Illinois parole law of 1899 was declared unconstitutional by the Supreme Court of Illinois in *People* v. *Joyce*, decided Feb. 16 (42 Chicago Legal News 223, Feb. 19; 40 National Corporation Reporter 48, Feb. 24). The reason for this ruling was found not in the system of parole provided by the act, but in the fact that the title of the act included two subjects, and the act violated, by implication, the provision of the state constitution requiring statutes appropriating the salaries of officers to contain no provision on any other subject. The act was therefore unconstitutional, and void as a repeal of existing laws.

Legislative Privilege. *Administrative Functions of Committees of Congress Subject to Review in the Courts—Legislative Duties Cannot be Delegated by Congress.* D. C.

In *Valley Paper Company* v. *Joint Congressional Committee on Printing*, decided

Feb. 28, Mr. Justice Wright of the Supreme Court of the District of Columbia announced the decision of the court that in directing the six members of the Congressional Joint Congressional Committee on Printing to show cause why a writ of *mandamus* should not issue compelling the committee to award a contract to the Valley Paper Company of Massachusetts he had not exceeded his authority.

The functions of the Joint Committee are ministerial and not legislative, according to the finding of the court. All legislative duties being conferred by the Constitution upon Congress, the court held that none of them could be delegated by Congress to its members. No power could be vested in a part of Congress by a law of Congress itself. That there was room to believe that the opening and inspection of bids for paper was an administrative duty, the court admitted, but it disclaimed any inference that any member by so doing held an administrative office.

Partnership. *Agreement by Shareholders to Treat Business of Two Corporations as a Partnership—Court of Equity Without Power to Take Corporate Property into its Control as Upon Dissolution of a Partnership.* N. J.

The parties in interest organized two corporations and engaged in the sale of subscription books, under a joint agreement, whereby each of them possessed a half interest in the stock and securities of the corporations and was to have an equal voice and equal control in the management of the business of both, the corporations being intended to become merely "instrumentalities or agencies for carrying out certain partnership purposes." The combined business was treated as a partnership. Differences arose between the partners, one of whom asked for the appointment of a receiver of the New York corporation.

In *Jackson* v. *Hooper*, decided by the New Jersey Court of Errors and Appeals Feb. 28 (N. Y. Law Jour. Mar. 8), it was held, by Dill, J., that a court of equity has no power to take the corporate property into its control, as upon the dissolution of a copartnership, but that the rights of the parties must be administered as shareholders in the corporation, not as partners.

It was also held that an agreement between shareholders controlling the stock of the corporation, that certain directors shall act as nominal or dummy directors, subservient to the will of the parties, is illegal and cannot be enforced in a court of equity; and that a court of equity has no jurisdiction to regulate the management of the internal affairs of a corporation organized under foreign laws, through the medium of an injunction issued either against the members of the board of directors as individuals, who are parties to the action, or against the corporation directly.

The Court followed the authority of a Massachusetts case decided more than seventy-five years ago and not cited by counsel, but deemed on all fours with the case at bar, *Russell* v. *McLellan*, 14 Pick. 63.

Police Power. *Act Licensing Dance Halls Unconstitutional—Unfair Discrimination.* N. Y.

In *People ex rel. Duryea* v. *Wilber*, 90 N. E. 1140, decided on Feb. 22, the New York Court of Appeals held that an amendment to the Greater New York Charter requiring that all public dancing academies and schools where a charge is made for teaching dancing shall procure a license authorizing the business to be conducted at the place named is unconstitutional. The object of the amendment does not appear to have been the promotion of health, safety, morals or the general welfare of the public and it is not a revenue measure. The enactment was held, therefore, not to be a lawful exercise of the police power, but an arbitrary and unjust discrimination against places where instruction is given in dancing. Vann, J., dissented.

Taxation. See Interstate Commerce.

Trial by Jury. *Not Guaranteed to Those Violating a Municipal Ordinance—Constitutionality—Intoxicating Liquors.* Ga.

The Supreme Court of Georgia (Lumpkin, J.) in *Loeb* v. *Jennings*, 67 S. E. 101, decided Feb. 16, denied trial by jury to one violating a municipal ordinance, and as the city charter conferred on the city of Atlanta the right to pass an ordinance providing penalties for the keeping of liquors for illegal sale, the plaintiff was properly convicted and sentenced to pay a fine of $500 and to perform thirty days' work on the public works. The court said:—

"There is no constitutional immunity in any citizen of this state or any other state to come within its borders and violate its laws in regard to prohibiting intoxicating liquors or to violate a municipal ordinance prohibiting the keeping of liquors on hand for illegal sale."

The Editor's Bag

THE CONNECTICUT CODE OF PROFESSIONAL ETHICS

THE Connecticut State Bar Association, instead of adopting the American Bar Association Code of Ethics with such slight amendments as might be desired, chose to rearrange the materials of that Code in a new form, adding a little here and subtracting a little there, with the result that Connecticut lawyers now have a Code substantially similar to that of the American Bar Association, marked by a finish and proportion which reflect a desire to avoid surplusage and to achieve simplicity.

The committee which prepared the draft expressed the highest regard for the Code of the American Bar Association, and stated that it had included substantially all the canons, re-arranging them, however, under five headings: "The Lawyer in Court," "The Lawyer in His Office," "Professional Etiquette," "The Grievance Committee," and "The Lawyer's Relation to the Public." It is extremely unlikely that such a procedure would have been adopted but for the conviction that "the bar in each state should in some form specially applicable to the conditions in that state affirm the principles set forth in these canons." Owing to the greater condensation of the rules prohibiting the subjection of judges or juries to improper influences, forbidding unseemly practices in advertising and self-exploitation, and discountenancing the solicitation of business by ambulance-chasing and other disreputable means, it is to be inferred from the more general phraseology that the Association considers many principles of professional conduct so firmly established in Connecticut by the traditions of bench and bar that it is unnecessary to particularize to the extent of adopting the national Code word for word.

Not many material changes have been made. Among the most notable are the restriction of the contingent fee canon, and of Canon 10 (A. B. A.), forbidding a lawyer to purchase any interest in litigation, making both apply only in the case of indigent clients. The declaration in Canon 29, that counsel should bring a case of perjury committed during the trial to the attention of the prosecuting authorities, is left out, as is also the clause in Canon 2 discountenancing the elevation to the bench of any one not willing to forego employments which might embarrass him in the performance of official duty. Other rules, forbidding counsel from expressing in argument his personal belief in the client's innocence or in the justice of his case, and setting forth the duties of restraining clients from committing improprieties, and of punctuality and expedition (A. B. A. Canons 15, 16, 21), have been discarded. These omissions, however, do not necessarily point to a distinct lowering of professional

standards. In some cases the committee probably felt that the subjects were sufficiently covered elsewhere in the Code by general admonitions. For example, Canons 12 and 13 (A. B. A.) relating to lawyers' fees have been rejected, and the following declaration has been substituted, which follows the American Bar Association Code only where we have italicized the words, and which will probably be conceded to set forth a high ideal of professional duty:—

A just and adequate compensation for legal services is essential to the independence and efficiency of the Bar. Effective provision for the administration of justice is properly one of the heaviest charges of the government and the use of such provision is necessarily costly to litigants. The cost of litigation is a necessary check to the evil of litigiousness. *In fixing fees lawyers should avoid charges which overestimate their advice and services, as well as those which undervalue them.* While the amount of compensation is ordinarily within the reasonable discretion of the lawyer making the charge, yet the close fiduciary relation between himself and his client calls for the keenest sense of honor and firm restraint of self-interest in the exercise of this discretion.

The client is entitled to a full understanding as to the basis on which the expected compensation will be computed, and the imposition on the client of unforeseen or unexpected charges is inconsistent with the mutual confidence which underlies professional employment, and is utterly indefensible as against indigent or ignorant persons, or those imperfectly acquainted with our language.

The reasonable requests of brother lawyers, and of their widows and orphans without ample means, should receive special and kindly consideration.

It is the duty of the Bar in appropriate instances to protect the indigent and helpless from oppression, and each lawyer should share as occasion requires in the performance of this duty. In such case he may properly charge a reasonable fee in the event of a successful issue, but the poverty of a client may never justify a lawyer in purchasing an interest in the subject-matter of the litigation or in stipulating for an extortionate fee on the basis of a wagering percentage of its profits.

In fixing fees it should never be forgotten that the profession is a branch of the administration of justice and not a mere money-getting trade.

New matter is added in the form of a denunciation of "seeking extortionate settlements through abuse of legal process," which strengthens Canon 31 of the national code, an express assertion of the inviolability of professional communications, and a statement at some length of the duty of thorough examination of witnesses in preparation for the trial of the cause. Matter of local bearing, treating of the Grievance Committee in each county, is introduced. Apart from these modifications, the committee has desired to emphasize the importance of the bar as a part of the system for administering justice, and in like manner emphasis is laid upon the lawyer's firm discharge of his duties both to the court and to his client, duties which are "not distinct, but complementary, constituting the fundamental duty of fidelity to the lawyer's trust," and there is also possibly greater emphasis on the duties of the lawyer as a citizen than in the American Bar Association Code.

The Connecticut State Bar Association seems to have acted on the theory that there was no special obligation to adopt the American Bar Association Code. There is, however, something to be said for the advantage of having it in force in all the states. It would tend to unite bodies of lawyers in widely separated parts of the country into closer sympathy with one another's professional aspirations, and would strengthen the feeling that they are members of one national bar, cherishing no pride of sectional prejudice. The American Bar Association Code has

already been adopted in a large proportion of the states almost as it stands. One of the most gratifying features of this movement is, in our judgment, the solidarity of sentiment which it evidences. The Connecticut State Bar Association may have shown that this Code can be improved upon in some minor particulars, but it remains true that it meets more effectually than any other yet proposed the need of exact and complete definitions of every professional duty. The caution displayed by the committee of the Connecticut Bar in not venturing to diverge widely from its substance affords an illustration of the opinion shared in all quarters that it is a standard code for the guidance of the entire American Bar.

SOME KANSAS ANECDOTES

JUDGE BARRET of the City Court at Wichita, Kans., according to the Wichita *Eagle*, is addicted to the habit of telling the following story:—

There was a case of petty larceny on wherein a colored man was being tried. Mr. Conly of Wichita represented one side and Mr. Harris the other. There were three negroes on the jury and three white men. The jury promptly brought in a verdict of acquittal, which was in favor of Mr. Harris. When the court asked the foreman, who was one of the negroes, just why that verdict had been reached he got this reply:—

"Well, jedge, you see it was this a-way. We fust thing thought de prisoner guilty. But dah prepondahance of eloquence was with Mistah Harris and so we jest brung in dat ah werdick of not guilty, yo' hahnah."

Recently Judge Barret, Mr. Conly and Mr. Harris were joking and telling stories, and after Mr. Conly had quoted the foregoing yarn from Judge Barret's large *répertoire*, the Judge came back at him with the following, which we fear may almost be too good to be true:—

"Bill Kyle, a huge negro and a political sharper of years ago, was given a job as night policeman by the Missouri Pacific to watch their coal yards. They had suffered with a long series of coal pilfering. One night a tall lanky colored man was seen by the alert sleuth to sneak along behind a gondola loaded with coal, and the night marauder carried a suspicious looking gunny-sack. Kyle lay low and waited. Soon the colored man's head was seen to peer cautiously above the side of the gondola. Promptly Bill let fly a big chunk of coal that hit the colored man square in the mouth, knocking five teeth out of his face, and mussing up his complexion considerably. The description was so accurate that before daylight a deputy constable had arrested him.

"Then to the dumbfounded astonishment of all court officials next morning, when the battered-up colored prisoner appeared in court, with his face all tied up in bandages, and his whole map a skinned proposition, there was Jim Conly with the most magnificent masterpiece of an *alibi*. Four other dusky sons of Ham testified that the accused was never near the Missouri Pacific yards at that time, but was shooting craps up in a resort near the stock yards. There sat the accused with his face in a sling, five teeth gone, and answering the description exactly, and yet the force of the *alibi* went, and he was turned loose.

"After that, out of complimentary recognition of the ability of the able rising young criminal lawyer, Jim Conly was thereafter dubbed with the descriptive and *apropos* nickname of 'Alibi Jimmy.' "

Mr. Harris has the reputation of being, of all the members of the Sedgwick county bar, one of the readiest in repartee. Some one asked him years ago what he thought of the judicial capability of a certain judge then on the bench. "Please don't ask me. I never like to probe deeply into abstract propositions of metaphysics," was the reply.

Mr. Harris at another time, in the heat of an argument before a jury, made use of an expression which brought down the gavel of the court, and he was warned not to do it again. Within a minute he said the same thing again.

"Sir," thundered the irate judge, "do you mean to show contempt for this court?"

"No, sir," replied Kos Harris, "I certainly do not. In fact I'm doing the best I can to conceal my contempt for this court."

CASES ON JOKES

(*Note.—The sittings of the Supreme Court of Joke-idioture are scheduled for the last week of each month at Greenbagville, and if the interest of the legal profession is sufficient to promote litigation in this Court, as we hope it will be, we shall take pleasure in permitting the publication of official reports of our decisions.* PER CURIAM.)

INSURANCE—TRESPASS—JUS NATURALE—JURISDICTION—DUE PROCESS OF LAW—STATE RIGHTS—INTERSTATE COMMERCE—HABEAS CORPUS—FEDERAL INCORPORATION—CONTRACTS.

EX PARTE BLIFFINGTON*

Supreme Court of Joke-idioture

April Term, 1910

TUSH, C.J.—About eight years ago the petitioner fell from a ferry-boat into the waters of New York Bay and was legally drowned, though not actually, in order that his legal widow but lawful wife might secure the proceeds of a life insurance policy of $10,000 to relieve the financial embarrassments of the petitioner's family at that time. There was litigation over payment of the policy, but judgment was given in favor of the putative widow, from which decision the insurance company has lately appealed. Meantime, the petitioner has been residing in modest obscurity in New York City, under another name, in company with Mr. Ellis Parker Butler, the author of "Pigs is Pigs." Now we come to the more important facts, from which this controversy has arisen. A few weeks ago the petitioner was sitting in his hall bedroom, when, under hypnotic suggestion from Mr. Butler, he for the first time saw his own ghost. He was not frightened, for the ghost looked quite like his natural self, except that it was phosphorescent and a little less bald. The ghost being obtrusive and showing a disposition to reside permanently with Mr. Bliffington, the latter grew somewhat uneasy, and consulted a legal friend, who informed him that as he was legally dead, the ghost was quite within his rights in haunting a legally dead man, and that the only way Mr. Bliffington could get rid of him was by going into court and having his legal death annulled. He had reasons for not doing this, however, one of which was that his wife wished him to produce the legal ghost as evidence of his legal death, in order to establish his identity. A meeting between the husband and wife was arranged, which was to lead to their re-union, but Mr. Bliffington then discovered to his horror that the ghost had shriveled out of sight, in consequence of which sad accident he has been unable to become reconciled to his wife, who considers him an impostor. Evidence has been adduced, however (in the *Cosmopolitan Magazine*) to show that the disappearance of Mr. Bliffington's ghost was due to the fact that the insurance company had just appealed, thereby putting the fact of Mr. Bliffington's legal death in doubt and divesting the ghost of all legal rights for the time being. Consequently Mr. Bliffington has now brought a writ of *habeas corpus*, praying that a decree may issue from this court restoring the ghost to life and liberty, so that the petitioner may be re-united to his wife.

This court does not consider that it has any jurisdiction of the subject-matter. It is well settled, however, that where a court is without jurisdiction, it can give judgment exactly as if it had jurisdiction, entering into a discussion of every phase of the case. *Dred Scott* v. *Sanford*, 19 How. 393.

There is nothing either in the common law or in the statute law applying to the rights of ghosts. It is certain, however, that a ghost cannot be deprived of its liberty without "due process of law." For interpretation of the Constitution has settled the meaning of "due process of law" to be "due pity for the law." *Hurtado* v. *California*, 110 U. S. 516.

We do not think the liberty of ghosts should be restrained. We never heard of trespass committed by a ghost. One cannot conceive of a ghost doing any damage, beyond unbalancing the minds of a few college professors, while ghosts have put money into the pockets of Mr. W. T. Stead, Professor Hyslop and Mme. Eusapia Palladino, and these and many others would suffer financial reverses were the legal rights of ghosts to be impaired. As a matter of natural right (*jus naturale*), ghosts are entitled to their freedom to go and come as they please, and an appeal from a decision that a man is legally dead cannot *de proprio vigore* deprive his legal ghost of its rights.

This Court is powerless, however, to grant the relief sought, owing to circumstances

*Suggested by Mr. Ellis Parker Butler's farcical tale of "The Case of Horace Bliffington," in the *Cosmopolitan* for March.

which will presently appear. The petitioner was supposedly drowned by falling into a ferry-boat plying between the shores of New York and New Jersey and therefore engaged in interstate commerce. We are dealing, therefore, with an interstate ghost. *Gibbons* v. *Ogden*, 9 Wheat. 1. The body of the ghost not having been produced in court, we feel that there is only a verbal difference between the principles involved in a writ of *habeas corpus* and a petition for federal incorporation of an interstate ghost, and as purely a federal question is presented, the petition must be dismissed.

DIXIE, J. (*dissenting*). I think this is a question which involves state rights. I have been endeavoring, though without avail, to convince my learned colleagues that the petitioner, in drowning himself, was carrying out the contract of insurance rather than that of interstate transportation, and that consequently *Gibbons* v. *Ogden* does not apply. It seems to me that there are already too many ghosts in the twilight zone between state and federal power, rather than not enough.

Petition Dismissed.

CORPORATIONS A LA MODE

AMONG the young lawyers of Indianapolis, Indiana, is one of literary inclinations, William Allen Wood, who has contributed to leading magazines, and lately was called upon to give a toast at a dinner of his college fraternity, the *Phi Gamma Delta*, the subject assigned, being "Corporations à la Mode." The toast follows:—

Brother Toastmaster and Brothers, I suppose there are those among you who think corporations served *à la mode* are corporations roasted. This is indeed a popular way to serve them, but it is neither a very palatable nor a fair way, and the corporations and myself are too good friends for me to treat them in that manner, at least seriously. Being a lawyer of the corporation variety, I fall within a class that has met some share of undiscriminating public condemnation. The public seems to think the corporation lawyer is like a certain divinity student of whom I once heard. He went from the divinity school to preach a trial sermon, and, on his return, was greeted by one of the professors in the institution. "How did you get on with your sermon?" inquired the professor. "First rate, first rate," said the student. "What was your text?" asked the professor. "How shall ye escape if ye neglect so great a salvation?" answered the young man. "A good text," said the professor. "And how did you treat it?" "First," said the student. "I showed 'em how great this salvation is, and, second, I showed 'em how to escape if they neglected it." The function of the corporation lawyer is not, I assure you, without arguing the point, to show the corporations how to escape the laws when they violate them, but it is a constructive function, a co-ordination of law and righteous business practice that is as valuable to the commercial life of America today as was the judicial practice of Lord Mansfield of England to the Law Merchant of his time and since. So I feel quite respectable when I stand before you and acknowledge that, in an humble way, I am a lawyer of the corporation kind. Moreover, I may state that I do not need either your assistance or your sympathy in my professional condition, as it is a matter of judicial record, in the case of *Latta* v. *Lonsdale*, 107 Federal Reporter, that "corporation lawyers have the opportunity and are quite able and capable of taking care of themselves."

John Kendrick Bangs has defined the "Copperation" as "a Creature devised by Selfish Interests to secure the Free Coinage of the Atlantic Ocean," and adds,

"Little drops of water
Plenty of hot air,
Make a copperation
A pretty fat affair."

I myself have defined the corporation, but in so serious a way that I am afraid it would make you weep after Mr. Bang's juicy definition, so I shall not impose my own on you. If there are some of you who like the corporations roasted, the foregoing will suffice, I hope, with the following additional stanzas which I will recite, following the elocutionary precedent set by some of our brothers.

"A copperation is a beast
With forty-leven paws
That doesn't ever pay the least
Attention to the laws.

"It grabs whatever comes in sight,
From hansom cabs to socks,
And with a grin of mad delight
It turns 'em into stocks.

"And then it takes a rubber hose
Connected with the sea
And pumps them full of H_2O's
Of various degree.

"And when they're swollen up so stout
You'd think they'd surely bust,
They souse 'em once again, and out
They come at last a Trust.

"And when the Trust is ready for
One last and final whack,
They let the public in the door
To buy the water back."

If you still have an appetite for roasted corporations, I refer you to Hazlitt's essay, On Corporate Bodies, or to the speeches of the disap-"peerless" leader of the Democratic party, which show up the corporation as the right bower of His Satanic Majesty.

You have noticed, perhaps, that few discover the water in stock except those who dabble in it. The American people have a fatal tendency to play with the corporation, to indulge themselves in beautiful green and gold certificates that look like government bonds, to take shares in some pot of gold at the end of a rainbow, even when the company would appear to be like that of which dear old Colonel Carter's financial agent said: "I couldn't raise a dollar in a lunatic asylum full of millionaires on a scheme like the colonel's." But we have to look with indulgence on this frailty of our compatriots—they are getting experience, and like most of mankind, experience is the one thing they can't accept without paying in full for it. The emotions and the imagination always command their price even when intelligence is selling at a discount. The American people are great, but they are not quite up to old Noah yet—he is the only person so far who has been able to float a company when the whole world was in liquidation.

I am very heartily an advocate of the corporate form of business organization, brother Fijis, and I could cite many eminent authorities who have the same attitude. Woodrow Wilson, President of Princeton University, has said, "I don't see how our modern civilization could dispense with corporations. I don't see anything but the utmost folly in entering upon a course of destruction in respect to the present organization of our economic life." Our brother in Phi Gamma Delta, Edward Alsworth Ross, Professor in the University of Wisconsin, who writes brilliant essays for the *Atlantic Monthly* on sin and society, says: "Corporations are necessary. In resenting corporate sins we must follow the maxim, 'Blame not the tool, but the hand that moves the tool.'" If I were able, brothers, I would serve the corporation to you, not roasted, but with the praise of whipped cream, glacéd fruits, preserved marrons, and other *delicatessen*, and with Chateau Yquem or sparkling Chablis or Veuve Cliquot and bunches of violets and an orchestra playing Viennese waltzes on the side. But the corporation is its own excuse; it is attracting more favorable notice on the part of the intelligent public all the time—already two-thirds of the business of the country is conducted under the corporate form, and great minds are at work trying to perfect this form of business conduct so that it will be a perfect machine, and so that the souls of its officers and directors will serve in lieu of a corporation soul, and so that both the unit of organization and the members who compose it will be openly responsible for all their acts to the state, the public, and to one another. The only effective way to unify the membership of a large number of men in lodges, unions, clubs, secret societies, fraternities, so as to make them a practically responsible business person, so they may stand before the community and say, "We are here to deal honestly with you, but if you think you have not been accorded all your rights, we can easily be reached through the law which unites us unto a business unit, by which we can be brought to justice as a unit, under one name, and not compel you to sue a collection of us as individuals"—the only effective way, I say, to unify a society to this end is to incorporate it. Now it may not have occurred to you that our fraternity is not incorporated. Some of our chapter house associations are incorporated, but the national organization is not, and in this we are behind some of our rival fraternities. I do not believe it is necessary to do more than suggest the desirability of the incorporation of the national society through the Board of Archons, as I believe the social conscience of the fraternity is sufficiently alive to demand this when the lack has become generally known among us.

The length of an after dinner speech, it is said, should correspond to that of the ballet-dancer's skirt, "*qui commencait à peine et finissait déjà*," and, to follow the formula, I must be ending. It was an enthusiastic member of another fraternity, which I may call Beta Kappa Delta, because there is no such fraternity, who exclaimed in concluding a speech, "Old Beta Kappa Delta! There she stands with her glorious past. Let us drink to her memory." It is unnecessary to com-

ment on the appropriateness of that toast. But, thank goodness, we Fijis can say, "Ever young Phi Gamma Delta! There she *moves*—from a glorious past to a more glorious future. Let us drink to her vigorous, throbbing life."

BETWEEN BENCH AND BAR

THE following story is told of a certain judge of the Superior Court of Massachusetts:—

The Judge has a remarkable memory for faces. A man was brought before him recently and pleaded guilty to the offense charged. Judge ——— sized the offender up with his penetrating glance and asked, "Have you ever been arrested before?"

"No, sir, I never have," the prisoner answered.

The Judge did not appear to be satisfied, and leaning over the bench he said to the prisoner, "I think I have seen you before, sir,"

"That may be," said the offender, "I'm a bartender."

MAXIM REVISED

Every cloud (on a title) has a silver lining (for the lawyers).

USELESS BUT ENTERTAINING

An expressman recently asked an elevator attendant at the Court House in Pemberton Square in Boston, "Does John Aiken work here?" On learning that the person he wanted was the Chief Justice of the Massachusetts Superior Court, he looked as if he had committed an unpardonable sin.

A few years ago George F. Haley of Biddeford was trying his first criminal case before the supreme judicial court of Maine, with Chief Justice John A. Peters on the bench. Mr. Haley was in the middle of his plea when a man in the audience fell over in a convulsion. The young lawyer stopped, disconcerted. "Go on, sir, go on," said the Chief Justice; "you're giving them fits!"

—*Kansas City Bar Monthly.*

A well-known Southern judge tells a story about a white man who, during reconstruction times, was arraigned before a colored justice of the peace for killing a man and stealing his mule. It was in Arkansas, near the Texas border, and there was some rivalry between the states, but the colored justice tried always to preserve an impartial frame of mind.

"We's got two kinds ob law in dis yer co't," he said, "Texas law an' Arkansas law. Which will you hab?"

The prisoner thought a minute and then guessed that he would take the Arkansas law.

"Den I discharge you fo' stealin' de mule, an' hang you fo' killin' de man."

"Hold on a minute, Judge," said the prisoner. "Better make that Texas law."

"All right. Under de law of Texas, I fin' you fo' killin' de man, an' hang you fo' stealin' de mule."—*Lippincott's.*

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

Correspondence

A NATIONAL CODIFICATION

To the Editor of the Green Bag:—

Sir: I read with much interest the article, "Memorandum *in re Corpus Juris*," in your February issue, by Mr. Lucien Hugh Alexander. There is more truth expressed in that article than in any other I have ever read. After trying to practise law for thirty-five years I have now discovered the real blocking of the game. I realized these same facts years ago, but they were not so forcibly brought to my attention.

Congress should, by act, appoint a commission (I should suggest the names of the gentlemen mentioned in the article) to codify the many decisions, with power to discriminate. Then Congress could adopt the report, fixing the price to be paid for the work, say $10.00 per volume for ten volumes (it would take at least that number), or $90.00 for the set. By said act of adoption, it could provide for sale of the right of publication, and repay the Treasury of the United States for any advance made to pay the Commissioners.

Each state could then enact the same as authority of the state.

Law publishing houses could bid for the work and make a million dollars' profit. Minneapolis has about 700 guessers now; 500 would subscribe, making $45,000 to

$50,000. It is of more importance than building battleships, when 3,000 miles of restless ocean protects us on the East and 10,000 miles on the West. These oceans have protected us in our infancy and will do so in the future, unless we wish to conquer.

ROBT. R. ODELL.

Minneapolis, Minn.
March 8, 1910.

[That readers who may not have read the article in the February number may not draw any insupportable inferences from the foregoing letter, it seems only just to say that Mr. Alexander and his colleagues, if we are not much mistaken, are not seeking a legislative codification; and that they also consider the difficulties in the path of public financing of a codification of any kind insuperable.—*Ed.*]

The Legal World

Important Litigation

Eight directors of the Consolidated Milk Exchange were indicted in New York City Feb. 23 for conspiring in June, 1909, to fix the wholesale price of milk, in violation of the Donnelly anti-monopoly law of New York State.

Six corporations and twenty-one individuals forming the so-called Meat Trust were indicted Feb. 25 in Jersey City by the grand jury of Hudson county. They were accused of conspiracy and of creating a monopoly, enhancing the price of meat and poultry, and deliberately carrying a shortage in the supply of articles necessary for food.

In *Loewe* v. *United Hatters of North America*, in the United States Circuit Court sitting at Hartford, Conn., the jury found a verdict Feb. 4 for the plaintiff in the sum of $74,000 damages done to the business of the plaintiff by means of the defendants' boycott. As the suit was brought under the Sherman anti-trust law, triple damages can be recovered, so that the Hatters' Union may have to pay $222,000 damages, and more than $10,000 court costs and counsel fees. The case dates back to 1902. It will be carried to the Court of Appeals, and if the verdict is there sustained, to the Supreme Court of the United States. The principle in the case is essentially the same as that involved in the famous *Taft-Vale* case in England, namely, that of the liability of a labor union for the damages it inflicts by means of a boycott. (Cf. *Loewe* v. *Lawlor*, 1904, 130 Fed. Rep. 633; 1905, 142 Fed. Rep. 216.)

A disbarment case recently came before the Supreme Court of Louisiana when Attorney-General Guion, on the recommendation of the disbarment committee of the Louisiana Bar Association, asked that F. Rivers Richardson be adjudged guilty of contempt. The latter was disbarred upwards of a year ago, but had continued to keep a law office, having been advised by Federal Judge Rufus E. Foster, Judge Saunders, Judge Fred D. King, and others, that he could advise clients and practise law in his office, but could not go before the court as a lawyer. One of the judges of the Court remarked, during the trial, that the case was of great importance as a precedent involving the right of a disbarred lawyer to keep a law office and give advice.

Important Legislation

The bill approved by the American Bar Association and Mississippi Bar Association providing that no judgment shall be set aside or new trial granted by the Supreme Court unless there is reason to believe that there has been a substantial miscarriage of justice was defeated in the Mississippi Senate Feb. 12, a majority of the senators believing that it would force the Supreme Court to try cases on the facts instead of the law.

A sound principle is perhaps embodied in the bill introduced in Congress by Representative Bennet of New York providing that all aliens committed to a state prison for not less than one year shall, at the expiration of their sentences, be deported to their native countries by the federal government. The penal institutions of many states swarm with immigrants who still owe allegiance to other flags.

The Administration injunction bill was introduced in Congress Feb. 18 by Representative Moon of Pennsylvania. In effect, it provided that no injunction, whether interlocutory or permanent, should be issued by any federal court without previous notice and an opportunity to be heard on behalf of the parties enjoined. But if there appears a probability that "immediate and irreparable injury" is likely to ensue, the court may issue a temporary restraining order without notice. It is required that every such order shall define the injury, state why it is irreparable and why granted without notice, and shall not extend more than seven days from the time the notice is served.

Personal—The Bench

Judge Howard C. Hollister, who was appointed Feb. 24 to be a United States judge for the Southern District of Ohio, has been a lifelong friend of President Taft.

Judge Prentis was endorsed by the Norfolk and Portsmouth Bar Association of Virginia on Feb. 18 for the new federal circuit judgeship for the Fourth District of the United States.

Hon. G. A. Endlich, re-elected as president judge, and Hon. George W. Wagner, chosen an additional law judge, were given a complimentary dinner Feb. 5 by the Berks County (Pa.) Bar Association.

The following appointments have been confirmed by the Senate: Fletcher M. Doan, Associate Justice of the Supreme Court of Arizona; Frank W. Parker, Associate Justice of the Supreme Court of New Mexico; Grant P. Trent, Associate Justice of the Supreme Court of the Philippine Islands.

Associate Justice Horace H. Lurton was the guest of honor of the New York County Lawyers Association at a dinner tendered him Feb. 26 in the Hotel Astor. Among those present were Judge Alton B. Parker, Senator Robert L. Taylor of Tennessee, Joseph H. Choate, Gen. Benjamin F. Tracy, William Nelson Cromwell and John G. Milburn.

Judge Emory Speer of the United States Court for the southern district of Georgia was tendered a banquet by the Macon bar Feb. 25, in observance of the twenty-fifth anniversary of his confirmation as judge. Judge Speer was appointed in 1885 by President Arthur, after nearly two years' service as district attorney. He was then thirty-seven years of age. In the quarter of a century that has intervened since his appointment, he has become one of the most distinguished jurists of the South, and is known the country over for his ability as a judge and for the wisdom and equity of his decisions.

Perhaps the youngest judge now presiding n a court of last resort is Judge Ira Ellsworth Robinson, who became President of the Supreme Court of Appeals of West Virginia, January 21. He was born near Grafton, in that state, on September 16, 1869, and is, therefore, only forty years of age. His ancestors were early Trans-Allegheny pioneers, who settled in the immediate section in which he was born and reared. Judge Robinson came to the bar at twenty-one, and practised at Grafton continuously until his appointment to the Supreme Court bench, to fill a vacancy, on October 9, 1907. At a distinct Judicial State Convention he was nominated without opposition to succeed himself, and was elected for a term of eight years at the general election in November, 1908.

Judge George A. Cooke, the youngest member of the supreme bench of Illinois, was the guest of honor at a banquet of the Will County (Ill.) Bar, held Feb. 5 at Joliet, Ill. Several speakers alluded to Judge Cooke's astonishing rise to the highest office in the state at an age which could hardly be termed the prime of life.

Judge Gardiner Greene of Norwich took his place on the bench of the Superior Court of Connecticut Feb. 5, succeeding Judge Robinson, who went to the supreme bench on the same date. Judge Greene is a graduate of Columbia Law School, and a leading member of the New London county bar. He has served twice in the legislature, and was a member of the commission which revised the General Statutes in 1902.

Judge Le Baron B. Colt of the United States Circuit Court of Appeals was the principal guest of the Beacon Society at a dinner at the Algonquin Club, Boston, Feb. 5. Judge Colt quoted the remark that "the greatest risk in the business world today is the legal risk," and devoted some attention to the Sherman act. He said that there have to be many adjudications under a law before it can be said just what the statute means. In the case of the Sherman law, for instance, many would like to know if the acquisition by manufacturing corporations of competing corporations, through an exchange of stock, is in violation of the act. Then there are many subsidiary questions, as whether acquisition is monopoly, or an attempt at monopoly. "In the interpretation of the interstate commerce clause," he said, "the Supreme Court has been guided by the rules of common sense, considering the clause as covering the instruments and all things relating to commerce. I have no doubt," he declared, "that in time the Supreme Court will so construe the Sherman act as to satisfy the business world and relieve it of apprehension." The speaker also defined the nature of the remedial agents which are at work to harmonize law and business, including fictions, equity and legislation.

Personal—The Bar

Wade H. Ellis of Ohio resigned Feb. 7 as assistant to the Attorney-General, in order to become chairman of the Republican Executive Committee of Ohio.

Attorney-General Dana Malone of Massachusetts has announced that he does not wish to be a candidate for re-election next fall. He has served in this capacity for five years.

Albert S. Anderson of Millen, Ga., who is judge of the city court of that city, will henceforth devote himself wholly to collection and commercial practice, withdrawing from all local business. The firm of Hill & Anderson

has been dissolved that he may carry out this purpose.

Protection of the individual from the tyranny of the group was the keynote of the address delivered Feb. 22 by Attorney-General Wickersham on the progress of law, at George Washington University. He declared that the situation in this country when the rising tide of monopoly began, about twenty years ago, was analagous to that in England in Queen Elizabeth's reign, when the granting of special privileges aroused the people to revolt. Relief from similar conditions in this country was obtained by the power conferred on Congress to regulate trade and commerce.

William D. Guthrie has been made Professor of Constitutional Law in the Columbia Law School. Mr. Guthrie, by the way, is commonly understood to have received $1,250,000, the largest fee ever earned for professional services, in connection with the judicial and final interpretation of the peculiar will written by the late Henry D. Plant. To carry on the case made necessary a complete knowledge of the history of testamentary trusteeship, the statutory and the common law relating to the question. Some $20,000,000 was involved.

John D. Lawson, LL.D., editor of the *Central Law Journal* from 1878 to 1881, took editorial charge of the *American Law Review* with the beginning of the current year. He was born at Hamilton, Canada, in 1852, and was a graduate of the Law School of Osgoode Hall in 1875, being called to the Ontario bar in the same year. He removed to St. Louis in 1876 and practised there until 1885, when he removed to New Jersey and from there to California. His most extensive legal work, "Rights, Remedies and Practice," was written at this time. He became Dean of the Law School of the University of Missouri in 1903. He has been a well-known writer on legal subjects for twenty-five years, and has been appointed by the American Institute of Criminal Law and Criminology a special commissioner to investigate criminal procedure in Great Britain.

Bar Associations

The annual meeting of the Louisiana State Bar Association will be held in Baton Rouge on May 20 and 21. As the two codes will be up for discussion in the General Assembly, it is expected that the association will be largely attended.

At the annual meeting of the Cumberland Bar Association, held Jan. 25 at Portland, Me., Hon. Charles F. Libby was elected president. The other officers elected were Hon. Seth L. Larrabee, vice-president, and Hon. John F. A. Merrill, secretary and treasurer.

E. B. Pierce of Chicago has been invited to read the principal paper at the annual meeting of the Arkansas Bar Association, to be held in Little Rock the latter part of May or the first part of June. Mr. Pierce is head of the legal department of the Rock Island system.

The speakers at the twenty-third annual banquet of the Kansas City Bar Association, which took place Jan. 26, included Edmund Wetmore of New York, ex-president of the American Bar Association, Robert C. Smith, president of the Bar Association of Montreal, and Murat Boyle and Charles M. Howell, representing the Association.

The Florida State Bar Association held its annual meeting at Tampa, Fla., Feb. 23–24. The annual address was delivered by the president, E. R. Gunby, and papers were offered by W. A. Blount, J. B. Brown, G. M. Robins, A. H. Farrar and C. P. Cooper. At the banquet which closed the meeting Hon. Edward B. Vreeland of New York, of the National Monetary Commission, made the principal address.

Attorney-General George W. Wickersham will deliver the annual address at the next meeting of the Illinois State Bar Association, to be held at the Chicago Beach Hotel at Chicago on June 23 and 24. Other addresses upon questions of general interest will be delivered by distinguished lawyers from different parts of the state. One of the leading questions for discussion will be the revision of the practice and procedure in the courts of Illinois. Preparations are being made to bring together the largest possible assembly of lawyers from all parts of the state. The membership of the association is now about fourteen hundred, but is expected to reach two thousand by the time of the next meeting.

The Oklahoma Bar Association held its annual meeting Feb. 14–15 at Oklahoma City. Secretary of Commerce Nagel was to be the guest of honor, but was detained in Washington by important business. The annual address was given by the president, W. I. Gilbert. The following papers were presented: "Legal Problems of Gas and Oil Development," W. R. Allen; "The Work of the Code Commission," John R. Thomas; "Descent and Distribution of Indian Lands," J. V. Cabell; "Proposed Constitutional Amendments," Frank Dale; "Progress of the Legal Profession," Judge James R. Tolbert; "A New Acquisition as Applied to Inherited Lands of the Five Civilized Tribes," Judge M. E. Rosser; "Municipal Bonds and Contracts," H. W. Harris, Oklahoma City. T. J. Womack of Alva was elected president for the ensuing year; Clinton O. Bunn of Ardmore, secretary; and C. H. Ennis of Shawnee, treasurer. A vice-president was named from each of the thirty districts.

Crime and Criminal Law

A judge was forced recently, under the laws of New Jersey, to send a boy ten years of age to prison for debt, being unable to find any loophole in the law. The boy's friends obtained his release from prison pending an appeal to the Supreme Court of the state by filing a bond for twice the amount of the judgment.

An unusual number of highway robberies and murders in Rhode Island has led to an agitation for the re-establishment of the death penalty, which was abolished in 1852, and a bill has been introduced in the legislature with this object. In Iowa and Colorado, where capital punishment had been abolished, it was restored, while in Maine and Rhode Island the number of homicides in proportion to population has been from two to six times as great as in death penalty states.

Dr. Andrew D. White recently asserted that "human life is so cheap in the United States that men and women may be murdered almost with impunity. There has been in this country a steady increase in the number of criminal homicides. Twenty-five years ago there were about fifteen hundred homicides yearly in the United States. There are now eight thousand every year. Statistics make plain two illuminating facts: First, that Belgium, which is the highest, has no death penalty. In Canada, which is the lowest, seven-eighths of the men tried for murder were punished, generally with death. The administration of criminal law in this country has become a game between two or three lawyers, and the whole thing is very much of a farce."

Testimonial to a Leading German Jurist

Heinrich Brunner, Professor of Law in the University of Berlin, will celebrate on June 21, 1910, his seventieth birthday. A committee of prominent German jurists has been formed to assure due recognition, on this anniversary, of Brunner's achievements as teacher and as writer. It is proposed to publish, as is customary on such occasions, a volume of essays prepared in his honor by his colleagues and former pupils, and also to raise a fund for a permanent memorial. In view of the fact that Brunner's researches in early German law and in the law of the Frank Empire have direct bearing upon the legal history of all the West-European states, including England, and that the results attained by him have been of the greatest value to French, Italian and English legal historians, it has seemed proper to give to the lawyers and historical students of all these countries and of the United States an opportunity to contribute to the memorial fund.

All American lawyers and historians who are familiar with the development of legal history during the last forty years are aware that Brunner, in his monumental "History of German Law," has cleared up many important and previously obscure points in Anglo-Saxon and in Anglo-Norman law, and that before the appearance of this work he had shown, in a now famous little book, the origin of the English jury system. No reader of Maitland or of Thayer or of Ames is ignorant of the debt which English legal history owes to Brunner. It is hoped that American lawyers and other Americans who are interested in legal history will largely embrace this opportunity to do honor, during his life, to one of the most eminent of living scholars. Since the value of the testimonial will depend far more on the number of subscribers than on the amount of their subscriptions, it is hoped that no one who wishes to contribute will hesitate to send a small sum. By direction of the German committee, American contributions are to be sent to Professor Munroe Smith, Columbia University, New York City.

Miscellaneous

The fourth annual meeting of the Society of International Law is to be held at Washington, D. C., April 28–30.

Gov. Hughes Feb. 17 signed the Conklin bill, removing restrictions preventing the erection of a new Court House for New York County in City Hall Park. The site which Mayor Gaynor desires, is, however, being strongly opposed by the bar, by architects, and by the press.

In order to investigate the causes of the delay in the administration of justice in the courts of San Francisco, President Curtis H. Lindley of the Bar Association of San Francisco has appointed a committee of five to look into the matter and suggest remedies.

Only 82, or thirty-three per cent of the 240 applicants for admission to the bar, passed the recent examination held in Boston. The low percentage is partly due to the higher standard which has now been set for entrance, requiring more thorough preparation in general studies as well as in knowledge of the law.

At the annual meeting of the Connecticut Probate Assembly, held Feb. 9, the following officers were elected: President, L. P. Waldo of Hartford; first vice-president, W. H. Burnham of Hamton; second vice-president, H. H. Woodman of Bethel; secretary and treasurer, Joseph B. Banning of Deep River. There was a discussion on the fees paid judges of probate.

Cumberland County, Me., has now a new Court House in Portland, considered the finest in Maine, which cost $850,000. Its erection consumed four and one half years. The building was formally opened Feb. 1, Hon. Charles F. Libby saying: "It stands as a

permanent expression of the appreciation of our people of the high functions of those who minister at the altars of Justice."

The American Society for the Judicial Settlement of International Disputes, which will devote itself principally to issuing articles by leading men of all countries on subjects indicated by the title of the organization and to organizing meetings of national scope in various parts of this country from time to time, with a view to educating the people, was organized in Baltimore Feb. 6, at the residence of Theodore Marburg. Dr. James Brown Scott, solicitor to the State Department and editor of the *American Journal of International Law*, was elected president.

Secretary of State Knox has complimented Miss Annie H. Shortridge, law clerk to Counselor Hoyt in the State Department, by describing her as "an able lawyer," by whom many important briefs were prepared when she was in the Department of Justice. Miss Shortridge obtained her legal knowledge in the conduct of her daily work. It became evident shortly after her appointment as a stenographer that she had a veritable genius for the law, and her official superiors took much interest in her constant efforts to add to her stock of knowledge. Before long she began to be consulted as an authority on the legal work of the Department of Justice.

Congressman Samuel W. McCall of Massachusetts will deliver the principal oration at the dedication of the statue of Thomas B. Reed at Portland, Me., next summer. The bronze statue is designed by Burr C. Miller, and stands about eight feet high, the whole structure rising fourteen or fifteen feet from the ground. It is erected by an association of which Hon. J. W. Symonds, formerly a Supreme Court justice, is the president, and which includes many United States Senators and Representatives. Generous contributions have been made by the late ex-President Grover Cleveland, Andrew Carnegie, H. H. Rogers and Col. A. G. Paine of New York.

An international copyright convention having been signed at Berlin in Nov., 1908, the president of the British Board of Trade in the following March appointed a committee to report as to the legislation necessary to give effect to it in Great Britain. The committee has now drawn up a report. It favors extension of "literary and artistic works" to include choreographic works and pantomimes. Architecture is considered to need greater protection than it at present enjoys. Greater protection is asked for lectures, sermons and speeches, which should be assimilated to dramatic works. Newspapers should be entitled to report them unless notice prohibiting publication is given at the time of delivery. The committee approved of the extension in time of the protection given to authors as proposed by the Berlin convention. The convention protects an author for his lifetime and fifty years after his death.

Necrology—The Bench

Andrews, Judge J. C.—At Woodbury, Ga., Jan. 30, aged 73.

Archer, Judge Lawrence.—At San Jose, Feb. 13, aged 89. Former superior court judge; practised in San Jose for fifty years.

Brannan, Judge William.—At Muscatine, Ill., Feb. 12, aged 86. Oldest ex-member of the board of Regents of the State University of Iowa.

Bryant, Judge David E.—At St. Louis, Mo., Feb. 5, aged 61. Born in Lerue county, Ky.; federal Judge of the Eastern District of Texas.

Bundy, Judge Martin.—At New Castle, Ind., Feb. 17, aged 93. One of the survivors of the convention which organized the Republican party.

Chrisman, Judge J. B.—At Canton, Miss., Jan. 28, aged 83. Served as Judge of Circuit Court 1878–1886.

Cone, John A.—At Delaware, O., Feb. 12, aged 74. Former probate judge and the second oldest member of the Delaware county bar.

DuBose, Judge Dudley.—At Seattle, Wash., Feb. 5, aged 46. Elected to Georgia legislature when only twenty-two years of age; judge of the district court of the Helena (Mont.) district; general counsel for the North American Trading and Transportation Company at Seattle.

Garnett, Judge Griffin T.—At Poplar Grove, Va., Feb. 3, aged 64. Confederate veteran; served as Commonwealth Attorney fourteen years; judge of Matthews and Middlesex counties; first judge of the thirteenth circuit.

Gibbons, Judge John C.—At Paris, Tex., Jan. 15, aged 76. One of the leading citizens of his city.

Grover, Judge Thomas E.—At Canton, Mass. Feb. 22, aged 67. Formerly district attorney for Norfolk and Plymouth counties; trial justice of the southern Norfolk district court for eighteen years.

Hendry, Judge Robert E.—At Wichita Falls, Tex., Feb. 9, aged 63. Founder of the city of Mineral Wells.

Jennison, Judge William T.—At Pacific Grove, Cal., Feb. 8. Practised in Denver and in Pacific Grove.

Keeler, Judge Samuel C.—In New York City, Feb. 17, aged 70. For eighteen years county judge of Schuyler county, N. Y.

Montony, Judge Richard G.—At Elgin, Ill., Feb. 12, aged 88. State's Attorney in 1856; later chosen judge of the City Court of Elgin and Aurora; practised in Chicago from 1876 until 1885.

Randolph, Judge J. C.—At Marlin, Tex., Feb. 14, aged 52. Former district judge; leading citizen of Coleman, Tex.

Roosa, John P.—At Monticello, N. Y., Feb. 23, aged 48. County Judge and Surrogate of Sullivan county, N. Y.

Shepherd, Justice James E.—At Baltimore, Md., Feb. 5, aged 63. Confederate veteran; member of constitutional convention of North Carolina in 1875; superior court justice; elected Associate Justice of the Supreme Court in 1888; lecturer in law department of the University of North Carolina.

Spensley, Judge William.—At Galena, Ill., Feb. 12. Practised and held many public offices; county judge of Jo Daviess county, 1873–1877.

Stone, Judge William H. R.—At Monroe, Ga., Feb. 3, aged 84.

Womack, Judge Thomas Brown.—At Raleigh, N. C., Feb. 18, aged 55. Practised in Pittsboro, N. C., and later became a judge of the superior court; wrote several volumes of digests of the decisions of the North Carolina Supreme Court and other law books; enjoyed extensive corporation practice.

Wilson, Judge John M.—At Mobile, Ala., Feb. 15, aged 58. For twenty-four years Judge of Probate of Clarke county, Ala.

Necrology—The Bar

Adams, Richard K.—At Milwaukee, Wis., Jan. 27, aged 79. Retired from active practice several years ago.

Atkinson, Louis E., M. D.—At Mifflin, Penn., Feb. 5, aged 69. Civil War veteran; served five consecutive terms in Congress.

Dodge, Thomas H.—At Worcester, Mass., Feb. 12, aged 87. Patent attorney; inventor of the cylinder printing press.

Everett, William.—At Quincy, Mass., Feb. 6, aged 70. Third son of Edward Everett; admitted to bar but never practised; member of Congress in 1893; teacher, author and scholar.

Fisher, George H.—At Brooklyn, N. Y., Feb. 6, aged 77. Served in the Assembly.

Fletcher, George L.—At Chester, Vt., Feb. 18, aged 90. Formerly United States commissioner of the circuit court.

Foster, Solomon.—At Pottsville, Pa., Feb. 12, aged 66. Editor and publisher in Philadelphia; became principal of the School of Law of the International Correspondence Schools; edited "Principles of Law."

Hassett, Edward.—At New York City, Feb. 23, aged 52. Had practised in New York City since 1888.

Hawkins, William M.—At Buffalo, N. Y., Feb. 14, aged 59. Elected to the Assembly in 1884.

Hornbrook, Capt. S. R.—At Evansville, Ind., Feb. 13, aged 77. Vice-Commander of Loyal Legion of Indiana.

Lawrence, Charles Gray.—At St. Paul, Minn. Feb. 3, aged 56.

Lewis, Hon. John S.—At Pine Bluff, Ark., Feb. 15. Leading member of the Humboldt bar.

Moore, John T.—At Manchester, N. H., Feb. 1, aged 85. Practised in Manchester.

Parker, Henry Langdon.—At Worcester, Mass., Jan. 24, aged 77. Formerly trial justice for Middlesex county, Mass.; had served in legislature; a leading lawyer of Worcester.

Parsons, Eli Burton.—At Troy, N. Y., Feb. 17, aged 85. Oldest member of the Bradford county Bar.

Parsons, Hon. William Oscar.—At Charleston, W. Va., Feb. 7, aged 35. One of the best known young lawyers of the state.

Pullen, Stanley T.—At Portland, Me., Feb. 15, aged 67. Former member of the state legislature and surveyor of the port of Portland; purchased the *Portland Press* in 1872; a broker in New York, 1886–1896.

Rainey, John.—At Brooklyn, N. Y., Feb. 17, aged 37. Lawyer and real estate dealer; served two terms in the Assembly.

Raison, Charles L.—At Newport, O., Feb. 16.

Raymond, Freeborn F.—At Florence, Italy, aged 57. Patent lawyer, a former partner of Thomas Clark of Boston.

Riddle, Francis A.—At Chicago, Ill., Jan. 28, aged 63. Civil War veteran; served in Illinois senate 1876–1880.

Rollins, James Wingate.—At West Roxbury, Mass., Feb. 22, aged 82. Practised in Boston for fifty years before his retirement.

Shaw, Oscar F.—At Brooklyn, N. Y., Feb. 10, aged 71. Real estate lawyer.

Shuey, Webster W.—At Dayton, O., Feb. 3, aged 61. Well-known lawyer of Dayton.

Snow, Col. William D.—At Hackensack, N. J., Feb. 11, aged 78. Elected U. S. Senator from Arkansas but never took his seat; oldest member of the Bergen County (N. J.) Bar Association.

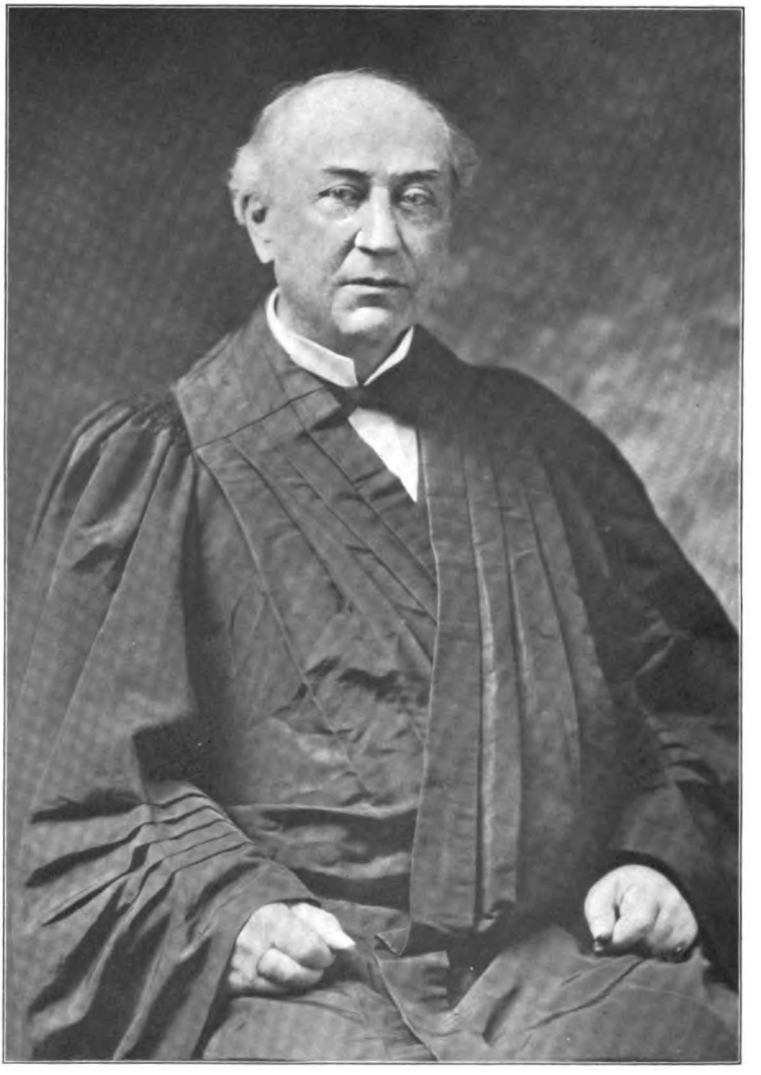
Stark, Joshua.—At Milwaukee, Wis., Feb. 9, aged 82. Born in Brattleboro, Vt.; City Attorney of Milwaukee in 1853; served in the Wisconsin legislature; district attorney for two years; bar examiner, 1885–1897.

Stout, Wesley B.—At Asbury Park, N. J., Feb. 5, aged 49. President of the Monmouth County (N. J.) School Boards Association.

Thomas, B. F.—At Maquoketa, Ia., Feb. 5. Pioneer attorney of Monticello, Minn.; fifty years a resident of Iowa.

Van Gaasbeek, Louis Bevier.—At Kingston, N. Y., Feb. 15, aged 59. Had practised in New York City for fifteen years.

Warren, Samuel D.—At Boston, Mass., Feb. 19, aged 58. Successful paper manufacturer; formerly law partner of Louis D. Brandeis in Boston; president of the trustees of the Boston Museum of Fine Arts, 1901–1907.



THE LATE HON. DAVID JOSIAH BREWER

OF THE SUPREME COURT OF THE UNITED STATES

The Green Bag

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The Late Mr. Justice Brewer

THE sudden death of Mr. Justice Brewer, in the height of his powers, coming at a time when the country was awaiting with eagerness the decision of the United States Supreme Court in the *Standard Oil* and *Tobacco* cases, not only startled the nation, but also brought about a somewhat grave situation, owing to the difficulty of selecting a fit successor to one whose powerful, well-balanced intellect and magnetic personal qualities undoubtedly did much to strengthen the position of the Court in the popular esteem. There can be no doubt in the minds of people who knew his keen sense of duty, and were aware that he might be called upon to write the opinions of the Court in those two cases, that his death was hastened by the labors that they entailed.

Justice Brewer was one of those men whom nature casts in a large mould, and endows with such energy and adaptability that they seem to be capable of achieving eminence in any one of several callings, and to accomplish with little effort what most men can gain only by drudging application. He deliberately chose a judicial career, but at one time he might have been picked out as likely to find his way into the United States Senate or to rise to some other great political office. He was not only a great judge, but a born orator and natural leader. He refused to allow himself to be hemmed in by the bounds of his profession, and as a lecturer and writer occupied a quasi-public position quite outside the sphere of his judicial duties. There was, moreover, something clerical in his make-up, derived from a Bible-nurtured ancestry, and his utterances from the public platform often had a pulpit flavor, and suggested, at times, something of the zeal of the missionary or the austerity of the preacher. His interest in teaching, moreover, led to his accepting a lectureship in the Georgetown University school of law. He probably was as eloquent a man as ever sat on the bench. He was singularly felicitous in diction and straightforward in thinking. His gestures were graceful and always helped to drive in the point he was trying to make. He was indefatigable as a judge. None worked harder than he. It was marvelous that he could accomplish so much.

As a judge Justice Brewer was distinguished by his strong intellectual qualities, his quick perception, his ability for hard work, and his prompt dispatch of business. His ability was evidenced by the approval of three Presidents. President Arthur had appointed him to the United States Circuit Court, Presi-

dent Harrison had promoted him to the Supreme Court, and President Cleveland had selected him as a member of the Venezuelan Boundary Commission. On the supreme bench he was a tower of strength and was regarded as one of the ablest jurists in that body. His decisions were among the most important handed down by the Supreme Court. He was universally regarded as possessing, along with a highly judicial temper, the clear mind and the broad learning of the great judge in questions of constitutional law.

In temperament Justice Brewer was a type of the wholesome Americanism which is schooled by a broadening experience to cast aside provincial limitations and to deal with all matters in a large, broad-minded way.

While a Western man, who had spent much of his life in Kansas, he had many close associations in New England, having a summer home on Lake Champlain, and being a graduate of Yale, of the class of 1856. His temperament might perhaps be described as a mellow blend of the over-ripeness of the East and the under-ripeness of the West. He did not stand for anything extreme, but always exhibited a healthy moderation of views. For this reason, any attempt to class him as an individualist, or as a "strict constructionist," is possibly ill-advised. If he opposed certain tendencies which have lately shown themselves on the bench, it must be admitted that he did not go so far in the opposite direction as to lay himself open to the charge of being hide-bound or re-actionary.

He was an individualist in the sense that he cherished the very moderate view that only serious considerations of public policy can justify any interference with the security of property and the freedom of contract guaranteed by our fundamental law. This was shown, for example, in the separate but concurring opinion he wrote in the *Northern Securities* case, where he maintained that the Sherman act prohibited only contracts or combinations in unreasonable restraint of trade. It was also shown in his decision, as a federal Circuit Judge, that a brewer of Lawrence, Kansas, could not be deprived of the use of his property by the state of Kansas without compensation, a decision which was subsequently reversed (in 1887) by the Supreme Court of the United States, but the reasoning of which he firmly reasserted afterward. But he was not an individualist in the sense of holding that private can override public rights, as was shown by his ruling in the *Debs* case, which established the right of the federal courts to restrain the obstruction of trains engaged in interstate commerce or carrying the mails. Nor was he an individualist in the sense of advocating any diminution of that control which the law exercises over the individual by means of the injunction. He said: "Unless the law is to place itself out of harmony with the advancing civilization, the right to prevent wrong should have an enlarged rather than a restricted scope."

Again, as regards his opposition to centralizing tendencies, he was a "strict constructionist" in that he continally laid stress on the Tenth Amendment, reserving to the states all powers not expressly delegated to the nation, and in that he opposed a federal income tax. But he was not a "strict constructionist" in the sense that he disavowed the position that the states of the American Union form a nation, as distinguished from a mere league of independent states.

Fortunately, however, his successor, Mr. Justice Hughes, is likely to be not less distinguished for moral earnestness, judicial moderation, and intellectual vigor.

The Unification of American Law

By Hannis Taylor

It has been estimated that in the France of the tenth century there were three hundred and sixty different kinds or groups of customary laws. Sometimes a custom prevailed throughout an entire province, at others it was confined to a city or town, or to some small locality. Only with the history of such precedent conditions clearly in view can we grasp the real nature of the marvelous work of codification made possible at last by that abrupt and profound break with the past known as the French Revolution. The necessity for such a work grew out of such a terrible complication of laws as had never existed in any other country, a condition prompting Voltaire to declare that a traveler in France changed horses not oftener than he changed laws. The effort to work a reform through the creation of a uniform code began in the Constituent Assembly with dreamers of the Rousseau school, who claimed that it should be "as simple as nature," so plain that any adult could understand it without extrinsic aid. But the work thus inaugurated never began in earnest until 1800, when Napoleon, as First Consul, appointed Tronchet as the head of a commission which completed the draft in four months. The entire work, finished in about four years, was adopted by the legislature and published in 1804, with all the reports and discussions in the Tribunate and Council of State, showing the original draft and all changes made in it. Thus out of a prolonged and critical process finally emerged the most famous modern code of substantive law, consisting of 2,281 sections, arranged under titles and divided into three books, preceded by a preliminary title. It was the final product of the fusion of the customary laws, wholly excluding all feudal laws and customs, of royal ordinances and laws of the Revolution, and of the vital principles of Roman private law stated with the greatest possible clearness and brevity.

On January 1, 1900, just a century after Tronchet and his colleagues began to draft the *Code Napoléon*, was officially promulgated a new general code for the whole German Empire. We should be able to look with confidence for an outline of that code to the world-famous jurist, Dr. Rudolph Sohm, who was the leading member of the commission that made it. From him we learn that the re-establishment of the German Empire was necessary to the re-establishment of German law; that that law, as embodied in the Civil Code, "is compiled principally from the various provincial codes before mentioned, and notably from those of Prussia and Saxony." He had told us long before that "it would be a mistake to suppose that the framers of these codes (the Prussian *Landrecht*, etc.) were suddenly inspired with some new and original wisdom. The codes were of course constructed on the basis of the law as it previously existed. Inasmuch, then, as prior to these codes (*i. e.*, from the reception of Roman law in the sixteenth century down to the end of the eighteenth) the law of the Pandects had subsidiary force as law throughout the whole of Germany, these codes must, of course, have been framed more par-

ticularly on the basis of the Pandects. The Prussian *Landrecht*, the Saxon and Austrian civil codes, contain a large number of legal rules which are directly borrowed from the law of the Pandects." While the *Landesrecht*, or "Provincial Law," is expressly annulled, an inconsiderable number of its enactments remain in force, which are, strictly speaking, "agrarian," because designed for the farmer, for agricultural conditions generally, as well as for the protection of vested rights. As the farmer and the merchant are and have been the two great powers in German history, the industrial and agrarian laws that survive may well be compared to the *jus civile*, while the laws of the Civil Code may be said to resemble the Roman *jus gentium*. The merchant has not inaptly been called "the father of the Civil Code of Germany" because, as commercial intercourse recognizes no national boundaries, he was naturally the first to desire a homogeneous system of civil rights. It was the mercantile element in the German cities that eventually crushed the spirit of feudalism; it was the mercantile element that opened the way for an Imperial Code by first creating a uniform system of commercial law. The first modern effort to give unity to law in Germany was made, as a prelude to the movement for natural unity, by the German Bills of Exchange Law (*Wechselordnung*, 1848–1850), while a general Commercial Code (*Gemeines Handelsgesetzbuch*), enacted in various states between 1862 and 1866, was re-enacted for the new Empire in 1871.

In juxtaposition with the foregoing statement as to the influence of commerce upon the unity of law in Germany should be set the fact that the first step towards the making of the existing Constitution of the United States was taken in January, 1786, when Virginia issued a call for a convention of states to meet at Annapolis, in order to consider the establishment of a uniform commercial system. When Maryland prompted Virginia to take that step, by proposing that commissioners from all the states should be invited to meet and regulate the restrictions on commerce for the whole, Madison saw at once the advantage of "a politico-commercial commission" for the continent. The outcome of the meeting at Annapolis was the call for a convention "to meet at Philadelphia on the second Monday of the next May to consider the situation of the United States." All the world now knows that three years and a half prior to the meeting of the Annapolis convention a prosperous merchant of Philadelphia, Pelatiah Webster, who began as early as 1776 to write on the currency, and in 1779 commenced the publication of a series of "Essays on Free Trade and Finance"—put forth, on February 16, 1783, *as his invention*, the entirely new scheme of federal government embodied in the existing Constitution of the United States. The elaborate and finished essay in which that epoch-making discovery was announced is just as authentic as the Constitution itself. Just as it may be said that the merchant was "the father of the Civil Code of Germany," so it may be said that a merchant was "the father of the Constitution of the United States." In the plan of the great architect large space is given to the influence of the merchant. "Merchants," he said, "must from the nature of their business certainly understand the interests and resources of their country the best of any men in it. . . . I therefore humbly propose, if the merchants in the several states are disposed to send delegates from their body, to meet and attend the sitting of Congress, that they shall be permitted to form a chamber of com-

merce, and their advice to Congress be demanded and admitted concerning all bills before Congress, *as far as the same may effect the trade of the states*. . . . Besides the benefits which Congress may receive from the institution, a chamber of commerce, composed of members from all trading towns in the states, if properly instituted and conducted, will prove very many, I might almost say, innumerable advantages of singular utility to all the states. It will give dignity, *uniformity* and safety to our trade." That recommendation was the only fundamental part of Pelatiah Webster's plan which the Convention of 1787 failed to adopt. But a century later his wisdom and foresight in that respect were fully vindicated by the creation of the Department of Commerce and Labor, which is now performing in a general way the functions which were to have been performed by the Chamber of Commerce outlined in his original plan. Thus it appears that the first modern effort to give unity to law in Germany was made by the merchant class as a prelude to the movement for national unity; thus it appears that the Annapolis convention called to establish a uniform commercial system really forced the meeting of the Federal Convention of 1787; thus it appears that the "wholly novel theory" of federal government which was embodied in the work of that immortal assembly was the invention of a Philadelphia merchant whose plan rested on two fundamental concepts—a uniform and self-executing system of federal taxation, and a uniform commercial system that would "give dignity, *uniformity* and safety to our trade."

While Pelatiah Webster's dream of a uniform system of federal taxation, enforceable by a self-sustaining system of federal government, has been fully realized, his dream of a uniform commercial system, resting on the "uniformity" of law, has been thwarted by the existence of independent sovereignties who stand to each other, so far as their domestic codes are concerned, almost like foreign nations. Out of that condition of things has arisen a "Conflict of Laws" whose embarrassments are endless. Against those embarrassments the commercial elements of this country are now struggling as never before, because as the commercial relations of the states become more intimate and more complex, the disadvantages incident to the conflict deepen in intensity. Why such embarrassments are not actually greater than they are it is hard to understand when we consider the number of law-making bodies and the number of supreme tribunals in active operation. No country in the world has ever been inundated by such floods of law, statutory and judge-made, as are now streaming from the forty-five state sovereignties and the one federal sovereignty by which we are governed. Nothing could be more appalling than the sight presented by an American law library, necessarily a vast one, containing all the statutory and judge-made law of those sovereignties as it now exists. In comparison the books containing the statutory and judge-made law of England are a mere handful. The late and lamented Judge W. W. Howe of New Orleans called attention not long ago to the fact that, comparing the size of the pages, the forty-sixth volume of Louisiana Annual Reports for the year 1894 contains as much matter as the entire Digest or Pandects, into which was condensed the judge-made law evolved at Rome during a thousand years. Nothing can so illustrate the gravity of our present condition as that contrast. It is generally understood that the first cause of a tendency to codify Roman law and make it more

accessible is to be found in the profusion with which Diocletian and his successors had used their legislative power, flooding the Empire with a mass of ordinances which few persons could procure or master. Certainly we now stand in a like situation. The noblest effort so far made to bring order out of the incoherent mass is that embodied in the monumental work known as the American and English Encyclopædia of Law, whose value to the legal profession can hardly be estimated. In its volumes the American lawyer was permitted to look upon the result of the first serious attempt to reduce, systematize and refine the essence of our substantive law, state and federal, carried as far perhaps as any such effort could have been carried at the outset. In it we have before us, for the first time in the history of English law, the fruits of centuries of legal development in the old land, supplemented by the wider experiences of the new. The success of that great undertaking has no doubt prompted the project of certain jurists who are now submitting to the American Bar a most imposing scheme, to be based on a million-dollar foundation, whose goal is really nothing more than a new American and English Encyclopædia of law in twenty volumes. It is entirely inaccurate and misleading to speak of such a digest of judge-made law as "The American *Corpus Juris*." The *Corpus Juris* of Rome was made up, as everybody knows, of the Code, published in 529; of the Digest or Pandects, published in 533; and of the Institutes, published before the close of that year. It was specially provided by statute that they, the Digest and the Code, should be regarded as integral parts of one great piece of legislation to be known as the *Corpus Juris Civilis*. That term cannot therefore be applied with accuracy or propriety to a digest without statutory authority corresponding with only one of its three elements,—the Pandects. What we need is not a new American Encyclopædia or Pandects of judge-made law, with no statutory authority,—a compilation "the big law publishing firms" can construct with far more skill and success than any inexperienced foundation,—but a code, *a typical code of American state law*, which each state can voluntarily adopt as its own with the least change possible. Statesmen of an extreme school, who spoke a few years ago of the states as inconvenient appendages to the Union, are learning from their experience in national administration that they are blessings in disguise. The more we expand, the more we are nationalized, the plainer it becomes that the national government cannot remain efficient if it is overburdened with work that belongs of right to the states. As the states must abide so long as the Union abides, the nation must learn as it grows older to draw all possible benefits from the two systems of law, while minimizing the inconveniences and conflicts necessarily arising out of the existence of two systems. Such inconveniences and conflicts have greatly multiplied recently as rapid intercommunication has drawn the states nearer together than ever before, and as the startling growth of governmental power, state and federal, has intruded itself, as never before, into the private life of the citizen, following as it does the apothecary to his laboratory, the dairyman to his churn, the butcher to his shambles and the baker to his oven. The widening circle of governmental power has intensified the difficulties afflicting both commerce and labor by reason, first, of conflicting state codes; second, by reason of the lack of uniformity between state and federal laws touching the same subject-matter. The result has been an

outcry from many interests which, during the last twenty years, has set in motion four great agencies which are now working together with perfect harmony and efficiency in the effort to unify American law.

First among these agencies stands the American Bar Association, which for years has been doing its utmost to bring about unity in state legislation upon subjects of common interest, through its standing committee upon "Uniform State Laws." In order to render that branch of its work more effective, an affiliated association was created in 1890 by the New York Legislature by an act authorizing the appointment of "Commissioners for the Promotion of Uniformity of Legislation in the United States," whose by-laws provide that "The members of the Committee on Uniform State Laws of the American Bar Association shall be privileged to attend the Annual Conference of Commissioners and participate in the discussion of the Conference, but without the right to vote." These affiliated associations thus yoked together have already accomplished very great things. Nineteen national conferences of Commissioners from different states and territories have been held, there being now forty-eight states and territories, including the District of Columbia and the Philippine Islands, represented in the conference. The *Uniform Negotiable Instruments Act* (approved by the Conference in 1896) has been adopted in thirty-eight states and territories. The *Uniform Warehouse Receipts Act* (approved by the Conference in 1906) has been adopted in eighteen states. The *Uniform Sales Act* (approved by the Conference in 1906) has been adopted in six states. The *Uniform Stock Transfer Act*, approved at the conference of 1909, is now being presented to the several state legislatures. The *Uniform Bills of Lading Act* was adopted at the conference in 1909, after the most careful criticism by the large interests affected. The Conference still has under consideration the draft of a *Uniform Partnership Act* and also the draft of a *Uniform Incorporation Act*. All of these acts have been prepared in response to the pressing need of the business world to remove as far as possible the uncertainty and vexation arising from the widely differing laws of the states and territories on matters of daily importance. So far as it has progressed the work of this organization is admirable, and it is growing in importance. Its president, Mr. Amasa M. Eaton, opened a recent address with the statement that "The subject of uniform state legislation has become of greater importance than ever during the last year and is in the air all over the United States."

While the work of unifying state legislation was thus advancing under the direction of the American Bar Association and its worthy yokefellow, a new force appeared in the person of the National Civic Federation, headed by Mr. Seth Low as president and Mr. Samuel Gompers as vice-president. Very recently that body has held a national conference at Washington, "after consultation with other bodies interested in promoting uniform legislation by the states of the Union." In its last program a quotation is made from a speech of the Hon. Elihu Root, who has said: "Under the conditions which now exist, no state can live untc itself alone and regulate its affairs with sole reference to its own treasury, its own convenience, its own special interests. Every state is bound to frame its legislation and its administration with reference not only to its own social affairs but with reference to the effect upon all its sister states"; and

from a speech of Mr. Samuel Gompers, who has said: "One or two things will eventually come: either Federal Government, as a matter of industrial and commercial necessity, will exercise the powers which constitutionally belong to the states, or, if that is to be avoided, the states must move toward acting with the greater degree of uniformity to the successful and lawful conduct of industry and commerce." The declaration is then made that "The entire nation appreciates the movement for the Conservation of National Resources inaugurated by President Roosevelt. But this great project cannot be carried forward to its perfect consummation unless the states adopt with considerable uniformity laws upon the subjects of forestry, water power, reclamation of lands by irrigation, etc. . . . During the National Conference on Taxation, under the auspices of the National Civic Federation at Buffalo in 1901, it became apparent that greater uniformity of state laws upon the subject of taxation was most desirable." Thus the horizon has been widened by the National Civic Federation whose program has swept into the struggle for unity in state legislation such subjects as public accounting, anti-trust and railway regulation, state banking, life and fire insurance, fire marshal laws, pure food laws, labor laws, commercial laws, vital statistics, marriage and divorce, laws relating to women and the custody of their children, and laws regulating the public health and good roads. That irresistible trend towards unity in state laws, which is widening and deepening every day under the impulse of commercial necessity, has suddenly brought into being still another agency destined to be more potent, perhaps, than all others in the precipitating the final result. The creation of the annual conference of the chief executives of all the states, known already as "The House of Governors," was little less than an inspiration. This new institution is destined to act as a hyphen or buckle to unite the masses struggling for the unification of American law with the state legislatures through whose agency it must be brought about, if at all. Each annual conference will put each governor abreast of the movement; after each meeting he will be ready to explain to the legislature of his state how much has been accomplished and how much remains to be done with its co-operation. Thus it appears that the machinery is all complete, and the public mind thoroughly aroused by the pressure of a necessity which grows more urgent every day. All that is lacking is a more comprehensive and scientific understanding of the end to be finally attained. It is perfectly natural that such an understanding did not exist from the outset. Great movements always grow as they advance; bit by bit the new land has always to be won. Theodosius laid down without executing the comprehensive plan of codification which Justinian, after the lapse of a century, finally carried out. When the members of the Annapolis convention met in September, 1786, simply for the regulation of the restrictions on interstate commerce, they did not understand that the only practical outcome of their meeting was to be the calling of the famous convention at Philadelphia, which in the next year formulated the existing Constitution of the United States.

The time has arrived when the American people must awake to the fact that its greatest and most pressing need is a comprehensive and typical code of state law, embracing all the subjects of legislation common to all, which each state may enact as its own with as little

change as possible; that, without a recognized standard, the unification of American law is impossible. Nothing could be more fortunate than the gradual and unconscious approach which has so far been made towards such an ideal. The fact that thirty-eight states and territories have been able to adopt a *Uniform Negotiable Instruments Act;* the fact that eighteen states and territories have been able to adopt a *Uniform Warehouse Receipts Act*, puts the fact beyond question that all may be induced gradually to adopt a scientifically constructed state code embracing every other subject in which they have a common interest. Savigny made a revelation when he said that law is the natural outcome of the consciousness of the people like their social history of their language; that it is part and parcel of the national life. By the operation of natural forces the states are rapidly moving towards the inevitable uniformity through the ceaseless pressure of commercial necessity. That process needs only to be hastened and moulded by artificial means. When we add our experience to that of England we have had, counting from the Year Books, six centuries of judge-made law, the inevitable prelude to scientific legislation. It is a truism with jurists of the historical school that remedial equity is everywhere older than remedial legislation. With the reign of Alexander Severus the power of growth in Roman judge-made law seems to have been exhausted. From that time the history of Roman law is the history of the Imperial constitutions and of the attempts made to subject the unwieldy mass to codification. Thus it was that the departing spirit of the creative epoch of Roman law infused itself into the voluminous rescripts of Diocletian and his successors. The creative epoch of English and American judge-made law has probably closed, and the result is embodied in a tangled mass of undigested precedents at which Roman jurists would have stood aghast. The first step to be taken in order to extricate ourselves from such a condition involves the construction of a typical and scientific code of state law, substantive and adjective, condensing within a reasonably narrow compass the fruits of our entire legal development. Such fruits should be so formulated as to embrace all the leading subjects in which the states have a common interest. The experience we have had already in the making of state codes should greatly facilitate the work which should be one rather of selection than creation. The "House of Governors" can easily arrange an equitable scheme by which all the states may contribute, upon the basis of population, to the expense of maintaining an interstate code commission, to consist of jurists of the highest order. Such jurists should be at once scientific and practical men of the type of David Dudley Field, William M. Evarts and John C. Spooner. As the *Code Napoléon* was completed from the first draft to the finish in four years, certainly that time should suffice for this undertaking. In Germany or France such a work would be executed without the slightest hesitation. After the finished product becomes accessible the state legislatures would no doubt adopt it, under the pressure of public opinion, by the normal process through which state codes are now adopted or revised at stated intervals. After a recognized standard has once been formulated, its rapid acceptance would be inevitable. The expense of the Interstate Code Commission should be borne of course by the states themselves; their dignity and independence forbid an appeal for aid to any individual or institution for such a purpose.

Before such an Interstate Code Commission can be organized Congress should begin to wipe out the confusion now existing in our federal statutes, little less than a national disgrace, by the creation of a Federal Code Commission to be charged with the duty of making a really scientific code of federal law, substantive and adjective. The proposal recently made by the President for a commission to prepare a code of adjective law or procedure is too narrow; the work of such a commission should embrace also the substantive law which is in sore need of careful revision. The two entirely independent commissions should promote the common object by working side by side, at Washington, in comfortable quarters which Congress should provide. In that way they would be able to devise harmonious regulations as to subjects upon which both state and nation must legislate, defining more clearly at the same time where state power should end and where federal power should begin. One-half of the conflicts that now arise are caused by the absence of such legislation. Above all two such bodies working independently and yet in concert should be able to formulate a simple system of legal procedure, embracing the enforcement of both legal and equitable rights, for the common use of all tribunals, state and federal. That part of the work alone would save millions annually to the nation in the expenses and delays of litigation. Rich as we are, we cannot afford to prolong existing systems, reeking as they are with unnecessary and oppressive expenditures, apart from the constant miscarriages of justice. No more inviting field for real fame ever opened before a dominating personality equal to the opportunity. Certainly in President Taft we have a great jurist of wide experience who should find in the unification of American law a task more congenial than any in which he is now engaged. Tariffs come and tariffs go, but a great code goes on forever. The President should supply the driving power to the existing machinery. On the one hand, he should exhort "The House of Governors" to provide the means for the organization of the Interstate Code Commission, while on the other he should urge Congress to delay no longer the creation of a Federal Code Commission to work in harmony with it. Of both Commissions the President might well be the *ex officio* chairman. He should be the harmonizing ligament between them. If it be urged that he has no time to give even to the initiation of such an undertaking, it may be answered that he is not a more busy man than Napoleon, who presided in person over fifty-seven of the one hundred and two sessions which the Council of State devoted to a critical examination of each section of the draft of the *Code Napoléon*. From Thibaudeau, who was present, we learn that "he regulated and directed the discussion, guided and animated the debate." Napoleon made no mistake when he prophesied that after all his battles are forgotten he will go down to a very late posterity "with his code in his hand."

Washington, D. C.

Divorce Legislation

By Walter George Smith

President of the Conference of Commissioners on Uniform State Laws

THE action of the recent conference called by the National Civic Federation, which held its sessions in Washington from January 17 to 19, 1910, in giving a unanimous approval to the Uniform Divorce Act, must have great weight in influencing public opinion in favor of uniform divorce legislation. The fact that the governors of more than thirty states and territories were assembled in convention during the sessions of this conference and received personally the resolutions adopted by it, recommending various commercial acts relative to negotiable instruments, sales of goods, warehouse receipts, bills of lading, and other subjects, will advance the cause of uniformity in commercial matters appreciably, for, as was justly said by Governor Hughes in his address to his fellow Governors, in order to make the cause of uniformity among the different states successful, the movement in each state must have the moral weight of each Governor's approval back of it.

So far as business and commercial matters are concerned, it seems as if success were within sight. Different conditions surround the Uniform Divorce Act and the whole subject of divorce. While it is true that the states of Delaware, New Jersey and Wisconsin have adopted substantially all of the cardinal principles of the Uniform Divorce Act and have embodied them in new statutes, there is a strong underlying opposition which develops whenever the act, adapted to the form of the statutes of any of the states, is presented for legislative consideration. Even in the legislature of Pennsylvania, on whose initiative the Divorce Congress was assembled and which in the act creating the commission distinctly stated "that the constantly increasing number of divorces in the United States has been recognized as an evil of threatening magnitude fraught with serious consequences to the well-being of our institutions and civilization," a determined opposition was developed to the adoption of a uniform act. Either in consequence of this, or of indifference to the subject, the bill has failed to be voted on out of committee for two entire sessions, and this notwithstanding the fact that it was approved by representatives of practically all Christian denominations in the state and by many of the leading newspapers.

It is not to be believed that the language of the legislature of Pennsylvania, speaking of divorce as an evil, does not represent the sentiment of the vastly preponderating majority of the good people of that commonwealth as it does of those of most of the states; but while, with the exception of a very few radical individuals, divorce is admitted to be an evil, when it comes to the suppressing of that evil, even by so sane, conservative and moderate a measure as the uniform divorce law, alarm is taken and opposition develops which manifests its power by postponement and quiet suppression in committee.

There is no phenomenon of modern times more interesting than the rapidly accelerating rate of divorce in the United States. Without dwelling upon the statistics of the recent reports of the Census Bureau, it is sufficient to say that there is now one divorce for about every twelve marriages, and the rate has been increasing year by year during the past four years. There is no principle of political economy more obvious than that which teaches that the laws enacted and carried into effect by a representative government must respond to popular sentiment. Otherwise, though they may remain upon the statute book, they become obsolete.

There have been divorce laws in almost all of the states of the Union since the adoption of the federal Constitution, and during the colonial period divorces were by no means unknown, especially in the New England colonies. The changed attitude towards marriage, brought into the religious belief of many European peoples by the leaders of the religious revolt of the sixteenth century, bore fruit in divorce legislation. Since the opinion of the leaders of Puritan thought did not differ essentially from that of Milton, that marriage was entirely devoid of sacramental character, divorce seemed under certain conditions entirely reasonable.

There is no evidence, however, that there was at any time any element in society of sufficient respectability to attract notice that advocated divorce on any ground excepting such as made the condition of the injured party intolerable. Such teaching as that the marriage contract differs in no respect from any other contract and the status may be terminated at the will of either of the parties whenever the burden becomes irksome, finds no support in the early history of divorce in the United States. While Protestant Christianity had given up the sacramental view of marriage, it retained in practice the same respect, or rather reverence, for marriage as all bodies of Christians had always entertained. And so the principle, which is fundamental in Christian society and distinguishes it from the highest civilization of Rome, that marriage is monogamous and life-long, has been practically accepted by all sociologists and legislators up to very recent times,—and this notwithstanding the fact that Protestant Christianity interpreted the teachings of our Saviour so as to permit divorce in intolerable cases, such as adultery, cruelty and desertion, which were gradually extended to conviction of crime and other causes that need not be enumerated.

Within a generation, however, this portentous revolution in the attitude of men and women towards the most important status of social life has been gathering force, and probably for the first time since Christianity came into general acceptance among civilized peoples, a school of sociological teachers has had the courage to come out frankly and accept the logical consequences of the proposition so often asserted in the past, that marriage is a civil contract only. While admitting its accidents are somewhat peculiar, none the less, according to this school, there is no philosophical reason why it should not be treated like any other contract, and when either party commits a breach of its conditions it should be dissolved. Such teaching has met acceptance and appears to be gaining ground, notwithstanding that many of its advocates have had the candor to admit that in order to sustain it the sanction of Christianity in any of its forms must be cast aside.

It is well known in the history of human thought that whenever a tendency towards evil develops, promptly there appear writers and speakers who put themselves at the head of the new school, which asserts that, far from being evil, the new teaching is for the betterment of mankind and its leaders are the apostles of a higher life. Another element that has had great influence in producing lax divorce legislation has been a kindly human feeling, extended especially towards women as the weaker sex, that their lives ought not to be wrecked by an unhappy marriage; that they should be relieved from the consequences, even though brought about by their own intelligent act, and allowed another chance for happiness in this world.

The lack of reverence for tradition and the loosening of the ties of dogmatic faith are particularly evident in the American people, and, with an exceeding self-confidence and certainty that their point of view is right, they cheerfully face the consequences of a social revolution,—probably more far reaching than any that could be brought about by other causes, no matter what they might be. For, if not checked, the tendency towards a freer and freer system of divorce must result in the destruction of the family, upon which, it is a truism to say, the state has been built. Yet it is insisted by sober-minded men that the average of morality in the relations of the sexes is far higher in the United States than in countries where no divorce laws prevail, forgetting, as they do, that morality from the religious and truly philosophical point of view does not depend upon the conventions of society or the legislation of the state, and that the same act done under color of law, where divorce is permitted, is not more moral than where forbidden in a country where no divorce law obtains.

It is not to be believed, however, that when the public mind has been educated to a full appreciation of its consequences they will accept the philosophy now being so industriously taught in many of our higher institutions of learning both to young men and young women, that there is no ethical or religious rule whereby the relations of man and wife are to be governed other than those contained in statutory enactments. Dogmatic faith, it is true, has largely waned, but the impetus given by Christianity has not lost its force. Unconsciously to themselves, many men and women are leading moral lives thinking that they do so because of their own innate sense of honor and justice, who really are the heirs of a Christian heritage. There are not wanting evidences that there is a gradual awakening of the public conscience to the enormous consequences that will follow from a failure to correct our present discordant divorce laws, and, as has been frequently said, all right thinking men and women, excepting that small school who would make marriage a mere matter of agreement, to be dissolved at the option of either party and without the necessity of the consent of the state either to its inception or to its dissolution, may unite in advocating the adoption of the uniform divorce law in all the states where divorce is permitted. Such scandalous situations as were developed in the famous case of *Haddock* v. *Haddock*, where a man was recognized as being lawfully married to one wife in Connecticut and another in New York, will be ended by the adoption of the simple jurisdictional clauses of that act, and the conscience of each state will be left to deal with the question

whether divorce shall be permitted at all within its borders and for its own citizens, and, if so, what causes shall be deemed sufficient.

A brief recapitulation of the essential points of the uniform divorce act will be appropriate:—

All suits for divorce shall be brought only in the state where the plaintiff or the defendant had a *bona fide* residence.

When courts are given cognizance of suits where the plaintiff was domiciled in a foreign jurisdiction at the time the cause of complaint arose, relief should not be given, unless the cause of divorce was recognized in such foreign domicil. The same rule applies when the defendant was domiciled in a foreign jurisdiction.

Where jurisdiction for absolute divorce depends upon the residence of the plaintiff or of the defendant, not less than two years' residence should be required where such plaintiff or defendant has changed his or her domicil since the cause of divorce arose.

The injured party, husband or wife, should have the option to apply either for an absolute divorce, or for a divorce from bed and board.

The causes for divorce should be restricted to offenses of so serious a character as to defeat the objects of the marital relation. They should never be left to the discretion of the court.

Causes for annulment of marriage and for divorce, both absolute and legal separation, are grouped into three classes. Those for annulment of the marriage are such as are usually recognized in all civilized communities. Causes for absolute divorce represent the prevailing sentiment in most of the states of the Union. They are as follows: Adultery, bigamy, conviction of crime in certain classes of cases, intolerable cruelty, willful desertion for two years, habitual drunkenness; and the same causes are ground for legal separation with the addition of hopeless insanity of the husband at the suit of the wife. This paragraph must be read in the light of the resolution, however, that the causes herein enumerated are those recognized in the great majority of the states, and there was no desire on the part of the Divorce Congress that any state should enlarge its causes of divorce where they were less than those enumerated, and in such states where these causes were recognized they would prefer to see them reduced rather than increased.

When conviction of crime is made a cause, it must be followed by continuous imprisonment for at least two years.

Absolute divorces should not be granted for insanity arising after marriage.

Desertion, when a cause, should never be recognized unless persisted in for at least two years.

The defendant should have full opportunity, by notice brought home to him, to have his day in court if his residence is known or can be ascertained.

Any one named as a co-respondent should be given an opportunity to intervene.

Hearings and trials should always be before the court and not before any delegated representative of it, and in all uncontested cases, and in any other where the court may deem it proper, a disinterested attorney should be assigned to defend the case.

A decree should not be granted unless the cause is shown by affirmative proof, aside from any admissions on the part of the respondent.

A decree dissolving the marriage

should not become operative until the lapse of a reasonable time after hearing or trial upon the merits of the case.

In no case should the children born during coverture be bastardized, excepting in the case of bigamous marriages or in the usual exception of impossibility of access.

A divorce obtained by an inhabitant of a state, in another state or country to which he has gone for the purpose of obtaining it, or for a cause which would not authorize a divorce by the law of the state of domicil, should have no effect therein.

Fraud or collusion in obtaining or attempting to obtain a divorce should be made statutory crime by the criminal code.

It is not to be believed that the adoption of this act in all the states (and as will be noted none of its provisions are new but all are drawn in part from statutes of some of the states) will stop divorce or even materially reduce the number of decrees, but it will have a tendency to awaken the public mind to the fact that the state has a responsibility as well as the individual, and that it is shirked unless there is a thorough sifting, as would be the case in any other law suit, of the facts and circumstances prior to the granting of a decree. If, therefore, the uniform divorce law is accepted, it will be the first step in divorce reform, and as such may properly be supported even by those whose religious or philosophical views require them to oppose absolute divorce for any cause.

Philadelphia, Pa.

Is Lying Increasing?

By H. B. Bradbury, of the New York Bar

THE only safe way to call a man a liar is to slap him on the back and laugh like h— when you do it," quoth a Virginia friend of mine. The stigma which this epithet carries with it is hotly resented in portions of the country other than that south of Mason and Dixon's Line. But whether the resentment takes the form of guns or fists, depends upon local custom.

That lying has been abhorred and liars hated and despised from time immemorial, the history and literature of all ages record.

A liar is a fool, Lord Chesterfield assured his son, in effect; which comes nearer to being sound doctrine than the assertion of the knowing one that "a man must be mighty smart to be a *good* liar."

The inspired Book directly and indirectly inveighs against lying as a sin more often, I believe, than it does against any other infraction of the moral law. The commandment, "Thou shalt not bear false witness against thy neighbor," is repeated twice in the Old Testament[1]; and the Master makes it universal in its application by omitting the words, "thy neighbor," and declaring simply, "Thou shalt not bear false witness."[2]

Scarcely any of the inspired writers

[1] Exodus, 20:16; Deuteronomy, 5:20.
[2] Matthew, 19:18.

failed to take a fling at lying and liars, or to commend the virtue of truthfulness. Let us take a few at random:—

They that observe lying vanities forsake their own mercy.[3]

Let the lying lips be put to silence; which speak grievous things proudly and contemptuously against the righteous.[4]

These six things doth the Lord hate; yea, seven are an abomination unto him: A proud look, a lying tongue, and hands that shed innocent blood, an heart that deviseth wicked imaginations, feet that be swift in running to mischief, a false witness that speaketh lies, and he that soweth discord among his brethren.[5]

Trust ye not in lying words.[6]

He that speaketh truth showeth forth righteousness; but a false witness deceit.[7]

Wherefore, putting away lying, speak every man truth with his neighbor.[8]

Happy art thou, O Israel: who is like unto thee, O people saved by the Lord, the shield of thy help, and who is the sword of thine enemies shall be found liars unto thee; and thou shalt tread upon their high places.[9]

The lip of truth shall be established forever; but a lying tongue is but for a moment.[10]

For our transgressions are multiplied before thee, and our sins testify against us; for our transgressions are with us; and as for our iniquities, we know them; In transgressing and lying against the Lord, speaking oppression and revolt, conceiving and uttering from the heart words of falsehood.[11]

I hate and abhor lying.[12]

One of themselves, even a prophet of their own, said The Cretians are always liars, evil beasts, show their bellies.[13]

But the fearful, and the unbelieving, and the abominable, and murderers, and whoremongers, and sorcerers, and idolaters, *and all liars*, shall have their part in the lake which burneth with fire and brimstone; which is the second death.[14]

With the need for all of this attention to a prevalent sin, it is no wonder David in his haste cried:

All men are liars.[15]

Nor is it a wonder he uttered the prayer:

Remove from me the way of lying.[16]

Then we have the example of the woman who tried to steal another woman's baby by lying and declaring it was her own. Her mendacity was discovered by Solomon's little "bluff," in ordering the babe to be severed in twain and a half given to each claimant. The real mother objected and consented that the child be given to the false mother rather than have it killed. But the false mother consenting to the arrangement, Solomon knew she was lying about her motherhood of the babe.

The story, somewhat less authentic, from the Apocrypha, about the two priests who testified glibly enough as to certain alleged wrong doings of the beautiful Susanna, wife of Joachim, in her Babylonian garden, is another example. The priests demanded that she consent to certain proposals of theirs and "she consented *not*." Then they denounced her. They charged her with improper conduct with another man. But after she had been convicted on the false testimony of the priests and was about to be executed, Daniel demanded a new trial and ordered the witnesses separated. The stories were again as glibly told, up to a certain point. Then Daniel asked:—

"Under which tree in the garden did it happen?"

"Under the holm tree."

The other witness was then called without giving the two a chance for consultation. The second repeated the story and as he was about to depart Daniel said:—

"Stay! Under which tree did you see them together?"

He hesitated, and then replied:—

"Under the palm tree" (in an opposite side of the garden).

"Thou hast lied," said Daniel.

[3] Jonah, 2:8.
[4] Psalms, 31:18.
[5] Proverbs, 6:16 to 19.
[6] Jeremiah, 7:4.
[7] Proverbs, 12:17.
[8] Ephesians, 4:25.
[9] Deuteronomy, 33:29.
[10] Proverbs, 12:19.
[11] Isaiah, 59:12 to 13.
[12] Psalms, 119:163.
[13] Epistle of Paul to Titus, 1:12.
[14] Revelation, 21:8.
[15] Psalms, 116:11.
[16] Psalms, 119:29.

So the two priests were put to death instead of the beautiful Susanna, whose virtue was vindicated and whose life was saved by a sharp cross-examiner. Modern lawyers are not always as successful as Daniel was in detecting falsehood by cross-examination.

With all this evidence of the prevalence of lying in the ancient world we perhaps may wonder if the frequent declarations, of judges and others, that perjury is prevalent to a greater extent than ever before, do not merely indicate the ever-present inclination to exalt ancient and decry modern times.

Perjury has always been considered a heinous crime. For one reason, because it is so difficult to detect. Another is that the consequences flowing from it are so serious, and, in criminal cases, may, without exaggeration, be termed horrible. In civil cases the whole power of the state may be called upon to enforce a judgment in favor of one man against the property of another, which decree rests upon a lie for its validity.

Nothing more horrible can be conceived than sending to the electric chair an entirely innocent man, whose conviction has been brought about by false testimony. It is truly better that a thousand guilty murderers should escape punishment than that one innocent man should be judicially murdered; and it is a matter of record that innocent men have been thus unfortunate.

The considerations are obvious therefore, that have led lawmakers, in all times of which we have any records, to prescribe serious punishment for the crime of false swearing. It has frequently been made a capital offense. In spite of the constitutional inhibition against cruel and unusual punishments, some of the Southern states found it necessary to pass stringent laws on this subject, which were applicable to negroes and mulattoes only (not confined to slaves). Doubtless they were not protected by the Constitution in this regard. By chapter 92, of the laws of 1822, of Mississippi, it was provided (§59), that if "any negro or mulatto" shall "have given any false testimony, every such offender shall, without further trial, be ordered by the said court, to have one ear nailed to a pillory, and there to stand for the space of one hour, and then the said ear to be cut off, and thereafter the other ear nailed in like manner, and cut off at the expiration of one other hour, and moreover to receive thirty-nine lashes on his or her bare back, well laid on, at the public whipping post, *or such other punishment as the court shall think proper, not extending to life or limb.*"

Such a statute sounds like a product of the dark ages in this day. So do the accounts of the burning of "witches" in New England, later than 1822.

The statutes of the various states as well as the acts of Congress are still very severe in their punishment of perjury. But whether there is more or less false swearing now than there has been in any other era, it is impossible to tell, because there are no statistics on the subject, and can be none, which would be authentic. Two well-advertised politicians in New York, who were rivals for the same office, passed the lie direct on several occasions. One of these men at least, as a judge, has been known to deplore the prevalence of perjury in the courts. Falsehood must lie between these men somewhere. But we cannot classify them or their utterances as being truthful or untruthful. Therefore, for the same reason, we are unable to determine the sum total of perjury per thousand of inhabitants in our own area, any more than we are able to discover the same percentage in any other age. So long

as falsehood hath a "goodly outside" it will be found attractive, and our experience is that attractive things are rarely entirely abolished.

Whether, as some jurists declare, women are more prone to false swearing than men, will probably also remain a mooted question. To paraphrase the Master, let the man who is free from lying make this charge against woman.

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The Right to Change One's Name

ONE of the most entertaining legal opinions we have ever encountered was that written by Mr. Justice Irving G. Vann of the New York Court of Appeals in the case of *Smith* v. *United States Casualty Company*, decided Feb. 8, 1910. This opinion, which was not less able than interesting, was announced in an insurance case, the court upholding without a dissenting voice the common law right of a man to change his name, and his right to recover a policy of insurance issued to him under an assumed name:—

"The history of literature and art furnishes many examples of men who abandoned the names of their youth and chose the one made illustrious by their writings or paintings. Melanchthon's family name was Schwartzerde, meaning black earth, but as soon as his literary talents developed and he began to forecast his future he changed it to the classical synonym by which he is known to history.

"Rembrandt's father had the surname Gerretz, but the son, when his tastes broadened and his hand gained in cunning, changed it to Van Ryn on account of its greater dignity.

"A predecessor of Honoré de Balzac was born a Guez, which means beggar, and grew to manhood under that surname. When he became conscious of his powers as a writer he did not wish his works to be published under that humble name, so he selected the surname Balzac from an estate that he owned. He made the name famous, and the later Balzac made it immortal.

"Voltaire, Molière, Dante, Petrarch, Richelieu, Loyola, Erasmus and Linnæus were assumed names. Napoleon Bonaparte changed his name after his amazing victories had lured him toward a crown, and he wanted a grander name to aid his daring aspirations. The Duke of Wellington was not by blood a Wellesley but a Colley, his grandfather, Richard Colley, having assumed the name of a relative named Wesley, which was afterward expanded to Wellesley (S. Baring-Gould's Famous Names and Their Story, 391). This author in his chapter on Changed Names gives many examples of men well known to history who changed their names by simply adopting a new one in place of the old.

"Mr. Walsh, in his Handbook of Literary Curiosities, makes an interesting statement at page 778: 'Authors and actors know the value of a mouth-filling name. Herbert Lythe becomes famous as Maurice Barrymore, Bridget O'Toole charms an audience as Rosa d'Erina, John H. Broadribb becomes Henry Irving. Samuel C. Clemens and Charles R. Browne attract attention under the eccentric masks of Mark Twain and Artemus Ward. John Rowlands would never have become a great explorer unless he had first changed his name to Henry M. Stanley. James B. Matthews and James B. Taylor might have remained lost among the mass of magazine contributors but for their cunning in dropping the James and standing forth as Brander Matthews and Bayard Taylor. Would Jacob W. Reid have succeeded as well as Whitelaw Reid?' While some of these names were merely professional pseudonyms, others were adopted as the real name and in time became the only name of the person who assumed it.

"Many other instances of voluntary change of name, both given and surname, might be added, but we will mention only two more." It is then recounted how Hiram Ulysses Grant came to be called Ulysses S. Grant, and how, in his teens, Stephen Grover Cleveland dropped his baptismal name.

The Causes of Divorce

By the Editor

Divorce: A Study in Social Causation. By James P. Lichtenberger, Ph.D., Assistant Professor of Sociology, University of Pennsylvania. Columbia University Studies in Political Science, v. 34, no. 3. Pp. 225 + index 4. Columbia University, New York. ($2.)

DR. JAMES P. LICHTENBERGER, of the department of sociology of the University of Pennsylvania, has made a study of the causation of divorce which is of scientific value despite an apparent tendency to indulge in speculation concerning subjects for which social science has scarcely yet furnished tools for accurate investigation. His point of view and general method of treatment are the right ones, and the outline of the causes of the rapid increase in the rate of divorce in the United States can be approved except in some minor particulars, while the fundamental propositions that divorce is the cause rather than the result of divorce legislation, and that the restrictive power of the law cannot materially check the evil, are of course sound. In this regard the attitude of the author deserves to be cordially endorsed when he declares (p. 146):—

> Mistaking the effect for the cause, and without adequate apprehension of the nature of the social forces which are producing changed conditions throughout our whole social fabric, many have looked upon the spread of divorce as an unmitigated evil and have sought to regulate the divorce movement by more stringent and uniform divorce laws. This is to treat the symptoms rather than the disease. This method of procedure will produce many good results, but its futility in respect to its influence upon the divorce rate needs no further demonstration than a clear apprehension of the causes involved.

The first thing one looks for in a monograph of this kind is a statement of the extent to which divorce has actually increased in the United States. Dr. Lichtenberger presents official statistics covering the forty-year period from 1867 to 1906 and analyzes them at length. He finds that the ratio of divorces to marriages is constantly increasing, being in 1905 approximately three times what it was in 1870. Other interesting deductions from the statistics are made, but this threefold increase is the fact of greatest importance to the general reader, while stress laid in another chapter on the fact that the period of this increase is co-extensive with the unprecedented development of commercial enterprise in this country since the Civil War suggests the line of reasoning selected.

At the outset, however, a precise estimate of the real significance of increasing divorce is missing. Are we to consider that there is three times the weakening of family ties now that there was in 1867? Obviously not, for legal divorce and real divorce are not identical; there may be a disruption of the family without recourse to legal remedies. Legal divorce is not the only possible symptom of the disintegration of the family, for it may show itself in many forms of immorality not necessarily leading to divorce. The truth of this the author himself seems to recognize when he says (p. 143) that "the study of divorce statistics can only be of service in indicating imperfectly the degree of disaffection in the family life. Legal divorce can never be more than an approximate index to the actual divorce in a population." Admitting this principle, however, he nevertheless seems not to go quite far enough in applying it. Human nature can undergo no great change in such a short period as forty years, and the presumption against which Dr. Lichtenberger has to contend is that the increase of legal divorce is of only superficial significance, no fundamental modification of family institutions having been likely to take place. The author does not even recognize the existence of this presumption, but treats the increase in legal divorce as if it fairly approximated the actual tendency toward the disruption of matrimonial ties. He therefore fails to take into account considerations which might have led him to correct an error of perspective necessarily resulting from taking the statistics as the point of departure for discussion of the main theme.

In consequence, the symmetry of the treatment is mutilated by the omission of an important topic. Before we study divorce we must consider marriage itself. Divorce results from the operation of forces disrupting the family after marriage, but it may have

been that at the time the marriage was contracted their operation could have been clearly foreseen and that the marriage was inherently bad. The knot may not only have been unloosed, it may not have been properly tied in the first place. Divorce is one form of laxity of the matrimonial bond, but palpably ill-mated or unfit marriages are another form not less important. If it were shown that an increasing divorce rate were counterbalanced by a gradual improvement in the quality of marriages, the growing laxity of the one might then by offset by the growing wholesomeness of the other. In other words, the threefold increase in the divorce rate has significance only with reference to the fundamental postulate that marriages are no better than they were forty years ago, no less recklessly and imprudently entered into, no more restrained by parental authority and by the supervision of church or state, and no more satisfactory as regards the age and other circumstances of the contracting parties. The opinion may be ventured that there is a difference in this respect between contemporary conditions and those of forty years ago. It may not be a great difference, but it would be strange if the increased pressure of competition in the industrial field had not reacted upon the family in such a way as to tend toward the transformation of marriage into an institution better able to maintain the well-being of the entire family, in a state of closer solidarity. It would be natural to expect, therefore, that marriage is nowadays usually contracted with a deeper sense of its responsibilities and upon the foundation of a more intelligent and sympathetic attachment, and that even though divorce may have increased threefold, the increase must have come about largely because of the increased willingness with which divorce is resorted to, whereas the proportion of good marriages to bad as a matter of fact may have increased rather than diminished.

It seems to us, therefore, that the author should have prefaced his sociological investigation of divorce with an investigation of the tendency toward or away from real as opposed to legal marriage, just as he has recognized a distinction between real and legal divorce. The result would doubtless have led him to modify slightly his views regarding the increase of real divorce. He might also with advantage, before proceeding to consider the causation of divorce, have embarked upon the inquiry as to how far the subject resolves itself into that of a growing popular disposition to make use of legal remedies. Dr. Lichtenberger does clearly recognize the distinction between the growth of the evil itself and the growing use of the remedies invoked to redress it. He however postpones to a later part of his book matter which would preferably be put first. In the four chapters which treat of the general causes of the increase, he is lumping together factors which operate directly upon the permanence of marriage and those which merely affect the motives which lead the aggrieved parties to have recourse to litigation. Obviously the former process is that which demands chief attention; the increased popularity of the action of divorce may well serve to introduce the main topic, but should not be confused with it.

We would then suggest that Dr. Lichtenberger, like a great proportion both of the lay and expert writers on divorce, so far falls victim to confused processes of reasoning that he makes himself out somewhat of an alarmist over conditions which are not so significant, either ethically or sociologically, as is often supposed. Data are scarcely obtainable to confirm this conclusion, but we think there is good reason to suppose that the growing laxity of the marriage bond, of which divorce is one symptom, has been partly offset by an improvement in what might be called the initial stability of marriage. Moreover, when we have also considered the popularization of law in general, on which Professor Willcox lays stress as one of the causes of divorce, and the popularization of the action of divorce in particular, and in addition a multitude of other causes, economic, social and religious, which have made it easier for people to seek remedies for evils that formerly were suffered to remain unredressed, we see that the supposed increase of true divorce must be still further offset by eliminating the purely remedial aspects of the subject. The consequence is that instead of a threefold increase in real divorce, the rate of increase during the past forty years must actually have been much smaller. Such a manner of approach would present to the reader a correct perspective at the outset instead of allowing him at best to acquire it piecemeal in the course of a roundabout treatment. It is impossible not to

regard Dr. Lichtenberger's assertion as to this supposed transformation in family institutions within so brief a period as a challenge to debate, for such changes of a fundamental rather than secondary nature as are assumed to have taken place would appear too vast to be explainable by the general line of reasoning which he adopts.

That the ratio of real divorces to marriages has increased, however, cannot possibly be denied.[1] This increase is to be attributed in our judgment to the following causes, which Dr. Lichtenberger, following Professor Willcox, approves: "The Popularization of Law," "The Emancipation of Women," "The Increase of Industrialism," and "The Spread of Discontent." There is another cause to which some importance must be attributed, "The Age of Consent," but as to the latter there is some disagreement. Professor Willcox and some others are of the opinion that early marriages are freest from divorce. Dr. Lichtenberger and others conclude that later marriages are more lasting. It would be hard to prove either of these contentions as a broad general proposition. The causes associated with religious beliefs are properly recognized, Dr. Lichtenberger expressing the view that social and economic changes contribute to the sudden increase of their activity. In a general way, therefore, Dr. Lichtenberger is in close sympathy with Professor Willcox's reasoning ("The Divorce Problem: A Study in Statistics"). We are glad to see, however, that he dissents from Professor Willcox's view that "laxity in changing and administering the law" is one of the causes of more numerous divorces. He rightly observes that the general trend of divorce legislation has been toward the adoption of restrictive measures.

To Dr. Lichtenberger's elaboration of the action of these various causes there seems to be only one serious criticism. Professor Willcox took pains to include "The Spread of Discontent." This factor might have received fuller treatment in this monograph. With Dr. Lichtenberger it comes to mean purely social and economic discontent. The pressure of modern industrial life has brought about a struggle for comforts and luxuries which affects every class of society. New avenues of economic activity have been opened to woman, and her sense of independence has been stimulated and her individuality strengthened by these new opportunities and wants. Disruption of the family has resulted, as we interpret Dr. Lichtenberger's arguments, from the creation of spiritual and physical wants which cannot be satisfied, and from her deeper sense of rights which will be protected by the law and which she need not hesitate to assert as proper grounds for dissolution of the marriage tie. We find ourselves unable, however, to follow the author's reasoning on this particular point. That intensified competition and the sharper social rivalry resulting from advanced standards of living may here and there have strained marriage to the breaking point, because of the inability of the institution to adapt itself forthwith to changed economic conditions, is readily conceivable. How the growing readiness of woman to enter business occupations could of itself serve to bring about a fundamental disruption of the family, however, apart from those remedial considerations with which we are in no way concerned, is difficult to understand. Obviously anything which would promote woman's economic productiveness could have no other effect but to increase the efficiency of the family and put it in a better position to recover the lost ground which may have been the penalty of altered economic conditions. Escape from Dr. Lichtenberger's seemingly pardoxical position is to be found by further development of the influence of the "Spread of Discontent." Not only has there been a growing social and economic discontent, but there has also been a growing domestic discontent. The wife is less satisfied than formerly with an arrangement which deprives her of directive power over the affairs of the family, and as she has come to insist to a growing extent on an equal voice with that of her husband in the management of the interests of the family, irreconcilable differences and estrangements have been far more likely to arise than under the old *régime*. It is to be regretted that Dr. Lichtenberger's strong woman's rights prejudices, as evidenced by some heated denunciations of what he

[1] That the increase in the rate of divorces has been pretty nearly as great in Europe as in the United States is the inference to be drawn from a article recently published in the *Riforma Sociale*, quoted by the April *American Review of Reviews* (see p. 294 *infra*). This need not be surprising, however, when one considers the development of altered conditions of political and social sentiment, the evidences of which are continually multiplying.

regards as a feudal or barbaric conception of marriage, blind him to the fact that one of the chief causes of the increase in divorce has been woman's lessening ability to adapt herself to functions which formerly helped to make the home, in a greater degree, a unit, and to preserve it, as a unit, from dissolution.

The author's forecast of the probable outcome of the tendencies he sketches is not completely satisfactory. He allows himself to be led away into regions of fruitless speculation, as when he reasons out the somewhat surprising position that the economic independence of woman and resulting economic equality of the sexes are to result in a lower rather than in a higher rate of divorce. He opens a path to a Utopia in which optimism seems to get the better of science. If he had more prudently adopted the view that woman can never achieve complete economic independence, he might have been in a better position to predict an improvement in social conditions. He might well have avoided looking so far into the future, and it would have been better had he treated divorce as he had previously intimated that suicide, insanity, and crime should be treated (p. 156) and been satisfied to stop at that point. No one supposes that because suicide has been increasing the race is likely to die out, and in the same way the growth of divorce furnishes no ground for the fear that the family is doomed. Economic changes, not to speak of other factors, may bring in their train suicide, crime, and insanity as the effects of intensified strife, but economic change is spasmodic rather than continuous, and there must always be a limit beyond which such symptoms of social maladjustment cannot go. There is therefore no occasion for uneasiness about the future, and such a fear arises only from the attempt to look too far ahead.

Then and Now

By Harry R. Blythe

AN OLD TIMER

His brow was high and mighty,
He stood six feet or more,
His speech was grand and flighty,
He loved to pace the floor.

His gestures were tremendous
His climaxes sublime,
He spoke in prose stupendous
And often burst in rhyme.

He bullied and dissembled,
And wrenched the roots of law
Till all the court room trembled
And juries sat in awe.

He was the "Great Unbeaten,"
The pride of all the town—
Too bad the years have eaten
The gilt from his renown!

A NEW TIMER

He has no art of phrasing,
He talks quite ill at ease
And yet it is amazing
How well his speeches please.

He never tears the eagle
Nor rises to the heights;
His manner is not regal,
He simply thinks—and fights.

He is not good at posing,
He can inspire no awe,
He never tries bulldozing—
He knows far too much law.

In short, his legal station
Is marred by no pretense;
He has no reputation
Except for common sense.

Review of Periodicals

Articles on Topics of Legal Science and Related Subjects

"American Corpus Juris." Letter by Edward D'Arcy of St. Louis, and editorial comment. 70 *Central Law Journal* 175 (Mar. 4).

Mr. D'Arcy indorses the position taken by the *Central Law Journal* (p. 226 *supra*) and says:—

"I think your article contains the germ of a great idea, which is, if I may attempt to state it, that if we are going to have a reformation of our law it must be accomplished by some great mind which understands and is able to elucidate the fundamental principles of the law. As you very well say, the work described in the *Green Bag* will be nothing else 'than a collection of exceedingly valuable monographs on special subjects of law.' If our law has to be restated by the three gentlemen named, or by any other three, it will probably never be restated.

"Justinian made the greatest restatement that has ever been attempted, and it is open to debate whether he would not have done better to have adopted Ulpian entire than to have turned him over to Trebonian and his entire editorial staff and cut him up piece-meal.

"Ulpian was a great leader—dismembered by Justinian. Bacon was the next, only to be treated in the same way by Coke and Blackstone, and the result is that we have no scientific statement of our law today.

"Some of us think we see some good in Mr. Hughes' Grounds and Rudiments of the Law. And it seems to me that a question would be pertinent addressed to those who propose this magnificent legal establishment, whether such a work as Grounds and Rudiments of Law does not contain all that is fundamental in the law, and, if it does not, what it is that it fails to contain, except immense elaboration."

With entire respect to Mr. Hughes, the work contemplated is one of much broader scope than his Grounds and Rudiments of Law,—one in which it is planned, to quote Mr. Alexander (22 *Green Bag* 71), "to block out with the ablest expert advice obtainable the entire field of the law . . . so that . . . the law on any particular point may readily be ascertained."

The plan, moreover, is not for the restatement of the law by any three persons. It is that the work shall be supervised by an editorial board of seven of the ablest experts in the United States, and actually executed by an associate editorial board of about twenty eminent specialists; these boards, moreover, would have the assistance of a strong Advisory Council of twenty or twenty-five of the ablest men in the profession, and of a still larger Board of Criticism. The ultimate executive control, to be sure, is to be vested in three men, but they are in no sense to be regarded as the authors of the proposed work.

The notion that that an epoch-making restatement of the law must be accomplished by one great mind, rather than by any three collaborators, shows a failure to grasp the fact that the American *Corpus Juris* project contemplates a restatement of the law by a large commission of experts, and it also betrays a mistaken belief in the capacity of one intellect to accomplish more than can possibly be achieved by several. Surely Mr. D'Arcy's examples, from Bacon and Coke onward, show a decline rather than an advance in great codification of the one-man species, and prove that the expert commission method, which was so successfully applied in the making of the German Civil Code, is the logical one to be applied in our own time.

Commenting upon this letter, the *Central Law Journal* approaches the subject from a different point of view, suggesting that for "a general synthetical presentation of the whole law and its great principles" we can have nothing better than Broom's Legal Maxims, Bacon's Ordinances, or Hughes' Grounds and Rudiments of Law. For if greater comprehensiveness of treatment be aimed at, a synthetical work, says the *Central Law Journal*, "becomes immediately involved in bitter contention that must inevitably discredit its authority and place it on the level of any other encyclopedia, except in so far as some particular monograph may excel in excellence, as a monograph, anything before written on such subject."

From the fact, however, that what is proposed is a statement of American *law*, it is naturally to be inferred either that the proposed work will confine itself to defining the law as it *is*, or that, if it sees fit to treat the law as it *ought to be*, simple typographical devices will be adopted to indicate such points as are disputed or not finally settled. It will not then discredit its own authority. On the contrary, because the product of systematic scientific method, it will gain greater authority from the thoroughness and consistency of the mode of treatment adopted than any disconnected series of monographs, however excellent, could ever possess.

"An American Justinian Needed." Editorial. *Independent*, v. 68, p. 485 (Mar. 3).

The *Independent* recapitulates the project of Messrs. Alexander, Kirchwey and Andrews in detail, and concludes:—

"The success of the project is contingent upon the establishment of the suggested foundation for the advancement of jurisprudence. Here is an opportunity which should satisfy the highest kind of altruism. Greater service can hardly be rendered to our nation or civilization."

Ames, James Barr. 23 *Harvard Law Review* (Mar.).

The March issue of the *Harvard Law Review* is a memorial number devoted to expressions of the affection of the faculty and present and former students for the late Dean Ames.

President-Emeritus Charles W. Eliot writes (p. 323): "Ames's influence as a professor and as Dean was much increased by another of his moral attributes—he was always gentle of speech, quiet in manner, attentive to the person who was addressing him, and fully alive to the honorable requirements of the situation. Under all circumstances he was a gentleman, and a man of good will."

Professor Joseph H. Beale, discussing "His Life and Character," says (pp. 326–7):—

"For years he examined each number of the National Reporter System as it appeared, and noted every case in which he was interested on a slip of paper. . . . His colleagues frequently remonstrated with him for spending so much time in merely collecting authorities and printing them in notes; but he said that they were on his mind, and he must print them to get rid of them. . . .

"He promised his colleagues again and again to give up the making of case-books and get down to serious work—after just one more. But in spite of this desire for serious scholarly work, he gave up his time without a murmur, deliberately and understandingly, to his administrative tasks."

Professor Samuel Willison, writing of "His Services to Legal Education," describes the manner in which he developed the *esprit de corps* of the faculty by making it his business to keep in the closest friendly touch with his colleagues, and his sympathetic and constant intercourse with the students, and continues (p. 330): "His recommendation of young men for the post of teachers in other schools was widely sought, and through these teachers, as well as through his case-books, and through his friendship with teachers in other schools, he exercised a great influence, though one not easily measured, in the legal education of the country."

Judge Julian W. Mack of Chicago, expressing a graduate's recognition of the extent of "His Personal Influence," says (p. 337): "No narrow university lines hemmed in his sympathy. The only rivalry between the schools that he recognized was that of producing, out of the raw material, lawyers capable of sound reasoning, men devoted to the right use of their training in the interests of their fellow men and their country."

"James Barr Ames." By Dean George W. Kirchwey. 10 *Columbia Law Review* 185 (Mar.).

"Maitland's maxim, 'Law schools make tough law,' became in his hands a principle of action. He was not content to have the school with which he was so long connected a nursery in which to breed practitioners and train them to their highest efficiency; he would have it a seat of legal influence, a force in the amelioration and amendment of the law. And so it came to pass that his social conscience, his lofty conception of personal obligation, his legal ideals have become a part of the living creed of hundreds of strong men who have gone out from his instruction to become members and leaders of the bar, judges and teachers of law in all parts of the land."

Bankruptcy. "Persons of Abnormal Status as Bankrupts." By Carl Zollmann. 10 *Columbia Law Review* 221 (Mar.).

"The decisions concerning married women, infants and lunatics are quite numerous and, taken together, establish definite doctrines, which it will be the purpose of this article to develop."

The author does this with much thoroughness.

"A married woman is at common law absolutely incapable of having debts, of being sued, or of committing an act of bankruptcy. Where, however, either by the civil death of her husband, or by the custom of London, or by special statute, her disability has been wholly or partly removed, she becomes *sui juris*, to the extent to which she has become liable to an ordinary action, and no further, and can contract debts, and commit any act of bankruptcy, and may either file a voluntary petition or be forced into bankruptcy.

"The contracts of infants and lunatics are generally voidable, and hence are not such obligations as will afford a foundation either for voluntary or for involuntary proceedings. Both infants and lunatics, however, are liable absolutely for necessaries and on judgments for torts, and in addition the lunatic may owe debts contracted while sane, and may even contract certain debts during lunacy. . . .

"It is clear that voluntary petitions are proper at the suit of infants, but to lunatics they have been denied both in England and America. It has been held, however, in England that a lunacy court can empower the committee in lunacy to do anything for the benefit of the lunatic, including the filing of a voluntary petition."

Conflict of Laws. "The *Renvoi* Theory and the Application of Foreign Law." By Ernest G. Lorenzen. 10 *Columbia Law Review* 190 (Mar.).

"*Renvoi* is insupportable in theory, and offers no real advantage to recommend its adoption on grounds of expediency. Courts that have sanctioned *renvoi* seem to have done so as a convenient means to escape the necessity of applying foreign law, a task often of considerable difficulty, but they have forgotten that this apparent gain, even if Westlake's theory were adopted, can be had only after proof of the existence of a different rule governing the Conflict of Laws in the foreign country. The burden upon the judge would, in fact, be increased and not diminished, for he would be obliged, to some extent at least, to acquaint himself with the rules of Private International Law prevailing in foreign countries."

Corporations. "Pooling Agreements Among Stockholders." By William P. Rogers. 19 *Yale Law Journal* 345 (Mar.).

"Wherever one corporation is permitted to own stock in another corporation without restriction, an effective plan for pooling stock can be easily devised. . . . But the stockholders of the holding company may change, and elect directors who are not in accord with the idea of thus controlling one corporation by another. Besides, there are only a few states in which one corporation can legally purchase and hold the stock of another . . .

"The most feasible plan for creating the desired voting trust is by means of a common law joint stock company. This kind of an organization requires no legislative sanction for either its existence or powers. . . . The sale of a share by one of the company will not, if so provided, work a dissolution of the association, as would the sale of a partner's interest in a partnership. The articles may provide, however, that the purchaser of such share of stock shall not become, by such purchase, a member of the association, unless acceptable to all the other members. Or he may be given a right in the property, income, or dividends without the right to vote, or to in any way participate in the management of the company's affairs. This restriction could not legally be imposed upon a stockholder in a corporation. Hence, the joint stock company may be utilized to greater advantage than could a corporation. It is not beyond the powers of a joint stock company to purchase, hold and vote the stock of corporations."

Cost of Living. "An Old-Fashioned Theory of Prices." By Prof. Franklin H. Giddings, LL.D. *Independent*, v. 68, p. 443 (Mar. 3).

A sprightly exposition of what the views of the classical economists Malthus, Ricardo, and Mill on the causes of the present rise of prices would probably be. They would say:—

"The whole world, in short, and not merely one small part of it, has arrived at diminishing returns. . . . Meantime, supplies of new gold of hitherto unimagined extent have been discovered and are being cheaply turned into the money reservoirs of the nations. . . . At present, standard money of gold is produced under conditions of increasing return. The raw materials of other commodities are produced under conditions of diminishing return. So long as these conditions last, prices must continue to rise."

"High and Low Prices." By Prof. Edwin R. A. Seligman, LL.D. *Independent*, v. 68, p. 674 (Mar. 31).

"Whether at any given time the rise in rents, in wages and in food is counterbalanced and more than counterbalanced by the fall in the prices of manufactured articles depends upon the relative progress that is made in the command of man over nature, and the forces at work in controlling population or raising the standard of life. The real problem of importance to the world is not that of high or low prices, for that is in large measure the result of an accident as to the supply of the money metal. The real problem is one of high or low cost. High or low prices will ultimately take care of themselves; cheap or dear cost means the entire difference between progress or poverty."

"High Prices and the Cost of Living." By Frank Greene, Editor of *Bradstreet's. Outlook*, v. 94, p. 569 (Mar. 12).

"Prices have gone down frequently in periods of large gold production, as, for instance, from 1873 to 1896, and evidence is not apparent that the increase in gold supply or bank currency and credits based thereon have been greater than the increase in the world's business justified. . . .

"The great cheapening processes witnessed from 1870 to 1900 as a result of the opening of the West have apparently culminated, and there is an apparent vacuum to be filled either by the opening of new lands or by the re-entry of the farms of the East or of Europe into the fields of production. . . .

"There are evidences that increased cost of municipal government operation has culminated in higher taxation, thus making for higher costs of wholesale and retail distribution in the cities. Then, too, the changed habits of many of the people, the falling into disuse of the old-time central markets, and the necessarily increased cost of retail food distribution must be reckoned with."

This is one writer's ingenious solution of the problem of increasing prices resulting from currency depreciation:—

"Too Much Gold." By Byron W. Holt. *Everybody's*, v. 22, p. 476 (Apr.).

"If a salary of $2,000 a year is made payable in a multiple standard, composed of the prices of one hundred commodities, and if, as happened in 1909, prices should rise an average of eleven per cent in a year, the salary would be increased to $2,220 the next year. In this way the purchasing power of wages, salaries, rates, incomes, etc., could be kept stable, and the inequalities and injustices of the gold standard would be largely overcome."

Conservative and properly equipped writers, it will be noted, attribute the higher cost of living to the abundance of gold production more than to any other cause. The tariff and the action of the trusts are not usually treated with such seriousness, in attempting to explain a current situation. A well-known writer on the trust problem reaches moderate conclusions which may be regarded as typical of leading opinion of the day:—

"Do Trusts Make High Prices?" By Prof. Jeremiah W. Jenks. *Review of Reviews*, v. 41, p. 343 (Mar.).

"The general conclusion must be that the late great general increase in prices cannot be

ascribed to the trusts, especially the prices that mainly affect the cost of living, though they are probably responsible for a small part of it."

Criminal Procedure. "French Criminal Procedure." By Frederic R. Coudert. 19 *Yale Law Journal* 326 (Mar.).

"Much criticism has been excited in France of recent years by the practice which permits the president to conduct the examinations during the trial. . . . It is stated that the Ministry of Justice is now to ask for an amendment of the criminal code by which the president will be relieved of this duty, and questions will be asked by both prosecution and defense. This would, it seems to me, have a wider effect than to merely impose this function upon counsel. It might well lead, I think, in time to the development of cross-examination, a thing hitherto unknown to the French law, and which is certainly, within reasonable limits, a very valuable device for the sifting of testimony.

"Whether the French system as a whole is more efficient in the repression of crime than our own, I do not know, and I doubt whether the question can be answered positively. It is an outgrowth of French society and conforms to French needs and views. With slight modification such as is now recommended, I see nothing in it incompatible with a perfectly just and efficient administration of the criminal law. . . .

"Undoubtedly the jury system, the public nature of all trials and examinations of prisoners, and the litigious as distinguished from the inquisitorial method of procedure are valuable acquisitions which American law should not lightly surrender. It verges, however, upon the absurd to turn respect for old rules or maxims into mere fetish worship. The rule against compelling examination of parties in criminal cases may well be thought to have outlived its usefulness. It is of no value to the innocent, and highly detrimental to society in its war against crime. . . .

"If the French legislator has been wise and liberal enough to borrow our jury system, may we not in turn gain something by examining in sympathetic spirit a system which has been worked out by the best minds of Continental Europe?"

"Lynching." By Charles C. Butler. 44 *American Law Review* 200 (Mar.–Apr.).

"I do not believe in railroading a man to eternity in order to appease the clamor of the mob and thereby lessen the number of lynchings. Let there be a fair trial as soon as practicable after the fury of the populace has subsided, but let there be no sacrifice at the behests of the mob or in order to forestall its bloody work. . . .

"Newspapers could do much to lessen the lynching evil, but they too often palliate, justify and even applaud mob violence. . . . It is apparent that there is no one exclusive cause for lynching, and, therefore, that there is no one exclusive remedy."

Criminology. "The Criminal." By Cesare Lombroso. *Putnam's*, v. 7, p. 793 (Apr.).

The last work of the noted Italian criminologist was the preparation of this brief article designed as a preface for a forthcoming book entitled "Criminal Man," in which his daughter and collaborator, Gina Lombroso Ferrero, summarizes the conclusions reached in her father's important work on the causes of criminality and the treatment of criminals.

Conveyances. "Advisability of Adopting the Torrens Law." By T. C. Sparks. 10 *Phi Delpha Phi Brief* 22 (Mar.).

"The New York law was adopted after a very thorough investigation of its merits by a commission of seven members appointed for that purpose, three of whom dissented from the report. Such a general adoption of the law naturally leads one to believe that where the demand for such a system is sufficiently great and the amount of business that would probably be done thereunder is sufficient to warrant the employment of highly competent officials, the possible dangers to be feared might in large part disappear. If we are to have a Torrens Law it must not be a makeshift, but its administration must be by the most competent men it is possible to employ, and the offices thereby created must be absolutely free from politics."

Declaration of London. See Maritime Law.

Direct Nominations. "The Retrogression of Direct Primary Nominations." By Charles H. Betts. *Editorial Review*, v. 2, p. 274 (Mar.).

Dissenting from Governor Hughes's perhaps questionable views on this subject, this hard-headed, well-informed article will repay some study on the part of those interested in the practical solution of a practical problem of political science.

Easements. See Real Property.

Election Laws. See Direct Nominations.

Employer's Liability. "Employer's Liability." By Prof. Floyd R. Mechem. 44 *American Law Review* 221 (Mar.–Apr.).

This and Prof. Freund's article (p. 291 *infra*) should perhaps be considered the leading articles of the month, and they will both repay careful study. Prof. Mechem shows how the common law has been modified, and incidentally considers the employer's liability legislation of Germany. The problems of employer's liability legislation in the United States are treated at much length. The difficulties in the path of the adoption of a uniform state law are pointed out. Of the federal Employer's Liability Act of 1908 Prof. Mechem says:—

"The determination of the construction and effect of this act will be awaited with

great interest. It probably marks the limit of the legislation which can at the present time be expected from the federal government, and it necessarily leaves great fields untouched."

The author, however, does not regard with favor any form of liability act:—

"A liability law simply means law-suits, delays, aggravations, and, worse than all of these, absolute inequality of operation. One jury will fix the compensation at one sum, the next jury at another sum, and anything like adequate prearrangement to meet such liabilities becomes obviously impracticable. . . .

"Another great difficulty with a mere liability act is that it does not dispense with the economic waste of litigation, or eliminate the hard feelings and antagonisms between employer and employee which result from the same cause. Such legislation, moreover, leaves a large class of cases unprovided for.

"The most rational solution of the whole difficulty under present conditions appears to me to be found in the efforts of those who are attempting to induce both employer and employee, in consideration of the undoubted advantage to each of them, to unite in furnishing an adequate insurance in view of the exigencies of the employment, and to eliminate entirely the question of legal liability, which is not likely to be settled to the satisfaction of either of them.

"It will be a matter of sincere regret if it shall prove that the contract clause of the new federal Employer's Liability Act will interfere with such arrangements."

"Compensation for Personal Injuries." By Hon. Addison C. Harris. 3 *Lawyer and Banker* 30 (Feb.).

"When the people at large come to fully understand that in all public utility cases, and largely in all cases of negligence, in the end they pay the verdicts; and that these are dissipated; and that they more or less supply by public and private aid the means to support disabled workmen and their families, it will not be long until they find a way to relieve themselves on account of any constitutional embarrassment, and to reach better results than now prevail. The people make the laws as they want them. Just when, or in what form this advance will come, one cannot at present foretell. But in time it will come, and abide."

Extradition. "Inadequacy of the Present Federal Statute Regulating Interstate Rendition." By Wilbur Larremore. 10 *Columbia Law Review* 208 (Mar.).

"In addition to the conflict of state decisions the general confusion is intensified by state legislation. These statutes are usually intended merely as practice acts and most of them regulate the granting and determination of applications for discharge on *habeas corpus*. Diverse and discordant systems of procedure in themselves are evils and, moreover, state judges, acting under the supposed sanction of state statutes, have impugned the substantive spirit of the federal law. Such a decision was that in *People ex rel. Ryan* v. *Conlin*, at a Special Term of the New York Supreme Court (N. Y. 1895, 15 Misc. 303).

"Enough has been said to show the necessity of a comprehensive and complete federal statute defining individual rights, more specifically asserting the authority of the federal government, supplying additional federal machinery and regulating procedure on *habeas corpus*. . . . It is believed that the elaborate scheme of legislation now suggested is as amply and indisputably within Congressional power as are the radical and wide-reaching systems of commercial regulation based upon the interstate commerce clause."

Federal and State Powers. "*Swift* v. *Tyson*; Uniformity of Judge-Made State Law in State and Federal Courts." By Henry Schofield, Professor of Law in Northwestern University. 4 *Illinois Law Review* 533 (Mar.).

"It seems as if the Supreme Court of the United States ought to be able to display legal wit and courage enough, and it does not require very much of either, to extricate itself, and the country, out of the barbarism of the separate and tribal judge-made state laws of the Burgundians, Visigoths and Romans, into which it blindly plunged itself and the country, headlong, after the death of Story, J., contrary to the opinion of Story, J. in *Swift* v. *Tyson*. If it is not able, or lacks the courage, to extricate itself, and the country, out of the mess of barbaric plurality of judge-made state law it has inflicted on the country, then Congress ought to lend a helping hand by enlarging the court's appellate jurisdiction over the state courts, enabling it to give practical effect to Article VI of the Constitution, and to the privileges and immunities clause and equal protection of the laws clause of the Constitution as applied to the conflicting judge-made state laws of state and federal courts."

Freedom of Contract. "Constitutional Labor Legislation." By Prof. Ernst Freund. 4 *Illinois Law Review* 609 (Apr.).

The following test for the constitutionality of statutes may be not less useful than original:—

"After the eight-hour law for miners had been sustained, the disapproval of the ten-hour law for bakers was, to say the least, a grave inconsistency. The course of decisions in the matter of hours of labor reveals a judicial censorship which is based upon no fixed principle. . . . The substitution of some intelligible and uniform principle of control is therefore a requirement of policy as well as of justice. The analogy of the appellate review of judicial decisions of fact suggests such a principle, approved by long experience. Applied to the statutes in question, it would mean that there must have been evidence of facts within the reach of the legislature

sufficient to support its judgment that an exigency existed for its interference. Such a test would not be unduly rigorous; and its effect upon legislation itself would not be otherwise than salutary. . . .

"Our views on social relations and public control may undergo considerable changes. A certain standard of living may come to seem as important as the preservation of health; industrial employment may become affected with a public interest, and regulation may supersede contract, as contract has superseded status. If such changes come, it will require no constitutional amendment to give them effect."

Habeas Corpus. "*Habeas Corpus* Cases in Federal Courts." By Russell H. Curtis. 3 *Lawyer and Banker* 12 (Feb.).

"A federal court has a discretion whether to exercise its jurisdiction to release by *habeas Corpus* a prisoner confined by state authority in contravention of the Constitution, laws and treaties of the United States, or to put him to his writ of error to the highest state court which can decide the case. The decisions of the Supreme Court show that the jurisdiction by *habeas corpus* in such cases will not be exercised except in urgent cases. That a defendant indicted in a state court has a defense arising under the federal Constitution to which the state court may not give effect when it tries the case, is not ground, standing alone, on which a federal court will grant a writ of *habeas corpus*."

Insurance. "Is Deed of Trust on Personal Property at Time Fire Insurance Policy Issues Violation of Condition Against Incumbrance by Chattel Mortgage?" By Beverley T. Crump. 15 *Virginia Law Register* 842 (Mar.).

"The rule in Virginia is now to be regarded as fixed—that the breach of the stipulation against a chattel mortgage, upon compliance with which the validity of the policy by its terms is made to depend, will avoid the policy and defeat a claim upon it, unless knowledge of the chattel mortgage is brought home to the company, or it is otherwise estopped from relying upon it."

International Arbitration. "The Foundations of International Justice." By Hayne Davis. *Independent*, v. 68, p. 504 (Mar. 10).

"Some of the chief difficulties encountered at The Hague in the endeavor to create an international judiciary do not appear to stand in the way of establishing a court of justice for the Union of American Republics.

"First, the governments are all of one kind, republics.

"Second, they are all committed by implication, if not expressly, to respect each other's territory; whereas the history of Europe is the history of national aggression. . . .

"Third, there is already a union of American governments whose Congress meets periodically, and is able to act. . . .

"Fourth, . . . a court composed of twenty-one judges (one from each American republic) would not present the insurmountable objections thought to exist against a court composed of forty-six judges. . . .

"Let the Pan-American Congress confirm the appointments made by American republics to the permanent Tribunal of Arbitration. This will ensure confidence of countries other than the one originally making the appointments. . . .

"There would be five or six circuits. . . . The Chief Justice of each Circuit Court appointed by his associates would represent his circuit on the Supreme Court to which final appeal would be in all cases between nations, and in specified cases between citizens of different nations."

Interstate Commerce. "The Department of Justice." By George W. Wickersham, Attorney-General of the United States. *Outlook*, v. 94, p. 611 (Mar. 19).

A description of the various branches of the work of the Department.

"I am firmly convinced of the necessity for the vigorous assertion of federal power over those subjects devolved upon the national government by the Constitution of the United States, which the experience of a century has shown cannot be properly and adequately managed by the states. The commerce of this country has become almost entirely interstate and international commerce. The states have demonstrated their complete inability either properly to regulate and control that commerce, or intelligently and efficiently to create and control adequate agencies to carry it on. The national government has been literally compelled to exercise its indisputable power to regulate interstate and international commerce, by undertaking the regulation and control of interstate railways, and to devise and enforce legislation to check the growth of great monopolies and combinations, in order to prevent the absorption into the hands of a very few men of all the great industries of the land. This work the national government must carry out thoroughly and effectively. It cannot delegate it nor leave any part of it to the states. Its control over this subject is, under the Constitution, complete, comprehensive, and exclusive."

"Power to Regulate Transportation Charges by Statutory Enactment." By Senator Joseph W. Bailey. 13 *Law Notes* 227 (Mar.).

The address given by Senator Bailey before the New York State Bar Association. (See 22 *Green Bag* 174.)

"Railroad Accounting in America *vs.* England." By W. M. Acworth. *North American Review*, v. 191, p. 330 (Mar.).

The writer takes issue with the ruling of the Interstate Commerce Commission that all expenditure for additions and betterments must be charged to capital account.

"We come then to the conclusion that all interests, the interest alike of the public and of the shareholders, are best served by charging freely, not mere repairs and renewals (*i. e.*, depreciation) against the annual income, but also substantial sums for additions and improvements, and, further, for what perhaps might be described as contingencies. In other words, the real test of what part of the gross income is net income is not whether the physical corpus of the property has been adequately kept up, but whether the earning power of the undertaking as a whole is being maintained."

"The Real Key to Railroad Investment Values." By John Moody. *Review of Reviews*, v. 41, p. 340 (Mar.).

"The steadily increasing efficiency and profit-producing power of these great American railroad systems have, of course, been progressively capitalized. But a little reflection on the subject will show the strength of these values. Instead of being 'water' they are of more importance frequently than the physical assets of the company, and indeed tend to steadily increase the worth of the physical property itself."

Government. "The Internal and External Powers of the National Government." By George Sutherland, United States Senator from Utah. *North American Review*, v. 191, p. 373 (Mar.).

"While maintaining the power of the general government to adequately meet and deal with every *external* situation which affects the general welfare of the *United* States, it is no less essential to maintain the supreme power of the state governments to deal with every question which affects only the *domestic* welfare of the *several* states. . . .

"The usurpation *by* the general government of any state power over local affairs, and the denial *to* the general government of any necessary power over national affairs are equally unfortunate and equally subversive of the spirit of the Constitution, which is the paramount law of state and nation like."

"The Article in the Constitution of Illinois on the Distribution of Powers." By Herman G. James. 4 *Illinois Law Review* 624 (Apr.).

From cases in which the courts have construed the article on the distribution of the legislative, judicial, and executive powers, it appears that "courts may not: determine boundaries of municipal corporations; declare affirmatively what rates may be charged in the future by public service corporations; declare private corporations to have, because of their growth, become affected with a public interest; or hear appeals from determination of administration boards. On the other hand, it is no violation of the article on the separation of powers for courts to make preliminary designations, when acting as a board, of the territory of proposed municipal corporations, or to appoint non-judicial officers, such as Park, Drainage and Election Commissioners."

British Constitution. "The Judicial Committee of the Privy Council." By William Renwick Riddell. 44 *American Law Review* 161 (Mar.–Apr.).

"This body is not a court—it is a committee appointed to consider certain legal questions and report thereon to his Majesty's Privy Council. There is no instance in which all those who are qualified actually sit; I have never seen more than seven; nor less than four—three exclusive of the lord president constitute a quorum. These Privy Councilors are clothed as ordinary English gentlemen, without official garb of any kind, although counsel appearing before them must wear the black gown, silk or stuff, according as he is or is not a King's counsel, bands of white lawn and wig of horse hair. In Ontario we wear all these, except the wig, but I found that one becomes accustomed to the wig very quickly and very easily. I presume it strikes the Englishman with the same sense of incongruity when he enters our courts and sees judges and counsel with gown and white bands, but without the wig, as it does an Ontarian when he sees certain American judges sitting in court with a gown but also with a black necktie.

"Being a committee and not a court, the decision a report, no dissent is expressed."

"England's Single-Chamber Experiment." By G. M. Godden. *Nineteenth Century*, v. 86, p. 409 (Mar.).

A historical study of the circumstances attending the passage of the resolution of the House of Commons abolishing the House of Lords, passed in 1649.

See Direct Nominations, Federal and State Powers, Interstate Commerce, Local Government, *Res Adjudicata*, and Taxation.

Labor Laws. See Freedom of Contract.

Legal Education. "The Utility of the Study of Legal History." By M. A. Carringer. 3 *Lawyer and Banker* 6 (Feb.).

"The law reformer, without a knowledge of legal history, is in danger of advocating schemes for the improvement of the legal system which have been long since tried and found waiting. . . . It is hard indeed to see how the history of English political institutions can be understood without a comprehensive knowledge of English legal history. This is equally true of the political history of the United States."

Legal Plagiarism. Scott's "Hague Conferences of 1899 and 1907." By J. P. C. [Chamberlain, Professor of International Law in the University of California.] 10 *Columbia Law Review* 276 (Mar.).

Professor James Brown Scott, Solicitor to the Department of State, and editor of the *American Journal of International Law*, is here charged with "making use of the research and felicitous wording of another without making the acknowledgment which authors usually recognize as required. Parallel passages are presented to show the similarity between Dr. Scott's phraseology and that of Moore's translation of Merignhac. Dr. Scott does cite Merignhac twenty-five times in about as many pages for quotations and 'instances.' But his handling of the material, if not improper, is certainly wanting in the customary acknowledgments.

"We note, too, that the authorities cited by the authors whom Professor Scott quotes or copies are sometimes cited by him without the appropriate acknowledgment: thus he cites (p. 202) Du Mont, Schmaus, Kluber et Ott, (p. 204), De Flassen Hall, 4th ed., and (p. 207) Vattel without expressly stating 'as cited by,' etc. Lack of space precludes further illustrations of this sort, but indications are not wanting to show that a free use has been made of Holls (pp. 47–87) and Moore (pp. 210–248) . . . .

"As a whole, the publication is not a credit to American scholarship, and in parts the methods of composition do not command respect. The author is undoubtedly an efficient public officer and successful lecturer. Our criticism is directed solely to his book. There is hardly a page which does not furnish some evidence of an incorrect apprehension of facts, of a misunderstanding of the matter quoted, of inconsequential reasoning, of extravagant and misleading statements."

Local Government. "Sanity and Democracy for American Cities." By Charles Edward Russell. *Everybody's*, v. 22, p. 435 (Apr.).

Describing the salutary results of the adoption of the commission form of government in five typical reformed municipalities.

Lynching. See Criminal Procedure.

Maritime Law. "The Declaration of London." By Prof. John Westlake. *Nineteenth Century*, v. 67, p. 505 (Mar.).

"The Declaration . . . may, when ratified, be not unfairly regarded as the greatest step yet made in the systematic improvement of international relations. . . .

"The Naval Conference of London was remarkable not only for its achievement, but also for the fact that, notwithstandnig the undeniably political character of much of the work entrusted to it, its members were not drawn from the higher ranks of diplomacy, but chiefly from the classes which, as jurists or naval men, are most conversant with the subject. . . . Perhaps a wider combination of special, with diplomatic or political, competence than has hitherto been usual may be one of the means by which future improvement in international relations may be brought about."

Marriage and Divorce. "Divorce in Europe." *American Review of Reviews*, v. 41, p. 502 (Apr.).

That legal divorce and separation have been on the increase all over Europe for some time is shown by an article published in *Riforma Sociale*, printed at Turin, of which an abstract is here given.

"In the countries where divorce cannot be obtained a rising number of separations must be noted. Thus in the case of Italy, where divorce does not exist, a period covering thirty years shows that the separations have virtually doubled. Austrian records reveal about that same rate of growth for divorce, although the separations do not reach quite so high a rate. In Belgium and Norway divorce has more than quintupled, while in Holland it has multiplied three and a half fold. As to separations, these three countries exhibit respective increases in the ratios of eight to five, two to one, and three to one. . .

"Among the nations of Europe, Switzerland leads off with the highest average of divorces, the record of the Helvetian republic being about four to every hundred marriages. France, too, has a high percentage, and so has Greece, and in both countries the figures exhibit a strong upward tendency. Other percentages given in the *Riforma Sociale* are: Roumania, two and a half; Prussia, one; Denmark, two; Sweden, one; England, one-half. In Ireland and Russia divorce is rare. . . .

"It is observed that the connubial knot is most often severed between the fifth and tenth year after marriage; by the fifteenth year financial difficulties are likely to have been overcome, or moderate differences of temperament compounded. . . .

"There are special features of our own time which promote the rise of separation and divorce, namely, physical mobility through increased facilities and opportunities of travel, concentration of population in large cities, intensity and nervousness of industrial life, waning of religious influence, and growth of the concept of individuality,—especially regarding the female sex."

"Divorce Laws and the Increase of Divorce." By Evans Holbrook. 8 *Michigan Law Review* 386 (Mar.)

A study of statistics, made for the purpose of ascertaining whether legislation has had a deterrent effect on divorces. For quotation see p. 310 *infra*.

"Common Law Marriage." By Robert C. Brickell. 44 *American Law Review* 256 (Mar.–Apr.).

"If I am correct in my analysis of the *Beggs* case (55 Ala. 108), the decisions in this state are in conflict upon the proposition of the validity of a marriage *per verba de praesenti*, not shown to be followed by cohabitation. . . . In view of the decisions of our court and the courts of other states upon this question, would it not be wise

that some statute should be passed not only in Alabama, but by all the states, making cohabitation or the public assumption of marital relations necessary to the validity of any marriage not contracted in conformity with the statutes of the state?"

"The Clergy and the Marriage Laws." By J. S. Franey. *Nineteenth Century*, v. 86, p. 554 (Mar.).

Discussing historical aspects of matters involved in the Deceased Wife's Sister Marriage Act, 1907.

Monopolies. "The Federal Anti-Trust Act." By Robert L. Raymond. 23 *Harvard Law Review* 353 (Mar.).

In many respects an admirable article. The Sherman Anti-Trust Act is conceived as so uncertain in its phraseology as necessarily to have led to a remarkable exhibition of judicial legislation. The decisions of the Supreme Court construing the act are carefully analyzed. The actual signification of the Sherman Act is then concisely summarized. In consequence, probably every great combination in the country "is liable to prosecution and dissolution under the Anti-Trust Act." Business and law have thus both got into "what it is little exaggeration to call an *impasse*." And this because the act has been construed as prohibiting combinations simply taking the form of the large corporation.

"The logic of events is certain to bring about a change either by continued judicial construction or by legislation. The enlightened and modern view of the trust problem is that it is an economic question. . . .

"The remediable evils are economic evils. The principle of combination is inherently sound. . . . The real evil of the trusts, it is now generally believed, consists merely in monopoly control; that is, in the power of a combination to do as it pleases. . . .

"The law must strike not at the principle of combination but at *monopoly* control. This . . . means only that actual and *bona fide* competition should be given opportunity to enter the field, and that when it has done so it should be fought only by fair and proper methods."

Up to this point the writer seems to be on pretty firm ground. When, however, he comes to explain just how free *bona fide* competition is to be maintained, it is to be feared that he may not grasp the fact that the real nub of the evil of monopoly is coercive conduct of which the boycott is an illustration as regards the treatment of competitors, and extortionate price-fixing as regards the treatment of consumers. The problem is not that of maintenance of competition, but that of maintenance of freedom to enter the field of competition—two things which are anything but synonymous. Entire freedom of competition involves freedom of combination, as Mr. Raymond perceives, but it likewise implies freedom to crush competition, and where competition is suppressed without coercion, fraud, or extortion, the courts have no right to declare that there has been a "restraint of trade."

It may seriously be questioned, therefore, whether Mr. Raymond is right in concluding that the Anti-Trust Act has performed a tremendously valuable service "in preparing the way for more just regulation," and whether, "in so far as it covers loose combinations," *i.e.*, those where there is not a single corporation, it "is a piece of final and complete legislation."

"The Sherman Anti-Trust Act and Industrial Combinations." By Herbert Noble. 44 *American Law Review* 177 (Mar.–Apr.).

Read at the last annual meeting of the Maryland State Bar Association.

"That competition, free and unlimited, is the life of trade is a pat phrase which rolls from the lips of the orator in high sounding periods. If literally applied, no partnerships would be possible, no combinations of capital could be made, no combined methods of distribution established. Unlimited competition is not desirable. . . .

"One constantly sees the expression that a combination to maintain prices is, of course, unlawful, because competition is thereby directly restrained, and that the object of the Sherman act is to maintain free and untrammeled competition. Attention is called to the fact that there is not one word in the act about competition, and that all that is said in the cases about the act being passed for that purpose is a matter of judicial interpolation. The act prohibits direct restraints of interstate trade, but it does not follow at all that all restraints of competition, whether of other persons' business on the one hand or self-imposed on the other are prohibited. . . .

"The proper construction of the act is that it makes unlawful only those contracts, combinations, conspiracies or acts—

"(*a*) which directly, immediately and necessarily restrain interstate trade or commerce to such an extent that the public is thereby injured; or

"(*b*) which restrain the trade of another, such as the driving of a rival out of business; or

"(*c*) which restrain the trade of another, as in the *Danbury Hatters'* case, by boycott; or

"(*d*) which result in the suppression of competition between the parties thereto without leaving substantial competition in the trade; or

"(*e*) which amount to a monopoly in the field to which they relate, whether done as the result of the act of a single person or of a combination."

"Prosperity with Justice—Working Toward a Solution." By Judge Peter S. Grosscup. *North American Review*, v. 191, p. 311 (Mar.).

"First: Let there be a valuation of each of the railway properties (I take the railway properties as an illustration only), rejecting 'the cost of reproduction' as the measure, but taking as the measure what it fairly cost to bring these railroads to their presen

condition. Add to this, as time goes on, the cost of extensions and such improvements as ought to go to capital account; and upon the capital that the two thus constitute—a capital that is definite—allow returns at a definite given rate, after making provision for depreciation, maintenance and the improvements that are rightly chargeable to operation and not to capital account.

"Second: The traffic rates now charged the public by the carriers are on file with the Interstate Commerce Commission. Take these, or such rates as are on file when the foregoing change goes into effect, as the second definite postulate; and ascertain at given intervals what the public has *saved* if anything, by the application of reduced rates, instead of the previous rates, to the traffic carried during the preceding period.

"Third: A saving to the public having been shown, allow the carrier out of the accumulation, if there be any, and if the reduction be not at the expense of quality of service, as a return additional to his fixed return, a certain percentage of such savings (the maximum to be definite), as also possibly for a security fund against the 'lean years,' this maximum also to be definitely fixed; allow the Employee's Insurance and Old-Age Pension Fund another percentage; and the Employee's Investment Account another percentage, to be invested for them *and as their property* (the apportionment to be according to age and length of service) in any authorized future issues of securities of the carrier for extensions or improvements.

"Fourth: Should it appear on such periodical accounting that the carrier has accumulated out of the rates charged the public, over and above the needs above set forth, and the constant bettering of the service, further amounts, the same shall go into the United States Treasury, *unless within a succeeding given period it shall have been absorbed in a still greater bettering of service or a reduction of rates of traffic charged the public*. . . .

"I submit the remedy thus outlined as the logical and the most promising next stage in the progress of events that have brought us to where we now are. It is applicable to those combinations that have made themselves monopolies, as well as to the natural monopolies—the anti-trust acts being left to act upon those enterprises that have not become monopolies. But I would not apply it where tariff revision would restore competition; tariff revision, therefore, is bound up with this corporate remedy."

"The Adequacy of Remedies Against Monopoly under State Law." By Frederick H. Cooke. 19 *Yale Law Journal* 356 (Mar.).

"Even if . . . state anti-trust statutes [are] inapplicable to transportation into the state, there yet remains in the states a vast source of power derived from the principle established in *Western Union Tel. Co.* v. *Call Publishing Co.*, that '*the principles of the common law are operative upon all interstate commercial transactions except in so far as they are modified by Congressional enactments.*' Here relief was held properly allowed in a state court against illegal discrimination even in transportation within the scope of the commerce clause. There seems no reason no doubt that the principle is equally applicable to relief against monopoly so that the commerce clause of itself, in the absence of Congressional legislation thereunder, furnishes no objection to the allowance in a state court of relief *on common law grounds* against transportation into the state under conditions of monopoly.

"Whether criminal liability could be enforced by virtue of this principle may not be entirely clear, though the opinion has been frequently expressed that there exists on common law grounds, liability for acts producing or tending to produce restrictions upon competition."

"American Affairs." By A. Maurice Low. *National Review*, v. 55, p. 119 (Mar.).

Anent the judgment of the United States Supreme Court in the *American Tobacco Company* case:—

"Every one assumes that the verdict of the Supreme Court will be in the government's favor, and it is this fear that has caused a semi-panic on the Stock Exchange and is checking business; that has made investors sell out their shares and has caused business men to run under close-reefed canvas in anticipation of the financial cyclone they see is coming. If the government is sustained there is little hope that Congress will repeal or modify a law that many people think is too drastic; if the government is defeated the present temper of Congress is to enact a law that shall meet the defects obnoxious to the Supreme Court, so that whichever way the business man turns he sees little to encourage him. Several professors of economics and publicists have within the last few weeks predicted a great panic in the course of a year or two as the result of high prices, but probably even more important than high prices is the fear of the disaster that will follow when the anti-trust law is sustained.

"The Trial of an Old Greek Corn-Ring." By Frederic Earle Whitaker, Ph.D. *Popular Science Monthly*, v. 77, p. 370 (Apr.).

An account, in the language of modern legal practice, of the trial of the Athenian corn-ring, the story of which has been preserved in the writings of Lysias, the Athenian orator.

Negligence. "Death by Wrongful Act, Neglect, or Default in Virginia." By Charles A. Graves. 15 *Virginia Law Register* 825 (Mar.).

Discusses in detail the way in which the Virginia act has been construed by the courts.

Penology. "A General Probation and Parole Law." By Charles A. Enslow. 3 *Lawyer and Banker* 42 (Feb.).

"A careful consideration of the entire proposition will show that no matter from what point the view is taken, everything favors the adoption of the system in every state and by the United States."

"First Offenders." By Hiralal Chakravarti. 11 *Calcutta Law Journal* 19*n* (Feb. 16).

"The latter half of the last century is remarkable for the growth of a new idea on the question of the treatment of offenders, juvenile and otherwise, who are not past reformation. . . . The movement began in America. So long ago as 1863, a legislative attempt was made at Boston to separate the young offender from the older one. The movement lay dormant for some time, but the old idea of no crime without a penalty began to be relaxed in the case of first offenders. In 1879 the English Legislature passed the Summary Jurisdiction Act, which invested Magistrates with the power of 'summarily trying children for indictable offenses, other than homicide, unless objected to by the parent or guardian, who claims trial by jury.' . . . As a first attempt, the statute, with all its limitations, was a decided success, and as recognizing for the first time the salutary principle, it paved the way for further legislation in the same line. . . .

"With regard to juveniles, steps should be taken to establish children's courts, presided over by special magistrates, whether stipendiary or otherwise, who have a strong faith in humanity, and love for children. . . . Efforts should also be made to separate children awaiting trial from the older under-trial prisoners. The trial should take place in private, and the child should not be made to feel that he is an ordinary criminal, shunned and hated by all, but that he is under the control of a gentleman who loves him and is anxious for his welfare. . . .

"When the criminal is a student, he should in some cases be handed over to the school authorities to be dealt with by them in any manner they think fit."

Perpetuities. "The Rule in *Shelley's* Case Does Not Apply to Personal Property." By Albert Martin Kales. 4 *Illinois Law Review* 639 (Apr.).

"Whatever doubt previous decision may have cast upon the matter, the law is now clearly settled by the recent decision of our Supreme Court in *Lord* v. *Comstock*, 240 Ill. 492, where it was held that the Rule in *Shelley's* Case as such did not apply to personal property and that the limitations of equitable interests in personal property in substance to A for life and then to A's heirs, conferred upon A only a life interest, with a future interest to A's heirs according to the expressed intent of the testator."

Pleading. "The Pennsylvania Practice in Quashing Writs and Setting Aside Service." By Henry B. Patton. 58 *Univ. of Pa. Law Review* 347 (Mar.).

Discussing what a defendant is to do in Pennsylvania, if he wishes to quash a writ or to set aside service for irregularity or lack of jurisdiction, owing to the fact that he "may find himself in a difficult position. The difficulty arises from the fact that if he is not careful, he may take some step that will amount to a waiver of his right to make the objection."

Procedure. "A Comparative Study of English and American Courts." By William N. Gemmill. 4 *Illinois Law Review* 552 (Mar.).

Continued from the February issue (see 22 *Green Bag* 237).

"Much has been said by American writers commending the freedom of the English judge in conducting criminal trials. It has been urged that there are no challenges of jurors, but that when a jury is called into the box to try a prisoner, both sides at once accept the panel without question and the trial proceeds with great speed and regularity. In a very large number of the 339 cases presented to the new Court of Criminal Appeal in the last year, the ground of appeal urged was that the prisoner at the bar was denied the right of counsel, although he demanded it. It frequently happens that the prisoner is called for trial, the jury is summoned and accepted without question, slight evidence is heard, the jury without leaving the box finds the prisoner guilty and the judge instantly sentences the prisoner to a long term of imprisonment or to be flogged or both. In reading these cases, I have been forced to the conclusion that, instead of this system being commendable, it deserves the strongest condemnation. . . .

"Last March nine lawyers were disbarred in England by the Inns of Court. Seven of them were found to be ex-convicts.

"It is well that we examine our own judicial system with a view to reform, but in doing so let us make a conscientious effort, and not be led away by criticisms that are not based upon facts."

"Patriotism and the Profession." By Frederick Trevor Hill. 19 *Yale Law Journal* 319 (Mar.).

"Practice under the New York Code of Civil Procedure—otherwise known as the 'New York Mode of Evil Procedure'—has become so complicated that no one but a specialist can hope to avoid its pitfalls, and even the expert in its mysteries frequently finds himself ensnared. . . . Under its protection dilatory motions and frivolous appeals may be employed to delay a trial on the merits almost indefinitely, and any ingenious trickster can involve the real issues of a simple cause until honest litigants are

exhausted or driven from the courts in disgust. . . .

"The whole tone and attitude of the Bar toward technicalities and delays has got to undergo a complete change. Once it is understood that public opinion, as represented by the best element in the profession, is adverse to a continuation of the present system, obstruction and legal jugglery will become as 'bad form' with us as they are in the courts of England."

See Criminal Procedure, Pleading.

Professional Ethics. "To Uphold the Honor of the Profession of Law." By Richard Olney. 19 *Yale Law Journal* 341 (Mar.).

Delivered in Boston at the meeting at which the Massachusetts State Bar Association was recently organized, with Mr. Olney as president.

"Lawyers as members of a community absorbed in money-making, are themselves inevitably more or less infected, so that it is not surprising that many, consciously or unconsciously, come to regard money-making as the real aim and object of their career. It is a view of the profession quite incompatible with the honor that should attach to it. . . . In what originates the axiom that the lawyer lives well and dies poor, except in the realization of the truth that money-making is not the true goal of his endeavors?"

Professional Titles. "A Distinctive Title for the Lawyer." By Alexander U. Mayer. *Docket*, no. 9, 202 (Feb.–Mar.).

The author proposes the following distinctive titles:—

"'A. C. L.,' to stand for Attorney and Counselor at Law (and likewise for the plural, following the style of a law firm); shortening our ancient familiar of ponderous dignity and Falstaffian proportions to the brevity which pertains to wit, yet preserving all of the essentials, so that the initials will at once suggest the title at length, even to the layman.

"'A. C.,' to stand for American Counsel, or 'F. C.,' for Federal Counsel; on all fours with the time sanctioned 'K. C.,' King's Counsel. This for those who have come to the dignity of pleading at the bar of the Supreme Court of the United States.

"'U. S. C.,' for United States Counsel, might also be submitted. This title, however, does not appear so practical and is apt to be mistaken for the title of a consular officer.

"'A. C.,' if it should be preferred to 'A. C. L.' for the general title, would also serve, of course, for Attorney and Counsel, or Attorney and Counselor at Law.

"'A. L.' has also been suggested. This, standing for Attorney at Law, would serve to distinguish foreign attorneys or solicitors who are not also counselors and barristers. It would also stand for American Lawyer."

Property and Contract. See Freedom of Contract.

Public Service Corporations. "The Inherent Limitation of the Public Service Duty to Particular Classes." By Bruce Wyman. 23 *Harvard Law Review* 339 (Mar.).

"It is but a half truth that those who commit themselves to a public employment are bound to serve the whole public. It is but a half truth, that the public servant may altogether decide as to the extent to which he will commit himself to public service. The real truth in this is, that by entering upon the service one comes within the law requiring him to meet the necessities of the situation,—but no more. The obligations are thus the involuntary ones of a legal status—not the defined ones of a specific assumption."

Real Property. "Taxation of Easements." By B. M. Thompson. 8 *Michigan Law Review* 361 (Mar.).

"Taxes levied upon the servient estate are not levied upon an estate in fee simple absolute, but upon the fee burdened with a servitude, and when lands so assessed are sold for delinquent taxes, it is the estate assessed and taxed that passes to the purchaser, the fee burdened with the servitude. . . .

"We do not think that the courts should hold that at the common law, much less under the Michigan statutes, that where a servient estate is sold for delinquent taxes the effect of such a sale is to deprive a dominant estate of an easement therein."

"Strict Foreclosure in Illinois." By J. Ed. Thomas. 4 *Illinois Law Review* 572 (Mar.).

Deals with these matters of Illinois law: "(1) when a suit for strict foreclosure may be maintained; (2) the necessary parties to a suit for strict foreclosure; (3) the bill for strict foreclosure; (4) the extent and effect of a decree of strict foreclosure."

See Conveyances, Perpetuities.

Res Adjudicata. "Does the Court Make or Interpret the Law?" By F. Granville Munson. 58 *Univ. of Pa. Law Review* 365 (Mar.).

"It is not possible to lay down any rule applicable in all cases as to the true nature of a decision—that while most courts and judges assert that the court merely interprets and does not make the law, it is nevertheless true that where decisions are overruled on other than constitutional grounds, rights previously acquired thereunder are generally protected, usually under the doctrine of *res judicata*. There are certainly grave practical difficulties in holding that all rights and liabilities must be readjusted in accordance with the latest ruling of the court. But it would seem that the doctrine of *res judicata* is opposed to any doctrine that the court merely interprets the law, for it is not interpretation in any true sense to call black white and crooked straight—which has been described as the function of *res judicata* (*Jeter* v. *Hewitt, et al.*, 63 U. S. 352, 364)."

Social Psychology. "Laws of Diminishing Environmental Influence." By Dr. Frederick Adams Woods. *Popular Science Monthly*, v. 77, p. 313 (Apr.).

Will be found interesting by those who would like scientific light on the problem of the influence of environment on mental and moral traits; the author regards this influence as "greatly overestimated," and presents a large amount of biological data in support of laws which he has deduced and here proposes.

Status. See Bankruptcy.

Taxation. "An Experiment in Equalization, and its Result." By William Carpenter. 8 *Michigan Law Review* 374 (Mar.).

The Michigan statute of 1909 providing a remedy for the injustice often occasioned by the boards of supervisors in equalizing the assessment rolls of the several townships, wards and cities of their respective counties, is here favorably regarded, and dissent is expressed from the opinion of the Supreme Court of Michigan in *Zimmer* v. *Bay County Supervisors*, 16 Det. L. N. 871, 123 N. W. 899; and in *Robinson* v. *Westover*, 16 Det. L. N. 875, 123 N. W. 904.

See Real Property.

Taxation (Federal Corporation Tax). "Is the Federal Corporation Tax an Interference with the Sovereignty of the States?" By John S. Sheppard, Jr., 23 *Harvard Law Review* 380 (Mar.).

Directed at a refutation of the argument by Charles W. Pierson in the *Outlook* (v. 93, p. 1639, Nov. 20, 1909), that the tax is an invasion of the sovereignty of the states.

Torrens System. See Conveyances.

Waters. "The Public Right in New York Water Power." By George P. Decker. 16 *Case and Comment* 264 (Mar.).

"If the law of public right is not co-extensive with future public interest to have the utility of public waters for power devoted to public benefit, the sovereign may proceed under its fishery and navigation rights to reclaim those waters wherever diverted from natural channels, and to reclaim the channels wherever occupied by structures serving to divert the flow for power, or to subserve any other use for private benefit, and regardless of the length of such user."

"Legal Rights in New York Water Power." By Henry P. Farnham. 16 *Case and Comment* 270 (Mar.).

"The rule is that in nontidal streams the right of the public is limited to navigation, and all other rights growing out of the conformation of the land and the flow of the stream belong to the riparian owner. If the stream has fall enough to be of much value for power purposes, it is not navigable in fact, and the public has no rights in it; and in those streams which are navigable, but can be available for power purposes by the erection of dams, the only interest the public has is to see that the navigation rights are not interfered with."

Workmen's Compensation. See Employer's Liability.

Miscellaneous Articles of Interest to the Legal Profession

Alaska. "The Vast Riches of Alaska." By Benjamin B. Hampton. *Hampton's*, v. 24, p. 451 (Apr.).

"It is senseless to assume that Alaska can be developed without great aggregations of capital. Let the government provide the transportation as a public facility. Then let it recognize the need of corporations for the development of the coal and the copper and the mother-lodes from which the vast wealth of Alaska's future gold production will come. Let these mines be opened and worked on a properly adjusted royalty basis."

Biography. *Kent.* "James Kent: A Legal Pioneer." By the Editor. 16 *Case and Comment* 259 (Mar.).

"In a country village to which he retired when his college studies were interrupted by military operations, he found and read the four volumes of Blackstone. 'Parts of the work,' he tells us, 'struck my taste, and the work inspired me, at the age of fifteen, with awe, and I fondly determined to be a lawyer.' "

Lindsey. "The Beast and the Jungle." By Judge Ben B. Lindsey. *Everybody's*, v. 22, p. 528 (Apr.).

Telling how the "system" tried to shear the Juvenile Court of its powers, and Judge Lindsey was victorious.

Pond. "The Late Ashley Pond." 8 *Michigan Law Review* 396 (Mar.).

"For many years he was justly regarded as one of the ablest men at the Michigan Bar, if not its unquestioned leader in many respects. . . . His power of rapid analysis was great, his clearness of thought unusual, his knowledge of principles broad, his power of applying instantly the true principle to the facts extraordinary, and his reasoning marvelously quick and accurate."

Child Labor. "Child Employing Industries." Supplement to *Annals of the American Academy of Political and Social Science*, March, 1910.

This book contains many important papers on different phases of the child labor problem, and reports from state and local child labor committees, in addition to the proceedings of the sixth annual meeting of the National Child Labor Committee.

Conservation of Natural Resources. "The Forests." By James S. Whipple, Commissioner of the State of New York Forest,

Fish and Game Commission. *Editorial Review*, v. 2, p. 253 (Mar.).

"We must plant 50,000,000 trees annually. We must have money with which to do it. The increase of forest lands on a large scale is vitally urgent. We must lift the tax burden to some extent on planted land. We must promulgate laws designed to encourage private lumbering along economic lines. We must change the Constitution to meet present-day exigencies. Arboricide must stop."

Far Eastern Question. "American Affairs." By A. Maurice Low. *National Review*, v. 55, p. 117 (Mar.).

"The proposal put forward by Secretary Knox to neutralize the Manchurian railways has been rejected by the Great Powers, and the fact that it was made has aroused some resentment both in Japan and Russia. . . .

"Mr. Knox has had no training in diplomacy, but he is a lawyer of great experience, and it is as a lawyer, rather than as a professional diplomat, that he is conducting the international relations of the United States. In the trial of a suit a lawyer often wants to get certain facts into the record, not so much for the direct bearing they have on the question at issue, but for the effect they have on judge or jury. Mr. Knox, I have reason to believe, had a definite purpose to serve; he wanted to write certain things into the international record and lay the foundation for a future line of attack."

Literature. "The Law According to Charles Dickens." By Sheriff Fyfe of Glasgow. 26 *Scottish Law Review* 85 (Mar.).

Abstract of a paper read before Glasgow Dickens Society.

"Charles Dickens was pre-eminently the novelist of the law, and his lawyers had a hold upon the public imagination far surpassing that of any other author. . . .

"Charles Dickens knew better than to present his readers with unreal lawyers. The strength of his legal portraits was their reality; but even the master himself could not altogether divest himself of the common habit of humanity, to let its particular personal experience color its views of a profession like the law. Dickens did not love the law, for his experience as a suitor had not been fortunate. . . .

"Dickens, he said, knew the legal world from the inside, and made no such mistakes as many authors—even those of high standing—sometimes make. He laid down no bad law, and his lawyers were living characters. . . . Some of Dickens' lawyers were eccentric, some commonplace, some dry-as-dust, some full of humor; no two of them were alike, but each was typical of a class. By his writings, Dickens exposed some cruel features of the legal system of his day, and there was no doubt that his books did much to soften some of its harder features."

Railways. "The Great Millionaire Mill: The Remarkable Story of the Southern Pacific Railroad." By Charles Edward Russell. *Hampton's*, v. 24, p. 479 (Apr.).

An interesting tale of the building and financing of the Pacific system of railroads and of the making of the great fortunes derived from them.

Scotland Yard. "The Lighter Side of My Official Life. VI, At Scotland Yard." By Sir Robert Anderson, K.C.B. *Blackwood's*, v. 187, p. 356 (Mar.).

The writer gives reminiscences of the period of the "Jack the Ripper" murders in the Whitechapel district of London, which occurred when he was at the head of Scotland Yard. He says:—

"One evening in the year after the Chicago Exhibition, I dined with some American gentlemen at the Hotel Cecil, and they gave me some astounding particulars of the number of homicides in that city. . . . Presently they asked me how many murders we had in London in a year. . . . I told them that the preceding year was the worst I had known, as we had had twenty murders; but the average was fifteen or sixteen. They threw down knives and forks, and stared at me and at each other. My words traveled across the Atlantic, and I received several letters, including one from a prominent official in Washington, asking me if I had spoken seriously and by the book."

Socialism. "Why Socialism is Impracticable: Its Latest Official Program." By Charles R. Miller. *Century*, v. 79, p. 903 (Apr.).

"There is no antidote to socialism. It was born in man when he first fought over the spoils of the chase and raged against his sturdier cave-mate who seized the larger share. But there are checks and palliatives. . . . The palliatives are being administered all the time in every civilized land, by the action of public opinion upon the makers of the laws. . . . The evils of which socialism justly complains are curable and being cured."

Taft's Administration. "A Political Balance Sheet." Editorial. *Outlook*, v. 94, p. 742 (Apr. 2).

"Mr. Taft's record as legislative adviser is a remarkable one; worthy of far more consideration and praise than have been bestowed upon it.

"One Year of Mr. Taft." By Edward G. Lowry. *North American Review*, v. 191, p. 289 (Mar.).

"I doubt whether this uncertainty, this attitude of questioning now manifested toward the Taft Administration and the uprightness, honesty, purity and courage of its motives and convictions will last. Mr. Taft has the capacity and the desire to write himself down in history among the best of our Presidents."

Tenement Houses. "City Housing; II, The Problem at Home." By Hollis Godfrey. *Atlantic*, v. 105, p. 548 (Apr.).

"If the housing authorities refuse to allow tenants to occupy a new house until all the necessary regulations have been met, builders become extremely anxious to meet requirements. . . . No landlord can hold property without assuming liability for such assessments for betterment as the city may think it wise to make. . . . Fortunately the final tribunal of this country, the Supreme Court of the United States, has already determined the right of a state to say to its citizens, 'You shall build in accordance with our laws and in no other way.'"

Waterways. "Highways of Progress—VI, The Future of Our Waterways." By James J. Hill. *World's Work*, v. 19, p. 12779 (Apr.).

"Waterways that are to play an important part in traffic must be *deep* waterways. That point cannot be emphasized too strongly. A vessel that carries only 1,000 tons cannot compete with a box-car. With a steamer carrying 10,000 tons you have it beaten. This is the key to the only growth of waterborne traffic that has taken place in our interior commerce. . . .

"Waterways should be created as other great physical enterprises are. . . . Locate the trunk-lines first. Open a way to the sea by the biggest, freest, most available outlet. Push the work as nature directs, from the sea-coast up the rivers. All this should be part of a general scheme of co-ordinate improvement and conservation of resources."

"Waterways and Railways." By Logan G. McPherson. *Atlantic*, v. 105, p. 433 (Apr.).

"If the transportation of the less remunerative traffic be an economic necessity, additional means of transportation should be provided to relieve the over-burdened railway. . . . That transportation by water has been and will continue to be a necessary factor in advancing civilization no one can deny."

Reviews of Books

ROMAN LAW IN THE UNITED STATES, ENGLAND AND GERMANY

Grounds and Rudiments of Law. By William T. Hughes. 4 v., v. 1, pp. xv, 283+appendix 71; v. 2, pp. x, Text-Index 228; v. 3, "Datum Posts of Jurisprudence," pp. x, 218+index 32; v. 4, pp. 12, Text-Index 275. Usona Book Co., Chicago. (Sheep $16, buckram $15.)

Roman Law in Mediæval Europe. By Paul Vinogradoff, M.A., D.C.L., LL.D., Dr. Hist., F.B.A., Corpus Professor of Jurisprudence in the University of Oxford, Honorary Professor of History in the University of Moscow. Harper & Brothers, London and New York. Pp. viii, 131—appendices. (75 cts. *net*.)

The Civil Code of the German Empire, as Enacted on August 18, 1896, with the Introductory Statute Enacted on the Same Date. Translated by Walter Loewy, B. L. (Univ. of Cal.), LL. B. (Univ. of Pa.), Ju. D. (Heidelberg) Translated and published under the auspices of and annotated by a special committee of the Pennsylvania Bar Association and the Law School of the University of Pennsylvania. Boston Book Co., Boston; Sweet and Maxwell, Ltd., London. Pp. lxxi, 568+appendix 54 and index 67. ($5.)

A NOVEL conception underlies Mr. Hughes's work on "The Grounds and Rudiments of Law," not only novel but radical. That the author in relation to the prevailing currents of legal thought is a thorough-going radical is shown by his effort to put forward a statement of the fundamental principles of jurisprudence, of working value in the actual practice of law, with utter contempt for the commonly accepted sources and for the doctrine of judicial precedent. The theory that the leading principles of the Roman law furnish the basis for our entire legal system is certainly surprising. This work therefore must be taken to offer a protest against the modern professional and academic attitude, and among the causes which have made such a protest possible one of the chief may be surmised to have been the writer's inability to appreciate the worth of that priceless legacy bequeathed to our own jurisprudence by the common law of England.

As may readily be imagined, the work is built upon a fallacy. The author declares at the outset that the history of the common law of England "is a history of the gradual adaptation, through centuries, of barbaric British, Saxon, Norman and Danish laws and customs to the universal principles of the Civil Law of Rome." This is putting the cart before the horse, for it would come nearer the truth to say that the history of English common law necessarily includes the adaptation of Roman law doctrines to the

needs of the English people, and even that might be misleading as a possible overstatement. The elaboration of this historical fallacy may be traced in various forms. From the late Professor Maitland's arrangement in parallel columns of the works of Bracton and Azo, Mr. Hughes concludes that the basis of Bracton is the civil law and not the common law. Scholarship has proved that of the actual content of Bracton's treatise only one-third shows any considerable trace of Roman influence, and that of that third a considerable part consists of English material modeled upon a framework of Roman principles. (See 1 *Law Quarterly Review*, 429, 430.)

Coke is approached in a somewhat prejudiced manner, emphasis being laid not upon his courage and independence but upon his conceit and ambition. We are told that Coke, while a learned common law lawyer, was narrow in his views, and to him the law was a tribal code, while to Bacon it was based upon principles of universal application. To follow the fallacy further, it was through Bacon that "the jurisprudence of Rome was under the name of equity established as the supreme law of England." An apparent inconsistency follows when Mr. Hughes, having given Bacon the credit for the establishment of the Roman law as the law of the land, declares (p. 33) that the legal profession, imitating Coke's course in his Institutes, "buried themselves" in the common law, and "have remained buried to the present day." The writer's mode of avoiding this apparent inconsistency, however, is by minimizing the importance of legal precedent. Apparently he would have lawyers thrust aside precedent for principle. So much for the historical fallacy.

It will thus appear that Mr. Hughes has not written, to be strictly accurate, a work on the grounds and rudiments of American law, but rather what might be called an essay on the doctrines of Roman law as illustrated by American leading cases. Yet as a work on the latter topic the volumes are by no means satisfactory. There is an offensive lack of proportion, far too little space being allotted to the substantive law and far too much to the procedural to preserve proper symmetry of treatment. Moreover, the author has built his work up around a nucleus of civil law maxims, consequently there are many important doctrines of the Roman law which as illustrative of American jurisprudence might well have been included and have not been. The writer's method, however, being expository rather than illustrative, he cannot claim for his treatise, in the face of these criticisms, even the advantage of a commentary on Roman law likely to be of any considerable aid to students of that subject.

Mr. Hughes' work does, however, evince laborious sifting of leading cases and abounds here and there in excellent reasoning. He evidently has the faculty of treating special subjects in an illuminating manner, even if he lacks a sense of proportion in assembling a group of subjects in proper relations, and even if he may fail sometimes to distinguish fundamental from secondary rules. In his volume entitled "Datum Posts" will be found an alphabetical digest of leading cases tersely stated and accompanied by notes of less important cases, a feature which may have some practical utility. But the substitution in the two volumes of "Text-Index" of an alphabetical arrangement for a scientific classification of topics, however, is a serious defect in a work of such aims, and the typography of all four volumes is of a cheapness unworthy of the text.

It is with pleasure that we turn from this unacademic and only partly successful attempt to state the fundamental principles of our jurisprudence to a liberal-minded, scholarly volume like Professor Vinogradoff's "Lectures on Roman Law in Mediæval Europe." These five lectures were delivered in the spring of 1909 at the University of London, and are now issued in a small book of pocket size. Each lecture is prefaced with a list of bibliographical sources, but Professor Vinogradoff everywhere leaves the impression of direct first-hand contact with original documents. He has compressed a vast amount of pithy information into a small space, and he presents it in a style which though learned is readable and unpretentious. The varying vicissitudes with which the decadent Roman law met in different countries in the Middle Ages in Italy, in France, in England, and in Germany, its "reception" in the two former being fairly easy, while that in the two latter was slower and less complete, are written about in a non-controversial spirit, with a happy freedom from that bias against barbaric usages which mars so much modern literature dealing with the Middle Ages.

The book is offered merely as "a sketch of great historical processes," only the principal epochs of which have been characterized. The criticism is not unlikely to be put forth, in some quarters, that he has possibly overrated the influence of the Roman law upon the common law. It would probably be fairer to say, however, that only the special standpoint selected prevents Professor Vinogradoff from indicating the real nature of the indigenous sources of English law. The average lawyer will find these lectures exceptionally interesting from the historical point of view and a stimulus to read more extended works.

In the works of such scholars as a Corpus Professor of Jurisprudence at Oxford will be found the refutation of Mr. Hughes' historical fallacy of the complete "reception" of the Roman law in England. A similar refutation is perhaps to be found in a book now to be considered, "The Civil Code of the German Empire," of which a good translation has now been made by a graduate of the University of Pennsylvania and the University of Heidelberg, under the auspices of the Pennsylvania Law Association and the Law School of the University of Pennsylvania. The impossibility of codifying the law of Germany in a form which should be a pure version of the *Corpus Juris Civilis*, and the production, as the only possible basis of compromise, of a code which could scarcely claim direct descent from Justinian, furnish the strongest proof that it was impossible for the Roman law to become the law of Germany. As the adoption of the Roman Law in the German Empire, while never complete, was far in advance of its adoption in England, what holds true of Germany applies with even greater force to England. If it is impossible to consider that the Roman law became the law of Germany, there is even less ground for the singular theory that it became the law of England. Mr. William W. Smithers, in his historical introduction, shows that one of the reasons why the first draft of the Code which was brought forward in 1887 had to be revised was because some writers found too much Roman law in it. The German law of today is neither the Roman law nor the barbaric customary law, but the product of historical conditions in the German Empire since the Middle Ages. The Roman Law tradition, however, permeates the whole fabric of German law.

This historical introduction contains some curious typographical errors, such as "Liebnitz," "Azro" (for Azo), "olographic," Tubingen, Lubeck, etc. It would also seem as if Franconia were to be preferred to "Françonia," Frankfurt-on-the-Main to "Franckfurt-on-the-Main," and Eike von Repgow to "Eike von Repkow." The editors may have some reason for choosing the spelling "Vizigothic," but we prefer "Visigothic."

In uniting with the University of Pennsylvania for the publication of the Code, the Pennsylvania Bar Association has accomplished much for the study of comparative jurisprudence by making a good English version accessible. Possibly a dignified scientific purpose would more fully have been realized by prefacing the Code with an introductory essay setting forth in detail the interesting principles which determined the selection of its material and containing a critical discussion of its subject-matter in comparison with the laws of other lands. In this manner the Code would have been introduced with more of the ceremony proper to the event. The annotations, however, will be found useful, and in them as well as in the skillful translation Mr. Loewy and the committee of publication may take much satisfaction.

WATKINS' SHIPPERS AND CARRIERS OF INTERSTATE FREIGHT

Shippers and Carriers of Interstate Freight. By Edgar Watkins, LL.B., of the Atlanta (Ga.) bar. T. H. Flood and Company, Chicago. Table of cases, etc., pp. 74 + text 488 + appendices 27 + index 28. ($6 *net*.)

"SHIPPERS and Carriers of Interstate Freight," by Edgar Watkins, is a good example of the law book written in response to the demands of actual practice. The author specifies as his subject "the rights and duties of shippers and carriers of freight that comes within the description of interstate commerce," disclaiming any purpose to treat interstate commerce generally. But in the very process of narrowing down his topic, Mr. Watkins has made an admirable exposition of the relation of one part of a great question to the whole; the principal merit of his work consists in the opportunity for orientation which it affords layman or lawyer wandering in the maze of law upon an almost all-comprehending subject.

After a brief preface, an analytical Table of Contents is given, then an index of Appen-

dices of Statutes, a Table of Cases Cited, containing over fifteen hundred citations, the latest being in 213 United States Reports, almost five hundred pages of text and appendices, including forms for procedure before the Interstate Commerce Commission, and an adequate index. Without evident purpose the author has made the book a very clear statement of the underlying question of jurisdiction, with the result that the principles of a common law of commerce appear constantly as the bases of decisions, which, as the author explains, he has summarized as frequently as possible in the language of the Court. The book, in fact, seems to have been written around the important case of *Texas & Pacific Railway Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, perhaps the most enlightening pronouncement as to the tendency of the "commission with power" to exclude all other means of regulating commerce.

Mr. Watkins discloses a keen understanding of the true inwardness of the subject of the relations between shippers and carriers of interstate freight and the methods which the law affords for their adjustment, and he has presented an analysis that is bound to commend itself to all who are called upon to know about interstate commerce.

COMPARATIVE CONSTITUTIONAL LAW

Modern Constitutions: A Collection of the Fundamental Laws of Twenty-two of the Most Important Countries of the World, with Historical and Bibliographical Notes. By Walter Fairleigh Dodd. University of Chicago Press, Chicago. V. 1, pp. xxiii, 351; v. 2, pp. xiv, 312 + index 20. ($5.42 postpaid.)

THE University of Chicago has assisted the study of comparative constitutional law by publishing this collection of written constitutions, edited by a leading scholar, which cannot fail to be valued by all who are interested in political science and public problems. The present undertaking is a modest one, but it is to be hoped that it may prove to be preliminary to a more ambitious work not only presenting the constitutional law of all the important countries in a form conveniently accessible, but also rendering possible, by methods already known to comparative jurisprudence, a comparison of all the provisions relating to separate topics.

Mr. Dodd has devoted the larger part of his editorial labor to obtaining correct English texts of the important documents as they stood at the end of the year 1906 or in many cases later. For this purpose, re-translation was necessary in some cases, and each text was submitted to a competent person for careful revision before its acceptance. The result has therefore been that many of the texts have been approved by leading authorities of the countries concerned. This procedure seems to have resulted in a trustworthy compilation of texts, which possess the further merit of having been rendered as far as possible into the technical language of political science. The countries represented in the collection are the Argentine Nation, Australia, Austria, Hungary, Austria-Hungary, Belgium, Brazil, Canada, Chile, Denmark, France, Germany, Italy, Japan, Mexico, Netherlands, Norway, Portugal, Russia, Spain, Sweden, Switzerland, and the United States.

The footnote annotations do not form an important feature of the work, as they have been mostly confined to information regarding amendments and have been sparingly used. Next to the careful preparation of texts, what has received most attention has been the carefully chosen bibliographical notes prefixed to each constitution, and also the short historical introductions, for which the editor modestly refrains from claiming anything more than the merit of brevity. The two volumes are well manufactured, and will be a welcome addition to the general libraries of many lawyers.

MACHEN'S CORPORATION TAX LAW

A Treatise on the Federal Corporation Tax Law of 1909; together with appendices containing the Act of Congress and Treasury regulations, with annotations and explanations, and forms of returns. By Arthur W. Machen, Jr., of the Baltimore bar, author of "The Modern Law of Corporations." Pp. xxv, 183 + appendices and index 125. Little, Brown & Co., Boston. ($1.50 *net.*)

THIS convenient handbook of the federal corporation tax law was hastily yet skillfully prepared for publication at sufficiently early a date to furnish assistance to corporations in making their returns under the statute. The author seems to have had two purposes in mind. The first and dominant one was to describe and annotate the act thoroughly, presenting information with regard to the character of the tax, what companies are subject to it, how the taxable income is calculated, the way returns are to

be made out, assessment and collection, and remedies. The secondary purpose seems to have been to throw some light on the question of constitutionality. In carrying out the former purpose, free use was made of decisions under former federal statutes, as well as relevant decisions under the English income tax laws. In seeking to realize the latter, while he has expressed serious doubts of the constitutionality of the tax, the author has approached the subject in a spirit of impartiality and caution.

Notwithstanding the care with which Mr. Machen gropes his way to the conclusion that the tax is in some respects unconstitutional if not so *in toto*, we believe that he is too ready to assume that the tax is levied on incomes. At all events, the principle he so confidently states, that the tax cannot possibly be laid on the right to do business, has been so generally recognized to be debatable that fuller consideration of the view likely to be asserted by the government, and actually asserted, as the outcome proved, in the argument before the Supreme Court, was to be desired. Taking throughout the position that the tax is laid on income, Mr. Machen, if this view is to prevail, seems also to have gone too far when he reasons that if corporate income derived from real estate and from invested personal property is to be considered as not taxable without apportionment, on the authority of the *Income Tax* cases, yet income received from business in general, excluding all income derived from investments, may be taxable (p. 56). It is difficult to see why all the income of a corporation is not derived from the invested personal property of the stockholders. It may therefore be questioned whether, on the authority of the *Income Tax* cases, any part of the income derived from the business of the corporation may be taxed. If it may, what may be good law may be bad economics.

We may perhaps also be excused for disagreeing with the suggestion that on account of the constitutional limitations on the federal taxing power, income derived from state and municipal securities may properly be deducted in computing the net income which measures the amount of the tax. Aside from these points we have found nothing to draw forth adverse criticism, and because of the copiousness of useful material included the book is likely to prove useful to corporations and their legal advisers if the Supreme Court should see fit to sustain the constitutionality of the act.

DILL ON NEW JERSEY CORPORATION LAW

The Statute and Case Law of the State of New Jersey Relating to Business Companies, under an Act Concerning Corporations (Revision of 1896) and the Various Acts Amendatory thereof and Supplemental thereto, with Annotations and Forms. By James B. Dill. Pp. 1, 216 + index 36.

"THE Statute and Case Law of the State of New Jersey" is the title of the 1910 edition of Dill on New Jersey Corporations. This book has been gradually expanded from a guide to incorporation "Under an Act Concerning Corporations (Revision of 1896)," to a compendious, if concise, treatise upon the law of corporations. The whole contains two hundred and fifty pages, within which are included the best (certified by the Secretary of State of New Jersey) of all the state enactments applicable to business corporations, annotations by citation from the fifteen hundred cases gathered into the table of cases, a complete set of forms and precedents, with a special index thereof, a schedule of fees and taxes, a table of contents, and an adequate general index. As the author, James B. Dill, had much to do with the original formulation of the present New Jersey policy toward corporations and is now a Judge of the Court of Errors and Appeals of New Jersey, to the obvious merits of the work must be added that of authenticity.

For the purposes of an attorney concerned with a matter of the New Jersey law of business corporations, this handbook may serve as well as a library, and, in some cases, better. The excellence of New Jersey statutes and adjudications makes for its usefulness with reference to the law of other states. If American corporation law is in essential uniform, New Jersey has worked out its problems in practice quite as far as any state, and nowhere, perhaps, have questions of corporate management been settled as a result of such a degree of attention from the leaders of the American bar. While the New Jersey citations predominate, the reports of other states are quoted and federal decisions as late as 209 United States Reports. Dill on New Jersey Corporations, long a standard authority for a special branch of the subject of corporations, seems to have attained a more general usefulness.

A BOOK OF VERSES

Dorian Days. Poems. By Wendell Phillips Stafford, Justice of the Supreme Court of the District of Columbia. The Macmillan Co., New York. Pp. vi, 112. ($1.25 *net.*)

IT is a pleasure to come upon a volume of verses by a judge who is also a poet. Judge Stafford has followed in the footsteps of Keats and William Morris. His devotion to beauty in its objective shapes is sincere. His verses are marked by distinction and are modeled upon a good tradition. Their charm is derived from beauty of form rather than of substance. The thought may be commonplace, but the imagery and diction frequently give rise to rare pleasure. There is often a reminiscence of the poetic manner of Keats, as where, for example, in "The Singing of Orpheus," we read that:—

> the moon increasing
> Leads on the black sea-wall her white-maned tides
> Till the breath of their nostrils is vainly blown
> high on its thundering sides.

The subjects of the chief poems are drawn from classical mythology, and among the most exquisite are those on the Belvidere Apollo, Actæon at the Bath of Artemis, and the Venus of Melos. The writer shows a particularly happy command of the sonnet form, and one of the best things in a book which deserves to be widely circulated is the noble sonnet on the Sistine Madonna, which may here be quoted:—

> Other madonnas ever seem to say,
> "My soul doth magnify the Lord"; but she,
> Dove-like in sweetness and humility,
> Has caught the words of wonder day by day
> And kept them in her heart. Look as we may,
> The mother is yet more a child than he
> Who nestles to her. In his eyes we see
> The prophecy of lightnings that will play
> About the temple courts, the conqueror
> Traveling in the greatness of his strength,—
> But in her eyes only the love unsleeping
> Wherewith, all times, he will be waited for,
> Which, as the cross lets down its load at length,
> Will take her babe once more into her keeping.

MORRIS'S HISTORY OF LAW

An Introduction to the History of the Development of Law. By Hon. M. F. Morris, Associate Justice of the Court of Appeals of the District of Columbia. John Byrne & Co., Washington. Pp. 315. ($2.)

ONE might suppose that the hierarchical conception of law no longer existed in an enlightened age, yet a judge of some prominence has seen fit to publish a book affording a startling example of modes of thought long since relinquished. At the outset Judge Morris declares:—

> All the fundamental principles of law, not merely divine law, but human law also, are of divine origin, and are the dictate of the Almighty Himself; and . . . by Him it is committed to the people to organize society, according to their varying circumstances, to carry the fundamental principles into effect.

This line of thought controls the treatment throughout. The author's point of view is that of mediæval theology, and his religious bias has led him to disregard the modern literature of most of the subjects upon which he writes. The result is an unscholarly series of essays, warped by prejudice and destined to mislead the reader. The attitude assumed toward barbarism and savagery, which "are merely lapses from a primordial civilization," results in the brushing aside of their phenomena as abnormal and unworthy of serious consideration. The writer is thus unable, notwithstanding some proof of diligence in superficial historical research, to present a symmetrical outline of the development of law. His book is without footnotes, bibliography or index, and its publication must produce the impression that his venture beyond the customary field of professional empiricism was ill-advised, and that these lectures at Georgetown University are likely to work greater injury to the cause of sound legal education than if they had wisely been suffered to remain unpublished.

NEW BOOKS RECEIVED

RECEIPT of the following new books which will be reviewed later, is acknowledged:—

The History of Caste in India. With an appendix on Radical Defects of Ethnology. By Shridhar V. Ketkar, A.M. (Cornell). V. 1. Taylor & Carpenter, Ithaca, N. Y. Pp. xv, 170+index 22. ($1.50.)

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.*)

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. II, Barradall's Reports, pp. 394. ($7.)

American Electrical Cases; being a collection of all the important cases (excepting patent cases) decided in the state and federal courts of the United States from 1873, on subjects relating to the telegraph, the telephone, electric light and power, electrical railway, and all other practical uses of electricity; with annotations. Edited by Austin B. Griffin, of the Albany bar. V. IX (1904–1908). Matthew Bender & Company, Albany. Pp. viii, 1140+index 47 ($6.)

Latest Important Cases

Automobiles. *A Taxicab cannot be called a "Carriage."* Mass.

A taxicab has been held not a "carriage" within the meaning of the statute, in the case of *Goldman* v. *Commonwealth*, recently decided by the Supreme Judicial Court of Massachusetts. The appellant had been arrested and fined for non-payment of fare, but appealed on the ground that chap. 103, sec. 55, of the Revised Laws afforded no protection to owners of automobiles. The Court declared it was certain that the legislature, in using the word "carriage," had no thought of a vehicle made up in a large part of complicated machinery and propelled by a powerful engine, whose operation is similar to that of a locomotive on a railroad.

Carriers. *May not be Required to Connect their Tracks with Grain Elevators—Police Power.* U. S.

The Nebraska statute requiring railways to build switches leading to all grain elevators upon their tracks, upon demand, was declared unconstitutional by the Supreme Court of the United States April 4 in *Nebraska* v. *Missouri Pacific Ry. Co.* The opinion, which was delivered by Mr. Justice Holmes, was based on the ground that such a requirement exceeded the limits of the police power and invaded the constitutional rights of private property.

See Interstate Commerce, Public Service Corporations.

Corporations. See Interstate Commerce.

Eminent Domain. See Real Property.

Employer's Liability. See Procedure.

Evidence. See Negligence, Real Property.

Interstate Commerce. *State Tax on Foreign Corporations Unconstitutional Burden on Interstate Commerce.* U. S.

Similar principles to those involved in the judgments of the United States Supreme Court in *Western Union Telegraph Co.* v. *Kansas* (216 U. S. 1, 30 Sup. Ct. Rep. 190, see 22 *Green Bag* 192), and in *Pullman Co.* v. *Kansas* (30 Sup. Ct. Rep. 232, see 22 *Green Bag* 250), were applied by the Supreme Court in *Ludwig* v. *Western Union Telegraph Co.*, a tax on the capital stock of foreign corporations, imposed as a condition precedent to engaging in business within the state, being adjudged an illegal burden on the interstate business of a foreign telegraph company.

Mr. Justice Harlan wrote the opinion of the Court, as in the two earlier cases, and as in those cases, the Chief Justice, Mr. Justice Holmes, and Mr. Justice McKenna dissented.

Fourteenth Amendment—Equal Protection of the Laws Violated by Tax on Foreign Corporations against which State Tax Laws Discriminate. U. S.

The decisions in the *Western Union Telegraph* and *Pullman* cases also furnished, in a considerable degree, the authority for the decision of the United States Supreme Court in *Southern Railway Co.* v. *Greene*, wherein the proposition was laid down that a foreign railway corporation which has acquired permanent property in a state and has carried on its business within its territory in conformity with its laws, is a "person" within the equal protection of the laws clause of the Fourteenth Amendment, and cannot be subjected, by new state legislation not taxing domestic corporations in the same manner, to an additional franchise tax for the privilege of doing business within the state. The opinion was delivered by Mr. Justice Day, and as in the other important interstate commerce cases above referred to, the Chief Justice, Mr. Justice McKenna, and Mr. Justice Holmes dissented.

See Carriers.

Negligence. *Evidence of Rules Governing Operation of Cars Admissible—Master and Servant.* S. C.

In *McCormick* v. *Columbia Electric Street Ry. Co.*, decided April 8, the Supreme Court of South Carolina declared the rules of companies regarding the conduct of their employees and the operation of their cars to be admissible in evidence, for the purpose of proving negligence in actions for personal injuries. The defendant company had a rule prohibiting its cars from being run at closer intervals than two hundred feet, except at terminals or junctions, and where a motorman whose car had caused the injuries had violated

the rule, it was held that the evidence was rightly admitted.

The Court thus disapproved of the rule stated in the following authorities cited by the Court: *Fonds* v. *St. Paul City Ry. Co.*, 71 Minn. 433, 70 Am. St. Rep. 341; *Isaacson* v. *Duluth Street Ry. Co.* (Minnesota) 77 N. W. 433. The Court preferred to adopt the rule in these cases: *Lyman* v. *Boston, etc., R. R.* (N. H.), 11 L. R. A. 364; *Chicago Railway* v. *Krayenbuhl*, 65 Neb. 889, 59 L. R. A. 920; *Lake Shore, etc.*, v. *Ward* (Ill.) 26 N. E. 520; *Railroad* v. *Williams*, 74 Ga. 723; reaffirmed in *Atlanta Con. St. Ry. Co.* v. *Bates*, 103 Ga. 330, 30 S. H. 41.

Duty of Owner to Light Premises Does Not Require Uniform Light Throughout Entire Length of Stairways. N. Y.

The New York Court of Appeals has decided that a descent of two steps from a main office to a wareroom, the first step being well lighted but the second being in shadow, does not constitute such a dangerous condition as to make a defendant liable for injuries received by a customer. *Weller* v. *Consolidated Gas Co.*, decided March 4 (N. Y. Law Jour., March 19).

The Court, per Willard Bartlett, J., said:—

"A rule of law which required all stairways of whatever length in every shop, store, hotel or building to which the public are invited to be uniformly lighted throughout their whole length would impose a burden much greater than is required for the protection of the community. It is ordinarily sufficient to light such a stairway sufficiently to disclose its existence and character. The persons who make use of it can reasonably be expected to exercise their faculties to some extent in order to ascertain its precise length."

Police Power. See Carriers.

Procedure. *Expediting Act Permitting Entering of Final Judgment According to all the Evidence in the Lower Court Need Not Deprive a Plaintiff of Right to Press his Suit on Statutory Courts, when he has Elected Common Law Counts—Employer's Liability.* Mass.

In *Stone & Webster Engineering Corporation* v. *Grebenstein*, decided March 26, the Supreme Judicial Court of Massachusetts for the first time construed a new expediting act.

Where a workman lost one eye in consequence of an electrical explosion which occurred while he was doing work under the direction of a foreman, and he brought suit against his employer for the negligence of the foreman in not warning him of the dangerous character of the work, nor giving him the proper tools with which to do it, it was held, that as the foreman was a fellow servant of the plaintiff, the latter could have no common law ground of recovery.

Where the plaintiff had elected to base his case upon the common law liability of the master, rather than upon that arising under employer's liability legislation, and a statute (St. 1909, c. 236) enabled the Supreme Judicial Court to expedite the final determination of causes by directing the trial court, by rescript, to enter judgment in accordance with a ruling sustaining exceptions to the action of the trial court in not directing a verdict either for or against the plaintiff upon all the evidence, it was held that this statute was not mandatory, and the Court was not compelled to order judgment in favor of the defendant, but that the trial court might now determine whether or not justice would require that the plaintiff be allowed to substitute a statutory for a common law claim.

Public Service Corporations. *Statute Fixing Rates for Transportation of Coal Constitutional.* U. S.

In *Northern Pacific Ry. Co.* v. *North Dakota*, decided March 14, the North Dakota coal rate law of 1907 was held constitutional for the present by the Supreme Court of the United States, despite the claim of the railroad that the law requires the transportation of coal below the cost of service.

In affirming the decision of the state Supreme Court, Mr. Justice Holmes said that there were so many uncertainties about the rate being confiscatory that the Court felt it was not justified in overruling the state court, which held the law would not prove confiscatory, if put into effect. The affirmance was made, however, with the statement that it should not prejudice the case of the railroads if after the law went into effect it should prove confiscatory.

Public Service Corporations Cannot be Compelled by a State to Furnish Better Service when Interstate Commerce would be Burdened. U. S.

The Supreme Court of Arkansas having attempted to fine the St. Louis Southwestern Railway for failure to supply more cars for

local traffic within five days after the time they were ordered by the shipper, and the railway having appealed, the United States Supreme Court on April 4 decided that the state of Arkansas could not thus burden interstate commerce, Mr. Justice White writing the opinion. *St. Louis Southwestern Ry. Co.* v. *Railroad Commission.*

See Carriers, Interstate Commerce.

Real Property. *Evidence of Structural Value of Buildings Admissible in Condemnation Proceedings.* N. Y.

In *Matter of Blackwell's Island Bridge Approach*, the New York Court of Appeals modified the rule which has hitherto prevailed in that state in ascertaining the value of real estate, according to which rule the improvements are treated as incidental to the fee and valued by the introduction of expert testimony. The Appellate Division of the Supreme Court had upheld this rule in the condemnation proceedings here reviewed, but the Court of Appeals reversed the decision March 4, substituting the following doctrine (N. Y. Law Jour., March 21):—

"It is common knowledge," said Judge Werner, "that buildings not only differ from each other in design, arrangement and structure, but that many which are extremely similar and are situate upon adjoining lands are essentially different in the quality and finish of the materials used and in the character of the workmanship employed upon them. It must follow that such differences contribute in varying degree to the enhancement in the value of the land, and we can think of no way in which they can be legally proved except by resort to testimony of structural value, which is but another name for cost of reproduction, after making proper deductions for wear and tear."

Trademarks. *Unfair Trade in Use of Similar Trade Name for Two Periodical Publications.* Penn.

In *Suburban Press* v. *Philadelphia Suburban Publishing Company*, decided by the Pennsylvania Supreme Court in January, the plaintiff, the publisher of *Suburban Life*, was granted a decree enjoining the defendant from using the trade name *Philadelphia Suburban Life*. The Court (Magill, J.) said that the use of the name adopted by the defendant would result in an "unfair, unjust and fraudulent advantage."

The Crime

By Daniel H. Prior

FEARFUL of a direful fate,
The prisoner a-tremble stood,
Wond'ring if the maiden would
Shamelessly her tale relate
To a heartless magistrate.

The judge began with smile bland
And read the charge: "'Tis larceny—
You stole a kiss, 'twas petty."
But she, on the witness stand,
Testified that it was grand.

The Editor's Bag

THE UNIFORM DIVORCE ACT AND SCIENCE

THE Uniform Divorce Act approved by the Commissioners on Uniform State Laws has not made such progress as some of the other uniform acts, having been adopted by only two or three of the states, but we do not believe that this is because of any serious inherent defects in the act, the merits of which, especially as regards uniformity in the matter of jurisdiction, will doubtless come more and more to be appreciated.

We print elsewhere a strong plea from the pen of one of the Commissioners for the adoption of the act as a piece of restrictive legislation. Mr. Roosevelt in a special message to Congress in 1905 referred to a widespread popular conviction that divorce laws were dangerously lax and indifferently administered, and the Committee on Resolutions of the Congress on Uniform Divorce Laws in 1906 spoke of the "many evils engendered by the lax and unphilosophic system prevailing in many of the states." A recent writer has investigated this assumed influence of divorce legislation on the increased divorce rate in the March issue of the *Michigan Law Review*. From an analysis of statistics gathered from typical states Mr. Evans Holbrook concludes that this influence is not all what it is frequently believed to be, even if it is to be seriously considered at all, and his carefully drawn conclusions derived from an impartial study of the facts deserve attentive consideration:—

> We have found changes in the law which ought to produce marked effects in the increase or decrease of the number of divorce decrees; the results of these changes we find to be extremely slight or else entirely lacking. . . .
>
> The fact of the matter is that divorce has become a problem far beyond any control by mere legislation, and those who hope to remedy the evil, as they call it, by the adoption of a model divorce code, seem doomed to disappointment. At least there is no great hope held out by the results of such statutory changes as have already been tried. The tide of divorce has gone on, steadily increasing in spite of the increase of legal restrictions, and the question is now certainly an ominous one. But it is doubtful if it is a question that can be met and settled by the legislator, unless he tries to settle it in some way different from his well-worn attempts at regulating the evil has been done. Perhaps the sociologists should be listened to, who say that the way to prevent the evil of divorce is to regulate marriage rather than divorce.

The impression in certain quarters that the Uniform Divorce Act is intended to restrict the rate of divorces is perhaps partly due to the fact that the National Congress on Uniform Divorce Laws included among its delegates not only members of the bench and bar and prominent public officials, but representatives of the churches as well, and partly to such expressions of the Committee on Marriage and Divorce as the declaration that a reduction in the number of grounds for divorce was more to be desired than an increase. The general attitude exhibited in the

reports of the Committee, however, does not lay emphasis on the restrictive aspect of the measure, and if the Act had to rely on this alone for support, the movement for uniformity in divorce legislation might well be in danger of receiving a serious setback.

The more enlightened thought of the day regarding the function of law discountenances the theory that it is possible to alter fundamental habits of human society by means of legislation. Law cannot supplant or overrule morality. It can at best only reflect morality and make its mandates effective. The problem of the jurist in drafting a uniform divorce act is solely that of formulating a law which fully meets with the requirements of social justice. The repression of the divorce evil may safely be left to morality, so long as the law rises fully to the responsibility of providing the means for executing the moral judgment of society. A dogmatic attitude on the part of the draftsman is thus ill suited to his task. He cannot afford to take the position that any special conception of morality is paramount to the general one permeating the whole social fabric, nor can he ignore the results of sociological investigation conducted in accordance with a sound scientific method. The sociologist, to be sure, may unconsciously underrate the responsibility of the state, but he nevertheless recognizes the fact that society is able to remedy its own evils, and will inevitably attempt that task without becoming wholly dependent upon external aid from legislation. The sociologist is by virtue of his calling a profound believer in the wholesomeness of popular conceptions of morality, and the public-spirited jurist and the conscientious churchman are not less devoted to the same ideal, if they do but know it. The age has reached the point where it is futile to expect that any theological or institutional statement of morality can prevail, except so far as it commands the approval of the community in general. All really have the same fundamental interest of social welfare at heart, and the churchman, the jurist, and the man of science can and should co-operate in the effort to make legislation conform to the highest ethical demands of the age.

For these reasons we do not think that the Commissioners on Uniform State Laws made any mistake in approving this Act, which was the outcome of the deliberations of a congress in the deliberations of which church dignitaries were allowed to participate. For these same reasons we think it would be a great mistake to ignore the manifest advantages of enlisting scientific co-operation for the purpose of promoting any phase of the movement for uniform state laws. The Uniform Divorce Act is a meritorious piece of legislation, and in our judgment reflects the views not of any special interest but of the progressive elements of the legal profession in the United States. If, however, it has any minor defects to which sufficient attention has not yet been directed, the liberal-minded, rational methods to be employed in remedying them are obvious.

DIFFICULTIES OF A CODIFICATION OF AMERICAN LAW

WE print elsewhere in this issue a powerful plea for a uniform legislative codification of American law. The article was inspired by the project of Messrs. Alexander, Kirchwey and Andrews recently outlined in these pages, contemplating a "tacit" or purely expository codification.

It is to be hoped that the issue raised by Dr. Hannis Taylor will not be confused with that involved in the main project. Legislative codificaton is an entirely different matter from "tacit" codification, and presents a far more controversial question than that offered by the simple unassailable proposition of Messrs. Alexander, Kirchwey and Andrews. The *Green Bag* entertains positive convictions on the subject of legislative codification, but it may not be necessary to express them at this time, and it would certainly be well to refrain from saying anything which might tend to prejudice the discussion of an entirely different proposal.

It is unnecessary to consider whether Dr. Taylor's plan is feasible or not; it is sufficient to point out that the difficulties blocking the way to its realization are much greater than they would be were the object merely the accomplishment of "tacit" codification. In the first place, the achievement of the plan depends wholly upon the success with which the states can gradually be converted to a new propaganda which however meritorious will not make its way easily. The adoption of the proposed code could come about only after long and earnest debate. In the case of the American *Corpus Juris* project, on the contrary, the objections which many members of the bar entertain toward legislative codification could not stand in the way, and there is nothing in the proposition likely to provoke strong or determined antagonism. Nothing radical or revolutionary is proposed; on the contrary, the projected statement of American law would be merely a broader and more systematic application, on a larger scale, of methods which have hitherto been followed by law writers in the preparation of the most useful text-books and digests, and perhaps also encyclopedias.

Not only is there danger of Dr. Andrews' project foundering on the rocks of anti-codification sentiment, but there is also the obstacle of public financing. The latter is a formidable stumbling-block, one recognized as serious by many authorities, and probably insuperable, as Mr. Alexander has declared (see 22 *Green Bag* 80 *supra*). This hindrance, likewise, would not interfere with the working out of Mr. Alexander's scheme.

It has perhaps been made clear, by a method of contrast, how trivial the objections to Mr. Andrews' plan are, if indeed any are serious enough to be considered at all. We can confidently say that were some broad-minded, progressive benefactor to see the wisdom of a liberal endowment for the purposes set forth, no opposition would be offered by the American bench and bar to the consummation of a plan which would everywhere be recognized as beneficent. On the contrary, Dr. Taylor's plan would have to fight its way over hotly contested ground, with no possibility of victory except after a long continued struggle, the outcome of which would be dubious.

SOME NEW LAW MAXIMS

AT the annual dinner of the Queens County Bar Association, at the Hotel Astor, New York, Jan. 15, Abraham Gruber coined the following epigrams:—

"A client in Manhattan is worth two in Bushwick."

"Do your client as you would have your client do unto you. But make him pay for it."

"Every client has a silver lining."

"Some judges are born famous; some acquire fame, and some appoint condemnation commissioners."

"It is a wise client that knows his own lawyer."

"There are three kinds of lawyers, but the others are just as good."

THE LAW AS IT IS DIGESTED IN DENVER

TWO hundred members of the Denver Bar Association, at their annual banquet Feb. 21, gave their consideration to the following brief:—

STATE OF COLORADO

City and County of Denver

IN THE TRAFFIC CLUB

THE DENVER BAR ASSOCIATION *v.* FOOD

BRIEF ON ORAL ARGUMENT

FILED FEBRUARY 21, 1910
JAMES M. LOMERY, Clerk

BILL OF PARTICULARS

(AND MEMORANDUM OF AUTHORITIES APPLICABLE THERETO)

"Eating dinner is a matter of necessity."—41 N. E. 1051, 1054.

"Water runs and will run."—12 Ga. 404, 411

BLUE POINT COCKTAIL

"Oysters have not the power of locomotion."—14 Wendell 42, 46.

CELERY

MOCK TURTLE A L'ANGLAISE

"There is a class of lies, voluntary, yet weak, that do not give rise to an action."—2 Ga. 66, 68.

CIGARETTES

The right to enjoy the use of tobacco is a natural right that is not forbidden by law.—12 S. W. 297.

RADISHES, QUEEN OLIVES, GHERKINS
BLACK BASS A LA MENIERE
SPRING LAMB CHOPS A LA PRINTANI

"One cannot be expected to encounter a lion as he would a lamb."—6 Jones Law (51 N. C.) 392, 398.

SWEETBREADS BRAISED AU TRUFFLE
ROMAN PUNCH

"Interest, when it accrues, feeds the estoppel."—2 Smith L. C. 775.

WALDORF SALAD

"A guest at a hotel may satisfy his appetite when he goes to the table."—18 Atl. 938, 939.

STRAWBERRY ICE-CREAM
FANCY CAKE

"One cannot eat his cake and have his cake too."—99 Fed. 695, 697.

CHEESE
TOASTED CRACKERS

"Cheese eaten with bread would hardly be called a sauce."—152 U. S. 626.

DEMI-TASSE
CIGARS

"Tobacco is victuals and drink."—23 Atl. 588.

"It is an inalienable right of the citizen to get drunk."—59 Mo. App. 122, 127.

"This is a dry banquet."

BRIEF

OF COUNSEL HEREIN DESIGNATED SPECIALLY APPEARING FOR THE PURPOSES HEREIN SPECIFIED

"A fit occasion to deliberate is when the court is full."—11 Pet. 173.

"Counsel may, in the discretion of the court, be permitted to lie down on the floor and holler at the top of his voice."—58 S. W. 422.

Hon. E. C. Stimson, Toastmaster.

"He would swear a hole through a two-inch plank."—74 N. W. 208.

Hon. John F. Shafroth.

"George Washington."

Hon. George W. Musser, "Dissents."

"All I can say is, that I differ from those judges, and I feel bound to say that when I do differ from such judges I entertain much more doubt as to the propriety of my decision than of theirs."—Brett, L. J., in L. R. 7 P. D. 102.

Hon. John T. Barnett, "Free Advice."

"The quality of the advice of counsel may be such as to warrant the presumption that it was obtained gratis."—9 S. E. 1040.

Ralph Talbot, "Our Justice Courts."

"No wise and orderly mind can reasonably complain when he gets the common justice of the country, though he may wish that the

country were wiser, in order that its justice might be better."—3 Grant Cases (Penn.) 311.

John T. Bottom, "*Show Me.*"

"It is common knowledge that one of the first things an attorney does when a client seeks to procure his professional services is to establish the relation of attorney and client. All understand how this is accomplished."—108 Fed. 39.

De S. De Lappe, "*Neighborhood Quarrels.*"

"A justice of the peace is generally a man of consequence in his neighborhood. He writes the wills, draws the deeds, and pulls the teeth of the people; also he performs divers surgical operations on the animals of his neighbors."—73 Ga. 594.

Alfred Muller, "*Side Issues.*"

"Anything may be argued, no doubt."—L. R. 19 Eq. 588.

Henry McAllister, Jr., "*The Lure of the City.*"

"In a great city the business of courts cannot be transacted as it once was in small country districts."—67 Ill. App. 195.

Ben C. Hilliard, "*Suffragettes.*"

"The notion that women belong to the weaker sex is only entertained by the credulous and unsophisticated."— 13 Pac. 289.

Willis V. Elliott, "*The Wages of Sin.*"

"There is no such crime known to the law as that of being a 'black Republican.' "—15 Md. 485.

HARDWORKING JUDGES

ACCORDING to an English physician of high repute nobody works harder than a judge. "The most intricate mental processes," he says, "are in progress all the time he is hearing a case. He has, for instance, to analyze and dissect all that he hears. Nothing is more mentally fatiguing.

"No brain work that I can imagine could make greater demands. Not once, of course, must the judge's attention flag. If it does so, he is neglecting his duty. For this reason, a judge should never continue sitting when he is tired. A fatigued judge cannot, however much he tries, keep the grip of a case that he does when he is mentally and physically fresh.

"If a judge begins his sitting at 10.30 a. m., and adjourns for half an hour for lunch, he should certainly not work after 4 p. m. Also, in my view, a Saturday and Sunday rest is essential for a judge. As regards vacations, I do not think those now in vogue are in any way too long."

LEGAL FORM FOR A PROPOSAL OF MARRIAGE

THE following has been suggested as a good form for a lawyer proposing marriage:

To Ann Bright of Blank, in the county of Blank, Spinster, Daughter of Edward Bright, of the same place, Gentleman, and of Mary, his wife—Madam: Whereas, I, the undersigned, John Smith, am a bachelor of the age of twenty-eight years, and am and have been for three years and upward now last past in practice as an attorney and practitioner at law;

And whereas, the net annual income and emoluments arising from the practice of my said profession amount to the sum of $1,500 and upwards, and in addition thereto I am possessed of or otherwise entitled to real and personal property producing a further net annual income of $1,000 or thereabouts, making together with the aforesaid professional income a total income of $2,500 or thereabouts;

And whereas, having regard to the several facts hereinbefore recited, I, the said John Smith, am in a position to maintain and keep a wife and I am desirous to enter the holy state of matrimony;

And whereas, on divers occasions and in divers places, I have observed the manners, behavior and demeanor of you, the said Ann Bright, and I have further made or caused to be made sundry inquiries and investigations concerning the character, disposition, habits, propensities, tastes, likes and dislikes of you, the said Ann Bright, and have thereby and by other sufficient means duly satisfied myself that you, the said Ann Bright, are in all respects a fit and proper person to become the wife of me, the said John Smith;

And whereas, after due and mature deliberation I have determined to make unto you the offer hereinafter expressed;

Now in pursuance of such determination, and for divers and good causes me hereunto moving, I, the said John Smith, do hereby irrevocably (but subject nevertheless to the stipulation contained in the final clause hereof) offer and tender unto you, the said Ann Bright, all that and those my heart, hand,

body, mind, understanding and affections to be held by you to the use of you, the said Ann Bright, for and during the term of your natural life in case you shall predecease me, or for and during our joint life in case I shall predecease you.

And I hereby promise and declare that in the event of you, the said Ann Bright, intimating to me in writing or otherwise within the space of seven days next after the date upon which this letter shall be served upon you or left for you at your last known place of abode, your acceptance of the offer hereby made as aforesaid, I will within a reasonable period thereafter intermarry with you, the said Ann Bright, at such church or in such other building as you may select for that purpose, and will at all times thereafter during our joint lives at my own expense in all things maintain and keep you, the said Ann Bright, as my lawful wife.

Provided, always, and the offer hereby made as aforesaid is upon the express condition that if you, the said Ann Bright, shall not within the space of seven days after the service or delivery of this letter as aforesaid intimate by writing or otherwise your acceptance of the said offer, the same offer shall thereupon be absolutely null and void, anything herein contained to the contrary notwithstanding.

In witness whereof I have hereunto set my hand, designating myself as

Your humble servant, John Smith.

—*Kansas City Star.*

THE FARMER WHO SHOULD HAVE BEEN A LAWYER

SAMUEL J. ELDER of the Boston bar tells the story of a farmer "who had a horse which had worked for years in front of a plow, but which had never been away from the farm. The old fellow's driving horse died, so the next time he wanted to go into town he hitched the plow horse to his buggy and started off.

"He had driven but a short distance when he reached a bridge across a stream. The animal had never seen a bridge before, and refused to cross it. Coaxing, whipping and every other method known to the farmer was of no avail.

"Finally he gave up in disgust, and turned the horse homeward. The following Saturday this advertisement appeared in the local newspaper:—

"FOR SALE—A nice, kind horse. Easy to drive, and will stand without hitching. Now owned by a man in the country who wants to go into town.

"If I didn't happen to be a member of the bar, I would say that that farmer missed his vocation and should have been a lawyer."

IN THE TENNESSEE MOUNTAINS

NOAH W. COOPER of Nashville, Tenn., is an eloquent and graceful orator and a genial whole-souled man. He tells of a novel experience he once had in amazing a Tennessee farmer's family by showing them that a lawyer could conduct family prayers.

"I had been to Smithville, Tenn.," he says in the *Nashville Banner*, "to try a mountain land lawsuit. In coming back to Nashville I rode in a buggy from Smithville down the mountain to catch the evening train near Brush Creek. But the train was gone, and the snow and the night were falling fast. So I stopped at a farmhouse near by, and begged lodging for the night. We had a good supper and then the family gathered round the fire and listened and looked at me. I told them my name and occupation where I'd been and where I was bound for. They seemed to think that it was my business to talk, and I talked a good deal, and asked many questions about the farm, the children, their hopes and prospects. I asked them about the lawyers in that country. I saw they were skittish about lawyers, and doubtless had the average opinion.

"Along about nine o'clock we all got sleepy. Somebody said something about going to bed. I had been looking at their books, and found a New Testament on the mantel. It looked like it had been used. I reached up and got the Testament off the mantel and said, 'I see you all believe in the Bible, like myself. When I'm at home I always have family prayers before going to bed, and if you don't mind it, I will read a chapter and we will have prayer before we go to sleep.' Well, sir, I never saw a sleepy crowd wake up quicker. It was like a thunderclap. When I finished, all arose, every eye on me. Their amazement at a lawyer having family prayers was simply speechless.

"Next morning the old gentleman asked me to say grace over breakfast. That showed growing faith in me. But as I took my grip and walked down with him to catch the train for Nashville he came up close to me and said,

'Mr. Cooper, didn't you say you wuz a lawyer ' 'Yes,' I said. 'Well, tell me,' he said, 'how can a man be a lawyer and a Christian?' And I told him; the train came; I jumped on and was soon home again."

A REMARKABLE LAW

WHILE some remarkably worded laws have found their way into the statute-books of this country, it is doubtful whether any such ever created so much amusement as one of the early laws of Nebraska.

According to the wording of this law, it committed any unfortunate justice to jail or made him pay costs, if he rendered judgment in carrying out the requirements of the act. The section referred to reads as follows:—

"For the violation of the third section of an act to license and regulate the sale of malt, spirituous and vinous liquors, twenty-five dollars—and on proof of the violation of said section, or any part thereof, the justice shall render judgment for the whole amount of costs, and be committed to the common jail until the sum is paid."

NO ROMANCE IN CRIME

"THE really great detective story where the solution of the problem is not to be found quite early on, and at the same time follows the probabilities of actual life, has yet to be written." So says Mr. Melville, former head of the Special Service Branch of Scotland Yard. "I used to read detective stories because I never was above learning, but I gave them up in the end. The writers set up their plots like so many ninepins aiming solely at knocking them down again. Neither the crimes not the criminals are recognizable in my experience. All this well-dressed burglar business is sheer nonsense."

MURDER WITHOUT MALICE

THE Dean of the Suffolk School of Law, Boston, sends us the following gem from a freshman examination paper:—

"Where murder is committed without malice aforethought it is a case of manslaughter."

HIS DELUSION

HE thought he was a lawyer,
He hadn't any doubt,
Because he got an office
And put his shingle out.

He thought his mind was legal
Because he owned some books,
But men are simple creatures,
They bank a lot on looks.

He petted his deception
Until he got a case
And then he had suspicions
That he was out of place.

When he was nearing forty
Suspicions turned to fears,
Poor man! he was deluded
For over twenty years.

At fifty he exploded
And came down with a chug
Then spent old age in cussing
That bloomin' legal bug.

HARRY R. BLYTHE.

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

USELESS BUT ENTERTAINING

"You are charged with larceny. Are you guilty, or not guilty?"

"Not guilty, judge. I thought I was, but I've been talkin' to my lawyer, an' he's convinced me that I ain't."—*Catholic News.*

Magistrate (discharging prisoner)—"Now, then, I would advise you to keep away from bad company."

Prisoner (feelingly)—"Thank you, sir. You won't see me here again."

—*Lippincott's.*

"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 witnesses along when I goes out chicken stealin', suh."—*Central Law Journal.*

"Your husband, my dear, is a self-made man. He got his money by extremely hard work."

"Why," answered the fair bride, "I thought his fortune was left to him by his uncle."

"Yes, it was, but he had the hardest work of his life getting it away from his lawyers."

—*Central Law Journal.*

The Legal World

Important Litigation

Satisfied that the present methods of operating its smelters by the Anaconda Copper Mining Company are not only destructive in a widespread degree of the surrounding natural forests but unnecessary, Attorney-General Wickersham caused a bill in equity to be filed at Helena, Mont., March 16 against the company. Efforts were unsuccessfully made in President Roosevelt's administration to stop the destruction of the forests resulting from sulphuric and arsenic fumes.

A bill for the dissolution of the alleged beef trust was filed by United States Attorney Sims in the federal court at Chicago March 21, charging violation of the Sherman anti-trust law. Simultaneously indictments were returned before Judge Landis against the National Packing Co. and its subsidiary companies. A short time before, proceedings against the National Packing Co. had been brought by Prosecutor of the Pleas Garven of Hudson county, in the New Jersey state courts.

The grand jury returned indictments against forty former and present members of the city councils of Pittsburgh March 21, as the result of the confessions of Klein showing that many city government officials had been guilty of grafting. Thirty-one more indictments were found March 25. Klein himself went to prison March 30 under a three-and-one-half-year sentence for graft. These indictments will doubtless make an unforgetable episode in the history of principal corruption in the United States.

The trial of Nicholas V. Tschaikovsky and Mme. Breshkovska on charges of criminal activity in the revolutionary organization took place at St. Petersburgh March 8 and 9 behind closed doors. Tschaikovsky was able to prove that his presence in Russia was due to business reasons and to justify the part he had played in the affairs of his country, and was acquitted. Mme. Breshkovska, however, had pleaded guilty of being a social revolutionist, and was sentenced to perpetual exile. The acquittal of Tschaikovsky was due largely to the success with which the defense discredited the testimony of Pateuk, who is himself serving sentence for murder and other crimes.

Arguments were heard by the Supreme Court of the United States in March in two great suits, that of the Standard Oil Company and that involving the constitutionality of the corporation tax law. In the *Standard Oil* case, arguments for the defense were presented by John G. Johnson of Philadelphia, and John G. Milburn and Frank L. Crawford of New York, and for the Government by Attorney-General Wickersham and Frank B. Kellogg, the hearing lasting three days, March 14–16. The *Corporation Tax* cases were argued on March 17–18, by John G. Johnson, Ex-Senator Foraker, Maxwell Evarts and others, for the corporations, and by Solicitor-General Bowers for the Government, William D. Guthrie and Victor Morawetz leading a flank movement with the object of showing that if the lax was not levied on the securities and instrumentalities of the states it would be constitutional. For reasons which can only be conjectured, the Court on April 11 set the *Standard Oil* case, together with the *American Tobacco Co.* case, for re-argument, thus deferring the reaching of a decision for several weeks, and possibly for many months.

Important Legislation

The bill creating a public utilities commission passed both branches of the New Jersey legislature March 16.

The opposition of twelve states is all that will be necessary to secure the defeat of the proposed income tax amendment to the Constitution. Thus far one state, Virginia, has rejected the proposition, and New York has indecisively voted it down by a majority of two votes in the Assembly. Eleven others are generally regarded as unfriendly to it, namely, Maine, New Hampshire, New Jersey, Vermont, Massachusetts, Connecticut, Rhode Island, Pennsylvania, West Virginia, California and Colorado. The amendment has already been ratified by Alabama, South Carolina, Mississippi, Oklahoma, Illinois and Kentucky (though it is doubtful whether the Kentucky resolution was in proper form). Arkansas, Iowa, Indiana, Louisiana, Minnesota, Missouri, Montana, Nebraska, North Carolina, North Dakota, Oregon, South Dakota, Tennessee, Texas and Wisconsin are expected to ratify at the earliest opportunity.

Congress has passed, and the President has signed legislation amending the federal Employer's Liability Act so as to give the state courts concurrent jurisdiction with that of the federal courts in dealing with damage suits growing out of industrial accidents. The passage of this amendment was sharply contested in the Senate, the question of the rights of the states to deal with controversies arising under the act being raised. The act has also been amended in such a way as to

leave the question of how far the injured employee was responsible for the accident, and the amount of damages, to the jury, the fellow servant rule being abolished.

A legislative commission has recommended the passage of two bills which carry out its views with regard to a fundamental change in the employer's liability legislation of New York State. The first bill relates solely to hazardous occupations and provides a schedule of compensation for all accidents, regardless of negligence. The second covers accidents to employees not due to the hazardous character of the occupation and provides for an elective scheme of compensation subject to agreement between the employer and the employee. It also places on the employer the burden of proving the employee's contributory negligence and modifies the fellow servant rule.

That employer's liability received an increasing degree of attention in the statutes of 1908 and 1909 appears from Bulletin No. 85 of the United States Bureau of Labor. Five states (Michigan, Texas, Idaho, Maine and New Jersey) and the Philippine Islands passed laws affecting employer's liability directly; while in Georgia, Iowa, Massachusetts, Mississippi, Ohio and South Dakota the customary defenses of employers in suits for damages by injured employees, *i. e.*, fellow-service, assumed risks, and contributory negligence, were more or less restricted or modified. The doctrine of comparative negligence, under which the contributory negligence of the employee is compared with the primary negligence of the employer, with a corresponding award of damages, has been incorporated in the laws of Texas, Iowa and Ohio, and in a modified form in the Georgia statute.

Personal—The Bench

Judge James D. Black of Barbourville, Ky., has accepted the presidency of Union College of that city, and will assume his duties next June.

The resignation of County Judge Lionel R. Webster of Multnomah county, Ore., went into effect March 1, and his place was taken by T. J. Cleeton.

The retirement of Judge George S. Brown from the district court of the county, following the creation of the ninth judicial district, was the subject of resolutions of regret adopted by the White Pine County (Nev.) Bar Association on Februray 23.

Judge William L. Putnam of Portland, Me., of the United States Circuit Court of Appeals, has been honored by the decision of the Fifth Company, formerly Company E, First Maine Regiment, to be known henceforth as Putnam Battery, in appreciation of the interest which Judge Putnam has always taken in the company.

The following appointments have been confirmed by the Senate: Howard C. Hollister to be District Judge, southern district of Ohio; Henry E. Cooper to be first Judge of the Circuit Court of the first circuit, Territory of Hawaii, *vice* John T. De Bolt, appointed Associate Justice of the Supreme Court of Hawaii.

A life-size oil painting of Judge Thomas G. Jones, of the United States Court for the middle Alabama district, has been presented to the state of Alabama by his sons. Judge Jones has played an important part in the history of Alabama, being in the storm centre of the late fight of the state on the railroads and corporations.

The President's nominations of the five judges of the new Court of Customs Appeals authorized by the Aldrich-Payne tariff law were confirmed by the Senate March 30. They are Robert M. Montgomery, Presiding Judge; William H. Hunt, Associate Judge; James F. Smith, Associate Judge; Orion M. Barber, Associate Judge; Marion De Vries, Associate Judge. These appointments are all the same as the original nominations withdrawn because of the failure of Congress to allow the salaries contemplated, with the exception of that of the Presiding Judge.

The memory of the late Presiding Justice Edward Patterson of the Appellate Division of the Supreme Court of New York was honored March 30 by the Justices of the Appellate Division and all the Justices of the Supreme Court of the first department, as well as many other judges and members of the bar, meeting in the Appellate Division Court House, New York City. Addresses were made by Presiding Justice George L. Ingraham, Judge John F. Dillon, ex-Ambassador Joseph H. Choate, Judge Morgan J. O'Brien and William A. Purrington. Letters of regret from Governor Hughes, Senator Root, the Chief Judge of the Court of Appeals, and Judges Werner and Edward T. Bartlett were read.

Judge Willard M. McEwen, who has voluntarily retired from the superior bench of Cook county, Ill., was given a farewell at a banquet of six hundred lawyers and judges in Chicago March 5. State's Attorney John E. W. Wayman acted as toastmaster. Judge Marcus Kavanagh of the Superior Court, Judge Charles S. Cutting of the Probate Court, Judge Frederick L. Fake, Jr., of the Municipal Court, and Edward D. Shurtleff, Speaker of the last house of representatives of Illinois, spoke for their respective branches, citing numerous instances of Judge McEwen's firm grasp of the law. The Supreme Court of Illinois was represented by Justices Orrin N. Carter and James H. Cartwright.

The late Judge George H. Williams and the Justices of the Supreme Court of Oregon were banqueted March 15 at Portland, Ore., by the Multnomah County Bar Association. Judge Williams gave reminiscences covering sixty-six years' experience in the practice of the law and in public life, and was crowned "Nestor of the Oregon Bar" with an impressive ceremony that had been arranged in honor of the distinguished jurist. It so happened, however, that the ceremony was destined really to be a last farewell, for a fortnight or so later, on April 4, Judge Williams died. The "grand old man of Oregon," as he was known, had had a most distinguished career. He was nominated by President Grant Chief Justice of the United States Supreme Court, but the nomination was not confirmed by the Senate.

Personal—The Bar

Daniel W. Baker, United States Attorney for the District of Columbia, has resigned his position in order to look after his private practice.

John Marshall Gest has been endorsed by the Law Association of Philadelphia for the position to be made vacant by the prospective retirement of Judge William N. Ashman from the bench of the Orphans' Court.

R. W. Burnie, barrister-at-law, a criminal lawyer well known in London, is to be ordained a priest of the Church of England in May, after an unusually short preparation specially sanctioned by the Bishop of London.

Frederick W. Lehmann of St. Louis, speaking on "National Control of Corporations" before the St. Louis Bar Association March 7, expressed the opinion that the national government is, in all matters of general concern, the best repository of all artificial powers and the best conservator of all national rights. The national bank, he said, was a striking example of good national control.

The following appointments have been confirmed by the Senate: William S. Kenyon, of Iowa, assistant to the Attorney-General, *vice* Wade H. Ellis, resigned; D. Frank Lloyd, Assistant Attorney-General; and the following United States Attorneys,—William E. Trautmann, for the eastern district of Illinois; Barnes Gillespie, for the western district of Virginia, *vice* Thomas Lee Moore, whose term had expired; Herbert F. Seawell, for the eastern district of North Carolina, *vice* Harry Skinner, whose term had expired.

Mr. Simon Fleischmann's admirable paper on "The Dishonesty of Sovereignties," read last January at the annual meeting of the New York State Bar Association, has been issued as a pamphlet reprint from the Proceedings of the Association. The contention of this eminent lawyer of Buffalo, N. Y., is that the present situation is discreditable both as regards the national and the state governments in meeting their obligations to private citizens, and that the nation, the state, the county, and the city should be made liable both in contract and in tort upon exactly the same basis as every individual and every private corporation.

New Dean of Harvard Law School

The name of the late Professor James Bradley Thayer will long be sure of an honored place in the annals of the Harvard Law School, and the appointment of his son, Ezra Ripley Thayer, to succeed the late James Barr Ames as Dean will be gratifying to many. Dean Thayer is forty-four years of age and has been very actively engaged for several years in the general practice of law, as a member of the prominent Boston firm of Storey, Thorndike, Palmer & Thayer, and he has lectured at Harvard Law School on Massachusetts practice. He is a member of the American Bar Association, and represented Massachusetts on the committee which formulated the code of professional ethics, and is also an active member of the Boston Bar Association. He edited his father's book of "Legal Essays." In addition to the appointment as Dean, Mr. Thayer was also made Dane Professor of Law.

Bar Associations

The Mississippi Bar Association will hold its annual meeting in Natchez, Miss., in May.

The Louisiana State Bar Association will hold its annual meeting in Baton Rouge on May 20 and 21, during the session of the General Assembly, which will then be giving its attention to the two revised codes.

At the annual meeting of the Worcester County (Mass.) Bar Association, held March 4, the following officers were elected: John R. Thayer of Worcester, president; David F. O'Connell of Worcester, vice-president; Frank C. Smith, Jr., of Worcester, secretary and treasurer.

The Bar of Philadelphia met on March 21 to take action on the death of the late N. DuBois Miller. Remarks appropriate to the occasion were made by Judge William H. Staake, Henry Flanders, J. Percy Keating, Theodore M. Etting, David Wallerstein, and T. DeWitt Cuyler.

The Massachusetts Trial Lawyers' Association held its first meeting on March 1 in Boston, with one hundred and twenty-five members present, and elected these officers: Judge Augustine J. Daly of Cambridge, president; Henry H. Bond of Boston, vice-president; Roland G. Sherman of Boston, secretary.

Massachusetts Bar Association

The new Massachusetts Bar Association is gradually perfecting its organization, two committees having been appointed at this writing. One of these, the Committee on Legislation, has already had several meetings and has submitted to the Judiciary Committee of the Massachusetts Legislature its views on the recent report of the commission which investigated the causes of delay in civil cases. This committee is charged by the constitution with those duties commonly allotted to committees on "law reform," and is made up of the following members: Charles F. Baker, Fitchburg; Christopher T. Calahan, Holyoke; Charles W. Clifford, New Bedford; Frederick A. Fisher, Lowell; John D. McLaughlin, Boston; John W. Cummings, Fall River; William H. Niles, Lynn; Frederick S. Hall, Taunton; Charles E. Hibbard, Pittsfield; Hon. George S. Taft, Worcester; Hon. Augustine J. Daly, Boston; Lee M. Friedman, Boston; George W. Anderson, Boston; and Robert Homans, Boston.

The Committee on Legal Education is thus constituted: John W. Mason, Northampton; Joseph H. Beale, Jr., Cambridge; Joseph B. Warner, Boston; S. H. E. Freund, Boston; and Alden P. White, Salem.

Crime and Criminal Law

Chattanooga's new Juvenile Court was opened on Feb. 28. City Judge Martin Fleming is the presiding judge.

According to a recent official report, the Rand, in South Africa, contains more criminals to the thousand inhabitants than any other place in the civilized world. The population is about 1,500,000. In 1909 one out of every 245 was convicted. The prison has lost its terrors for the native. During the last five years 182,689 natives have passed through the prisons—roughly, one-fifth of the total native population.

Delegates representing penological and other closely allied interests will make a two-thousand-mile journey next autumn to visit reformatories and penal institutions between New York, Chicago, Louisville and Washington. On arrival at Washington the delegates will attend the annual meeting of the American Prison Association from September 28 to October 2. The eighth quinquennial International Prison Congress will be held at Washington from October 2 to October 8, on the invitation of the Department of State, being opened by President Taft. Distinguished experts and students of criminology both at home and from abroad will attend. The Congress is divided into four sections, Section I dealing with indeterminate sentences and other subjects of criminal law and procedure, Section II with reformative methods, Section III with preventive methods, and Section IV with methods of dealing with neglected and defective children showing criminal tendencies.

Miscellaneous

The twenty-sixth conference of the International Law Association will be held in London from August 2 to August 6, under the presidency of Lord Justice William Rann Kennedy.

For the first time in the history of Columbia University, women are to be permitted to take the law course. They will be received at the summer session, which begins on the first Wednesday in July. Heretofore no law courses have been given at the summer school.

The twenty-third Congress of the Institute of International Law was opened in the Sorbonne March 28 by Minister of Justice Barthou. There was a large attendance of authorities on international law, all parts of the civilized world being represented. The delegate from the United States is James Brown Scott, Solicitor of the State Department. The questions under discussion included the treatment of the vessels of belligerents while in neutral ports in time of war, which point was actively debated following the Russo-Japanese conflict; regulations for the laying of submarine mines, and international law as affecting individuals.

President Taft was the chief speaker at the dinner given in his honor by the American Peace and Arbitration League March 22 in New York City. He urged the importance of having a permanent court of arbitration, and continued: "As resort becomes more and more frequent to this permanent court questions which can be submitted in the view of the nations will grow broader and broader in their scope. I have noticed exceptions in our arbitration treaties, as to reference of questions of honor, 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 any more than matters of property or matters of individual proprietorship."

Necrology—The Bench

Bingham, Marcellus A.—At Burlington, Vt., March 14, aged 64. Judge of Chittenden county probate court; formerly State's Attorney, representative, and state senator.

Brewer, David Josiah, LL.D.—At Washington, D. C., March 28, aged 73. Born in Smyrna, Asia Minor, his mother being a sister of David Dudley, Cyrus W. and Stephen J. Field, and his father a missionary; educated at Yale and at Albany Law School; entered practice of law at Leavenworth, Kas.;

county and later district judge on the state bench, 1863–69; district attorney of Leavenworth county, 1869–70; judge of Supreme Court of Kansas, 1870–74; judge of United States Circuit Court for the eighth circuit, 1884–1889; Associate Justice of the United States Supreme Court, 1890–1910; served on British-Venezuelan arbitration tribunal in 1899; author of several books for lay readers on vital topics of the day.

Burton, Judge T. J.—At Edwardsville, Ala., March 4, aged 74. Probate Judge of Cleburne county for six years.

Caldwell, Judge Hugh J.—At Cleveland, March 9, aged 75. For fifteen years circuit judge at Cleveland.

Finn, Daniel E.—At New York City, March 23, aged 64. Civil War veteran; in Assembly, 1884–1900; on municipal bench 1900–1904; had since served as police magistrate.

Garvan, Judge E. J.—At Hartford, Conn., March 4, aged 39. Judge of Hartford police court from 1903 to 1908.

Gray, Judge George W.—At Harlem, Ga., Feb. 26, aged 70. Ordinary of Columbia county, Ga.

Guffy, Judge B. L. D.—At Morgantown, Ky., Feb. 27, aged 77. Several times elected county judge of Butler county; Appellate Judge, 1894–1903; later member of the state legislature.

Hall, Charles S.—At Binghamton, N. Y., March 16, aged 83. Dean of the Broome County Bar Association; United States Commissioner.

Hawes, Judge James Elliott.—At Xenia O., March 19, aged 73. Judge of Common Pleas for Greene county, 1879–1889.

Huddleston, Judge Green B.—At Philadelphia, Miss., Feb. 22. Well known in Mississippi as a criminal lawyer; served three terms as district attorney; four years as circuit judge.

Hunt, Judge J. A.—At Grant City, Mo., Feb. 24, aged 60. Formerly probate judge.

Hurlburt, Judge Belden Goodwin.—At Woodland, Cal., Feb. 17, aged 90. Came to California in 1852 from Connecticut; served as county judge in Sutter county, also in the Assembly.

Kelly, William H.—At New York City, March 14, aged 60. Served twelve years as judge of old District Court; prominent in Tammany politics.

Lessing, Judge W. H.—At Terrell, Tex., Feb. 23, aged 66. Confederate veteran.

Marr, Hon. William A.—At Philadelphia, Pa., March 12, aged 73. Former Judge of the Court of Common Pleas of Schuylkill county, Pa.; resided in Ashland, Pa.

Noyes, Judge Daniel.—At La Porte, Ind., March 13, aged 80. Served three terms as mayor of LaPorte; eighteen years judge of the LaPorte and St. Joseph circuit courts.

Pancake, Joseph F.—At Mt. Airy, Ga., March 7, aged 69. For many years Justice of the Peace in Bloomington, Ala.

Potter, Alvah K.—At Lockport, N. Y., March 1, aged 70. Former county judge of Niagara county; served in Civil War.

Prendergast, Judge.—At Mexia, Tex., March 4, aged 93. Former Chief Justice of Brazos county and later of Limestone county; Civil War veteran.

Provine, John.—At Gettysburg, S. D., March 8. Formerly county judge of Potter county, S. D.

Robertson, Judge William Gordon.—At Roanoke, Va.; March 15.

Robinson, E. J.—At East Lake, Ala., March 20. Former probate judge of St. Clair county, Ala.; Confederate veteran.

Willard, Edward N.—At Scranton, Pa., March 2, aged 75. Former superior court judge; dean of the Lackawanna county bar.

Willey, Judge Hiram.—At Hadlyme, Conn., March 8, aged 92. Practised for nearly seventy years; State-Attorney for New London county, 1854–1861; United States Attorney for the district of Connecticut, 1861–1869; probate judge, 1869–1870; judge of the court of common pleas for New London county, 1870–1873.

Williams, Judge George H.—At Portland, Ore., April 4, aged 87. Born in New Lebanon, N. Y.; elected Judge of first judicial district of Iowa; appointed Chief Justice of the Territory of Oregon in 1853; Attorney-General of the United States during President Grant's second term; nominated by Grant to be Chief Justice of the United States Supreme Court, but the nomination was not confirmed; once had perhaps largest law practice in Oregon; Mayor of Portland, Ore., 1902–1905.

Necrology—The Bar

Arnold, Howard Payson.—At Pasadena, Cal., March 3, aged 79. Traveler and lecturer; author of "European Mosaic," "Gleanings from Pontresina," and other books.

Baker, Seward.—At Kingston, N. Y., Feb. 23, aged 55. Practised chiefly in New York City.

Brigham, Clifford.—At Milton, Mass., March 13, aged 53.

Bullitt, Col. Thos. W.—At Baltimore, Md., Mar. 3, aged 71. Formerly practised in Louisville.

Burke, Ellis P.—At Brooklyn, N. Y., March 7, aged 68.

Carter, William W.—At Dorchester, Mass., March 24, aged 80. Had practised in Boston nearly all his life; his specialty was probate law.

Edmondson, F. T.—At Memphis, Tenn., March 12, aged 55. Lifelong resident of Memphis; well known through Shelby county.

Eskridge, Morris.—At Hardinsburg, Ky., Feb. 24, aged 65.

Fisher, Edgar C.—At Hull, Mass., March 19. Member of Boston firm of Fisher & Fisher.

Hallheimer, Max.—At Los Angeles, Cal., Feb. 19, aged 60. Former Brooklyn lawyer.

Hammond, Stephen H.—At Geneva, N. Y., March 9, aged 81. Formerly deputy attorney-general and later state senator.

Hardy, Horace Dexter.—At Arlington, Mass., March 17, aged 33. Special assistant to District Attorney Higgins of Middlesex county; represented Arlington and Lexington during two terms in the state Legislature.

Harl, Charles M.—At Council Bluffs, Ia., March 1, aged 54. President of the Iowa State Bar Association; born at Sandusky, O., Nov. 13, 1856; prominent in the Republican party; member of the firm of Harl & Tinley at time of his death; one of the leading lawyers of Iowa; of sterling character and unusual attainments.

Hogan, James J.—At New Haven, Conn., Mar. 20, aged 39. Deputy Commissioner of streets in New York City; formerly football star at Yale; graduate of Columbia Law School.

Holland, William S.—At Windsor, Va., March 20. Formerly Commonwealth's Attorney of Isle of Wight county, Va.

La Mare, James C. De.—At New York City, March 3, aged 69. Member of the firm of La Mare & Morrison; came to New York from England in 1856.

Leist, Henry.—At Chicago, Ill., Mar. 12, aged 50.

Macbeth, James E.—At Cumberland, Md., Feb. 20. Popular member of Allegany county bar.

Mayenbaum, H.—At Oakland, Nev., March 14. Born in Germany; two terms county attorney for Lander county, Nev.; connected with many cases well known in that section.

McCreary, Bernard J.—At Brooklyn, March 7, aged 33.

Miller, N. Dubois.—At Germantown, Pa., March 14, aged 58.

Minzesheimer, Lazarus J.—At Chicago, March 2, aged 49. General attorney for the Chicago City Railway Co. for eighteen years.

Moore, Prof. M. Herndon.—At Columbia, S. C., Mar. 1, aged 44. Dean of the Law School of the University of South Carolina; City Attorney for Columbia in 1900; vice-president of American Bar Association in 1903.

Morris, George B.—At Summit, N. J., March 8, aged 67. Assistant United States Attorney in New York City, 1876–1879.

Norris, James L.—At Washington, D. C., March 5, aged 65. Leading patent lawyer and financier; prominent Democrat.

North, Edmund Doty.—At Lancaster, Pa., March 13. Member of Lancaster Bar Association; noted for his remarkable memory for decisions and where they could be found.

Perkins, James Breck.—At Washington, D. C., March 11, aged 63. Serving his fifth term in Congress; born at St. Croix Falls, Wis.; admitted to bar, 1868; practised in Rochester; City Attorney of Rochester, 1874–1882; author of several notable works on French history.

Ponce, John H.—At Boston, Mass., March 23, aged 53. Had practised since 1883 in Cambridge; state representative, 1896–1898.

Pope, Eugene A.—At Cambridge, Mass., March 7, aged 64. Authority on probate and real estate law and practice; practised in Boston over forty years.

Potts, G. A. S.—At Field, B. C., March 9, aged 40. Practised in Winnipeg; prominent in settlement of C. P. R. mechanics' strike in 1908.

Redman, John B.—At Ellsworth, Me., March 9, aged 62. Democratic candidate for Governor of Maine in 1884; later Collector of Internal Revenue for the district of Maine.

Ridgway, James.—At New York City, March 3, aged 81. Former United States Commissioner; born in New York City; studied law in the office of Benjamin F. Butler; prominent in legal practice for fifty years; represented Richmond county in the New York Assembly during the Civil War.

Rogers, Col. John I.—At Philadelphia, aged 66. Chief counsel for the Building Association League of Pennsylvania since 1877; appointed Judge-Advocate-General of Pennsylvania in 1883; authority on military law.

Shepard, William F.—At New Brighton, S. I., N. Y., March 6, aged 72. Civil War veteran; former resident of Middletown, N. Y.

Silverman, Julius.—At New York City, March 3, aged 45. Practised in New York the past sixteen years; formerly in Fort Smith, Ark.

Smith, Marion-De Kalb.—At Chestertown, Md., March 15, aged 60. Ex-Comptroller of the Treasury of Maryland; State's Attorney 1883–1891; State Comptroller, 1891–1897; a prominent Democrat.

Veuve, Judge William P.—At San José, Cal., March 7, aged 57. One of the ablest lawyers in California.

Walkley, Rev. Albert.—At Boston, March 28, aged 58. Unitarian minister; was graduated from Boston University Law School in 1906 and had a law office at Salem.

Whitmore, Stephen C.—At Brunswick, Me., Feb. 21, aged 60. Practised in Gardiner, Me.; for many years recorder of the Brunswick municipal court.

Williams, John H.—At Hot Springs, Va.; March 19, aged 34. District Attorney of Luzerne county.

Williams, Samuel E.—At LaPorte, Ind., March 11, aged 92. Practised successfully at the LaPorte county bar.

DAVID BANKS, 1786–1871

WHO FOUNDED THE BUSINESS BEARING HIS NAME IN
1804 AND WAS ITS ACTIVE HEAD UNTIL 1857

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The Oldest Law Publishing House in the United States

WHAT is without doubt the oldest law publishing business in the United States was established when, in 1804, David Banks, a regular practitioner in the courts of New York State, acted on the advice of prominent Judges and founded a distinctively American house for the manufacture and sale of law books. Before that time, law books were scarce and expensive. Only the most prosperous lawyers could afford anything like a respectable working library. Books had been imported, or printed here and there in small quantities by various firms by official order or by popular subscription, but this state of things was not satisfactory to the profession. It was at the suggestion of the Judges of the Old Court of Chancery and of the Court of Error that Mr. Banks turned aside from the practice of law to take up a business which in course of time reached unprecedented proportions, and to which he devoted himself with great assiduity.

The beginning was a modest one, in a shop on the corner of Broad and Wall streets in New York City, where the Drexel Building and offices of J. P. Morgan & Co. are now located, another shop being opened about the same time in Albany. At that time, strange though it seem, Wall street was an uptown residential thoroughfare. Mr. Banks took William Gould in partnership, the firm being known as Gould & Banks. After doing business several years under that name, they formed the firm of Banks, Gould & Co., in New York, and Gould, Banks & Co., in Albany, N. Y.

Mr. Banks, the founder of the house, was a man of strong and attractive personality, an uncompromising "hard-shell Democrat," who possessed the friendship of eminent men of his time and was often urged to accept nominations for public office, never caring to accept any, however, except that of Alderman. Whenever he ran for this office he was elected, even the Whigs voting for him, and he served as President of the Board when that signified a far greater honor than it would now. They presented him with a handsome silver pitcher when President of the Board of Aldermen, for opening Chapel street, now West Broadway. He lived to be eighty-five years old, retaining the use of his mental faculties unimpaired to the last. The son of that sturdy fighter David Banks, who crossed the Delaware with George Washington and fought with him in all the battles of the Revolution, the second David Banks showed similar ardor and energy in his intense devotion to his business, which was soon printing more law books than any other concern in the world.

After twenty-five years the building on Wall street was found too small, and

Banks, Gould & Co. moved to the site of the present Tribune Building.

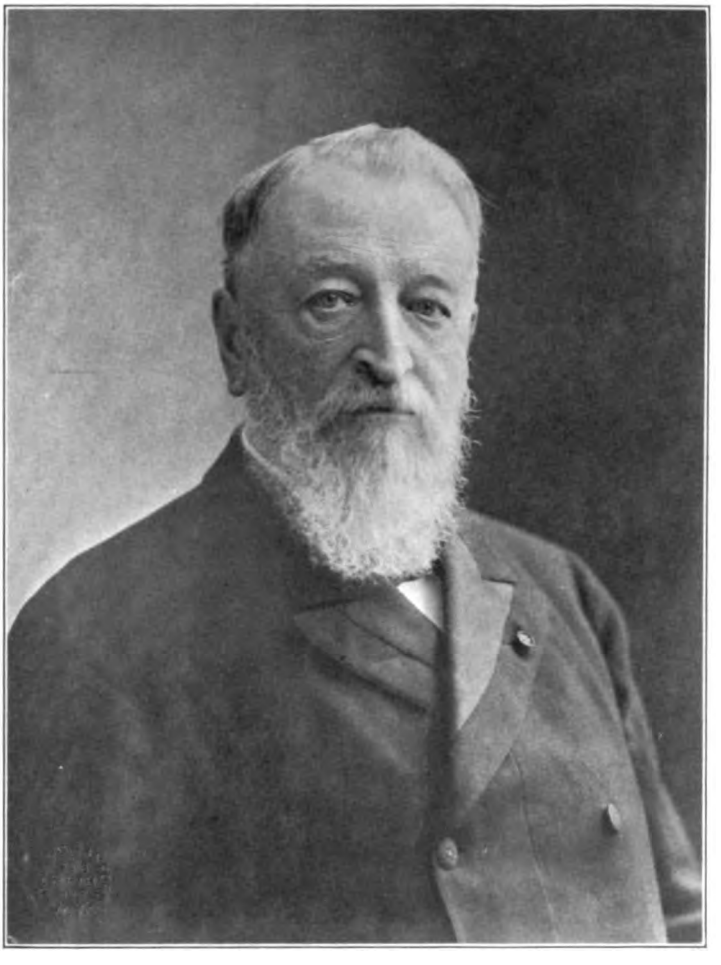
In 1832 they moved to 144 Nassau street and constructed a six-story brick building, which was regarded the finest building on the street at that time, and which excited much comment both because it was so far uptown and because it was the tallest business building in the city. This building became noted as a meeting place for famous men of the time. Among those who were accustomed to meet regularly in the back office, which came to be nicknamed "Tammany Hall, Jr.," to discuss topics of national importance and to settle many grave matters, were Chancellor Kent, Martin Van Buren and Andrew Jackson, not to mention prominent men prominent in public life or at the bar. Mr. David Banks, Jr., the son of the founder of the house, years ago gave the following recollections of General Jackson and the others who met in the little back-office:—

"I can see him distinctly as he stood in the office in a flapping blue coat with brass buttons, holding his inseparable white hat. He invariably wore a yellow buff waistcoat. As I remember it, these gentlemen were all of a fine, dignified presence, above the ordinary height, and dressed with the most scrupulous care. Their big, bell-crowned beaver hats were carefully brushed and their white ties and shirt frills were spotless. Jackson was not so careful as the others about keeping his clothes without a wrinkle, but his dress was always neat. They talked on grave topics with my father. Of course I, who was only a boy then, cannot remember what they said, but I know that legal, political and financial questions were debated with thoroughness and admirable temper."

The first David Banks retired in 1857, and the firm of Banks & Brothers was organized, comprising Mr. David Banks, Jr., Mr. Charles Banks and Mr. A. Bleecker Banks. Mr. A. Bleecker Banks attended to the business at Albany and Mr. David Banks, Jr., and Mr. Charles Banks attended to the business in New York at 144 Nassau street, the latter being regarded as the main house, as all of the larger business and contracts were made by the New York house, the Albany concern being a branch house, with two of the brothers in New York and one in Albany. Banks & Brothers had the name and reputation of being the leading house in the law book business and have published more Reports and supplied more large libraries than any other house in this country. English houses, particularly that of Stevens & Sons, bought largely of the Banks publications. American editions of the English standard works were issued, and made possible a reduction of the price to one-quarter of that charged for the original editions. The firm shipped to California the first lot of law books ever sent to that state.

Mr. David Banks has been connected with this firm since 1848 and is the oldest living law book publisher in America. He is still the active managing head of the business and probably will continue so for many years. Any one to see and talk with him would not dream he was in his eighty-fourth year. He is familiar with the law-publishing business in all its complex details. Like his father, he has declined many importunities to be a candidate for public office. He is one of the founders and an ex-President of the St. Nicholas Club, and New York Club, ex-Commodore of the Atlantic Yacht Club, member of the Council of New York University, and otherwise prominent in the social life of the city.

Mr. Charles Banks retired from the business in 1882, and the firm then consisted of Mr. David Banks (formerly Mr. David Banks, Jr.) of New York and Mr. A. Bleecker Banks of Albany. In 1897, Mr. David Banks, Jr., and Mr. William Lawrence Green were admitted to the firm. Mr. Joseph G. Jennings was



MR. DAVID BANKS

THE OLDEST LIVING LAW PUBLISHER IN AMERICA

PRESIDENT OF THE BANKS LAW PUBLISHING COMPANY

associated with this and the old firm from 1857 to 1898. He was a connoisseur in books and was regarded one of the best informed men on American and English law books, and secured for Banks & Brothers some of the largest library orders that were ever given to any firm. This firm continued as the firm of Banks & Brothers until 1899.

MR. DAVID BANKS, JR.

THIRD OF AN HONORED NAME, NOW VICE-PRESIDENT OF THE BANKS LAW PUBLISHING COMPANY

After the dissolution of Banks & Brothers, the Banks Law Publishing Company was incorporated with Mr. David Banks as President.

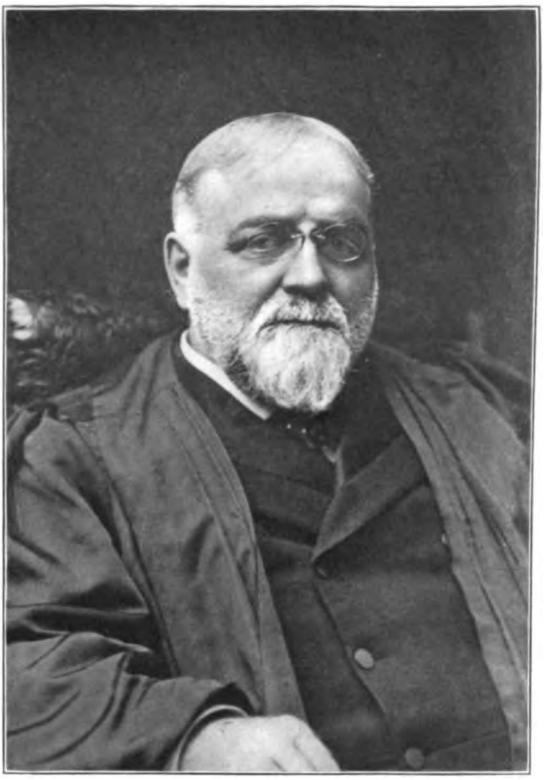
The Banks Law Publishing Company, now located at 23 Park place, New York City, consists of Commodore David Banks, President; David Banks, Jr., Vice-President; George A. Jennings, Secretary; and Isaac S. Jennings, Treasurer.

The Banks Law Publishing Company are the publishers of the Official Edition of the United States Reports, the greater number of the volumes of the New York Court of Appeals Reports; the Pennsylvania Reports; all the Connecticut Reports; some volumes of Iowa Reports; a portion of the set of Colorado Supreme Court Reports; the Colorado Appeals Reports; some volumes of Wyoming Reports; also a large list of text-books comprising Anson on Contracts, Bispham's Principles of Equity, Butler's Treaty-Making Power, Donovan's Modern Jury Trials, Dos Passos' Stock Brokers, Joyce on Damages, Joyce on Electric Law, Joyce on Franchises, Nelson's Interstate Commerce Law, Richards on Insurance; Takahashi's International Law, Russell & Winslow's Syllabus Digest, United States Reports, Throop's Massachusetts Digest; and many other text-books, digests, statutes, etc.

Judge Bartlett Dead

EDWARD THEODORE BARTLETT, Associate Judge of the New York Court of Appeals, died of heart failure May 3 at the Albany Hospital. He had been a member of the Court of Appeals since 1894. He was born June 14, 1841, at Skaneateles, N. Y. His ancestors included two signers of the Declaration of Independence. As a member of the Association of the Bar of the City of New York, he took an active part in the fight under the Tweed régime for the purity of the judiciary, which resulted in the impeachment of two judges.

Governor Hughes happily voiced the sentiment of the legal profession in his feeling tribute to this able and conscientious jurist: "He has served the State in its court of last resort with conspicuous ability and fidelity, and enjoyed general esteem and confidence."



THE LATE JUDGE EDWARD T. BARTLETT

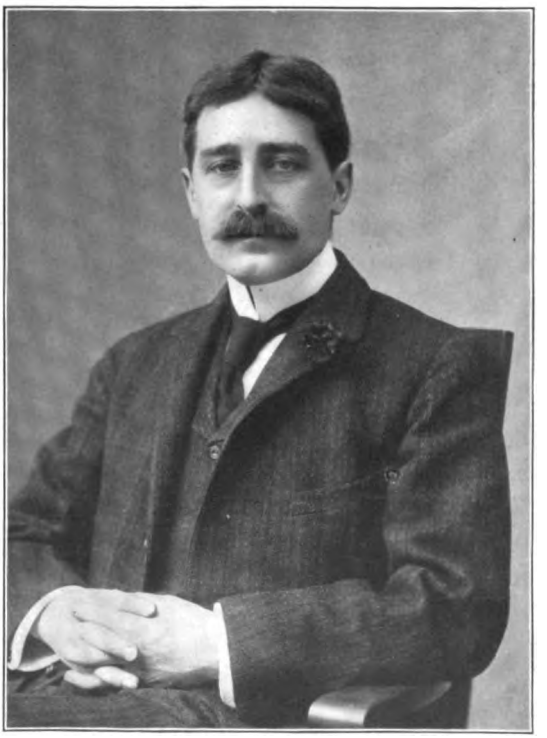
(Photo by Albany Art Union)

Ezra Ripley Thayer

THE first instructors in law at Harvard as a rule were retired judges or practitioners. Story lectured there while still on the bench of the Supreme Court of the United States. When President Eliot in 1870 began the development of the graduate departments, he selected for Dean of the Law School a recent graduate who had conceived a new method of legal instruction by teaching the student to reason from the original sources. Dean Langdell and his successor, Dean Ames, had but the slightest experience in practice and were essentially students and teachers. The success of their method, both theoretically and practically, is proved by its adoption by almost all the other law schools, and its acceptance by the profession. Indeed it seems to have reached nearly the limit of development.

The new President of Harvard University is himself a lawyer, and in choosing a successor to Dean Ames, he has selected a product of the teaching of Langdell and Ames, but one who, with only a brief experience in teaching, for nearly twenty years has been engaged in active court practice.

Ezra Ripley Thayer was born, February 21, 1866, in Milton, Massachusetts. He was prepared for college at the Cambridge Latin School, Hopkinson's School, and by private tutors while travelling in Greece. He received from Harvard the degree of A.B. in 1888, and was throughout his college course the first scholar in his class. In 1891 he graduated from the Law School, receiving the degrees of LL.B. and A.M. While in the Law School he was for two years one of the editors of the Harvard Law Review, and at graduation received the prize offered by the Harvard Law School Association to the graduating class of 1891 for an essay on "Judicial Legislation, Its Legitimate Function in the Development of the Common Law." [1]



EZRA RIPLEY THAYER
THE NEW DEAN OF THE HARVARD LAW SCHOOL
(Photo by Chickering)

Immediately after graduating from the Law School Mr. Thayer became secretary of the late Judge Horace Gray of the Supreme Court of the United States. He afterwards began the practice of the law in Boston with the firm of Brandeis, Dunbar & Nutter, of which he became a member in 1896. For a number of years he lectured on Massachusetts practice at the Harvard Law School. In 1900 he retired from the firm of Brandeis, Dunbar & Nutter, and became a member of the firm of Storey, Thorndike & Palmer, the name of which was changed in 1903 to Storey, Thorndike, Palmer & Thayer. For many years he has been a member of the Council of the Boston Bar Association and of the Grievance Committee. He also rendered valuable public services as secretary of the Committee on the Amendment of the Law. He was a member of the Committee of the American Bar Association, which drafted its code of ethics in 1908.

In 1907 Mr. Thayer edited some of the unpublished essays of his father, the late Professor James Bradley Thayer, with the title, "Thayer's Legal Essays."

Traditions of scholarship and education are Mr. Thayer's by inheritance. He has solid attainments and a brilliant mind; but perhaps his most obvious distinction is the effective combination of these qualities as a practising lawyer.

[1] (See 5 Harv. Law Rev., 172.)

Suicide and Life Insurance

AN ARGUMENT

By S. Ross Parker, B. S., LL.B., of Seattle, Wash.

A GENERAL discussion of suicide clauses in life insurance policies would be too prolix for publication in a magazine article. This paper will, therefore, discuss the law applicable to one particular state of circumstances of suicide by policy holders.

In the absence of any statute to the contrary, a clause in a life insurance policy which states that the assurer will not be liable in the event of the suicide, sane or insane, of the assured, is valid. Generally, the insurance company will, of course, be liable if the policy states merely that the company will not be liable if the assured die by his own hand, and the assured commits suicide while insane. (The phrases "die by his own hand," "self-destruction," "take his own life," "suicide," etc., are adjudged synonymous.) In other words, to escape liability for the suicide of an insane policy holder, the insurance company must so stipulate in the insurance contract. These propositions are so elementary that there is no appreciable diversity of opinion on them.

What if there is no provision in the policy in regard to suicide, and the assured takes his own life while sane? A recent, and authoritative, reference work says: "In the absence of any express exception as to suicide, or self-destruction, the beneficiary is not defeated by the wrongful act of the assured in taking his own life, such defense being available only as against the assured or his personal representatives."[1]

[1] 25 *Cyc*, 881, citing decisions in six states: *contra*, 94 Fed. 729.

This, of course, means suicide while sane. In such a case a suicide's policy would be void if payable to the suicide's heirs, whereas if it were payable directly to the same heirs as beneficiaries named in the policy, it would not be void. If, in such a case, the suicide's heirs were young children, then their designation in the policy as heirs merely would prevent them from recovering on their parent's policy, whereas, if the parent had used the ingenious foresight necessary to carry out his most likely intention, those children might have been saved any anxiety of becoming wards of the state. There is a maxim of Anglo-Saxon law quite as age-honored as the one generally cited to bolster up the above doctrine, and it is that when the reason of the law ceases the law itself ceases. Is there any meritorious reason why persons in whose interests a contract has been demonstrably, though not expressly, made cannot have the benefits of that contract because they are designated in a particular manner therein? The situation is further aided by that one of the basic maxims of our law which declares that that is a certainty which can be reduced to a certainty. Does the slight difficulty of showing who are the heirs in some cases justify such a classification of their rights as to deprive them of benefits which under the same state of circumstances are allowed to go to others, regardless of the probable preference of the one whose death gives rise to the benefits?

This paper is not, by the way, an argument that beneficiaries should profit by the voluntary suicide of a sane

person in any event, as will presently appear. The above illustration is offered to show, as far as it may, to what a shadowy difference some decisions will attach their reasoning for allowing a recovery on suicide policies.

A maxim which aids in keeping the law exact, though it progress, is the one just cited in regard to certainty. Could there be any lack of certainty—certainty to the highest degree in general, if necessary—as to what persons are entitled to recover under a policy payable to heirs? This distinction between named beneficiaries and heirs is said to rest, also, on the fact that the beneficiary has a vested interest which the assured will not be allowed to destroy. This is going the rule of commercial paper one better, by allowing a man to give not only a better title than he possesses, but to so transmit such title solely by his own wrong subsequent to the creation of the title. Moreover, unless the interest is so absolutely vested in the beneficiary that the assured cannot substitute another as beneficiary, there seems no appreciable merit in this distinction. And it is a fact that most life insurance policies of the present day provide that the assured may change the beneficiary at will. Therefore, in a majority of the life insurance policies now being written such a use of the word vested would be a radical departure from it use in its most appropriate sphere—in the law of real property. And, as the New York court has said, "There can be no such thing as a vested right to commit suicide." The lack of legitimate significance with which the word vested is used in the decisions which purport to raise this distinction between a policy payable to one's estate or heirs and a policy payable to a named beneficiary is observable in an important Illinois case (224 Ill. 346) where the court said: "Where, however, a policy of that character is made payable to a third party, and contains no stipulation in reference to the insured intentionally destroying his own life, it is held that in the event of the self-destruction of the insured while sane the beneficiary may recover, for the reason that his or her interest became a vested one upon the issuance of the policy."

In this last above case the court was construing a benefit certificate in a fraternal society. The certificate had no provision for forfeiture in the event of the assured's suiciding, and the court said: "The mere absence of such a provision in the contract leads the applicant to conclude that the contract is not defeasible by intentional self-destruction on the part of the insured." By such expounding of the law the assured is practically allowed to infer that he may ignore the implied condition of his policy—the implied covenant that he will show such a reasonable amount of good faith and square dealing with the company (which stands ready and able to make the stipulated provision for his dependent ones because others show that good faith) that he will not, by, at least, any criminal act of his own, mulct that company in the extra cost of making the provision within a shorter period of time than it would otherwise have had for the arrangement.

Suppose the beneficiary is a creditor of the assured, and the estate of the assured who suicides is sufficient without the life insurance money to pay all decedent's debts. It seems that in such a case the law should tolerate a circuity quicker than sanction a wrong. And it would be a very slight circuity, if any, to have the creditor reimburse himself out of the estate other than the insurance money; while the wrong of

the assured's assuming to have the right to so breach his contract that the other party to the agreement would be compelled to do that which he cannot, in any view of the case, be held to have contracted to do—at least, not allowed directly to contract to do—is stamped a wrong by the criminal as well as by the civil branch of our jurisprudence.

If a debtor gave his creditor as security a policy of fire insurance on the debtor's house, and then set fire to the building, the creditor could not collect. Yet, as far as the sanctity of "vested" goes, are the cases not identical, except with, possibly, a shade of difference in favor of the title of the beneficiary of the fire insurance policy, since life, more than property, is the object of the law's tenderest care? In the fire insurance case the assured loses because of his wrong in destroying his own property, which diminishes his own material wealth only; while in the case of his life insurance he is allowed to cast material wealth upon another by his own wrongful act, which diminishes the power of the state to defend itself. Arson and suicide have both been crimes since a time so remote that the memory of man moves to no other condition of the law. It has ever been quite generally the policy of the law to give a stronger protection to life than to property. But it can hardly be said that the law throws more safeguards around life than around property in insurance law while it allows payment of money to a person named by one who afterwards commits suicide, but denies any recompense to the assignee of one who thus destroys his property. The ease with which life may be thus converted into money shows that it is more malleable than property in the crucible of wrong conduct, and stamps it as one of the less valuable things in the assaying department of human laws.

As is stated by one of the able editors of Lawyers' Reports Annotated: "The right to recover on a policy of insurance in case of the suicide of the insured while sane should be made to depend upon the intent of the insured rather than upon the vested right of some third person in the policy, which will ordinarily be of an entirely fortuitous nature, or will be determined by the design of one in whose mind the possibility of suicide may have lurked, although it was not actually contemplated at the time of taking out the policy."

The United States Supreme Court has said that a policy which should state that the assured's beneficiary would be paid a certain amount if the assured committed suicide while sane would undoubtedly be void. If persons cannot contract directly for one of them to do a certain thing, what reason has a court of justice to hold that a contract between those persons and silent as to the doing of that thing is to be construed as a contract that one of them must do that certain thing? In what other branch of the law will the courts, by construction, place upon a person a liability which that person would not be allowed to expressly contract to assume? What difference can there be in the moral influence on the assured between a policy which provided for payment if the assured should take his own life and one which is silent as to such payment while the assured knows that by judicial construction, supreme in his case, the latter policy will be held to give his dependent ones the right to receive payment for his suicide?

By a familiar maxim, older than the first insurance policy, one is not liable for the acts of God, but may contract to assume liability. Yet here we have an act of man, the results of which no liability can be expressly contracted for, yet if not so contracted for will be

deemed by the expounders of the law to be included among the things contracted for. To say that such an application of legal principles is upheld by the "vested interest" theory, is to poorly beg the question and beggar the most time-haggard examples of false analogy.

The law cannot afford to lend its forces to aid the laity in deceiving themselves with the belief that they are thus "beating the corporations," for every case of suicide which is saddled upon the exchequer of the insurance companies has a direct tendency to make insurance more costly to those who prefer to die sane.

If suicide continues to increase among policy holders as rapidly as many insurance officers assure us it has since incontestible policies came so fully into use, and the courts do not take a stand to discourage self-destruction, it is likely that some company will, in the not distant future, blaze a path into a new field of business by refusing to pay suicide policies, holding itself out as the honest policy-holders' company and giving reduced premiums on account of the elimination of those who are unequal to a Napoleonic facing of destiny.

No person should have, or be allowed to transmit to another, an enforcible right based upon an act as immemorially condemned by both branches of our law as is self-destruction. And no state should lend its aid to enforce a liability which accrued solely by a wrongful depletion of its powers as a state.

Oratory and the Lawyer

By E. Connor Hall

IT is the fashion nowadays with many lawyers and journals to cast ridicule upon oratory, not merely upon particular specimens but upon oratory as an art, and to deprecate its usefulness to the lawyer. Part of this hostility can be ascribed to the human disposition to kick the under dog. For it cannot be denied that the power of oratory as a weapon of popular warfare has greatly decreased within the last generation. This has been brought about by a variety of causes. First of all, is the increased distribution of the newspaper. The daily paper, by its wide dissemination of information of all sorts, has rendered the reader less hungry for oratorical discussion, and has, at the same time, afforded to him wishing to present any matter to the public an audience more numerous than the fame of any orator could collect or any human voice reach. Another cause is to be found in the absence in our time of any of those overshadowing national questions, such as produced Demosthenes and Cicero in the expiring days of Grecian and Roman freedom; Burke, the Pitts, Fox, Sheridan and Erskine, in the morning of the modern British Empire; the Adamses, Madison and Randolph in the revolutionary, and Webster, Clay, Calhoun, and Hayne in the ante-bellum period in our own country. Orators are subject to that law which operates alike upon all, and will permit nothing to ripen into perfect development until the conditions of the times have created a need for it. Great crises are the breeding times for orators, and as we have had none of supreme

importance since the settlement of the slavery controversy, the effect is seen in the absence of public speakers of the first ability. Closely connected with this cause is a third, which is the commercialism of the present day and the consequent decay of that high, idealistic responsiveness wherein lies the peculiar power of the orator. A great speech is almost as much a creation of the audience as of the speaker. A people whose every thought is intent upon the accumulation of individual wealth are not open either to appeals to lofty sentiment or to the presentation of broad schemes of national or racial policy.

Though these reasons may explain the decay of the influence of the orator, they afford no justification to those who affect to treat the art of oratory with contempt. For though books and newspapers be ever so common, the printed page can never supply the place of the human speech, aided and enforced by gesture and facial expression, and, above all, enspirited by the personality of an earnest man who believes in his message, and is eager to impart it to his hearers. It is said of Erskine, Henry Clay and Seargent Prentiss, that those who heard them speak would turn with impatience from the printed reports of their speeches. These reports may have been accurate as verbal reports; and yet they were not the speeches.

But whatever may be said of the utility of oratorical skill to the modern preacher or public man, as for the lawyer the multiplication of books and papers can never render it of less value to him. Newspapers cannot discuss his points of law before the judge, nor argue his questions of fact to the jury. He must conduct his own case quite as much as his brother of past ages. Nor has he less opportunity or less incentive than in former times. Upon his presentation still depend the dearest rights of those who are forced to rely upon his ability and skill in defending their lives, liberties and property. And surely these are not of less value now than in the past! In the lawyer's work of asserting human rights in the ultimate tribunals forensic skill has always been accounted a valuable weapon. But within recent years it has become fashionable with many lawyers and legal journals to ridicule all oratorical attainments—as valuable only to the bombastic holiday speaker.

Part of this disposition is no doubt to be ascribed to a short-sighted practicality, which overreaches itself, a philistinism which despises all that is excellent or beautiful in art, and can brook no thought if it be not expressed in the language of the counting-house.

Another—and perhaps a more common—cause lies in a loose use of the word oratory, due either to carelessness in speech or ignorance of the true meaning of the word. Many writers, and even some lawyers, seem to think that oratory means only windy, holiday, and schoolboy speeches, or the high-flown peroration, often tacked on without logical connection, after the main speech is ended. To them the word is synonymous with irrelevancy and extravagance. Only recently a Judge of the Supreme Court of New York was quoted as advising a law class to "eschew eloquence and stick to the facts." As if oratory and eloquence were something different from the facts with which they had nothing to do!

"Oratory," says Quintilian (15 Inst. 38), "is the art of speaking well." Prof. Webster defines it as "The art of an orator; the art of public speaking in an eloquent or effective manner; the ex-

ercise of rhetorical skill in oral discourse; eloquence." And when we examine the speeches of famous advocates we find that they produced their effects not by wandering from the facts but by marshalling and correlating them. Cicero in the oration against Verres brings forward instance after instance of the depredations of the Governor of Sicily. Erskine did not procure the acquittal of Lord George Gordon, Horne Tooke or Thomas Hardy, by appeals to the jury to disregard the facts, but by using the facts to demonstrate that the accused were not guilty. Take also the celebrated defense of Judge Wilkinson by Seargent Prentiss. With marvellous skill he passes in review the facts, thereby establishing the innocence of his client.

Burke and Sheridan, one the most splendid, the other the most fervid of orators, in their speeches against Hastings, denounce him in the most bitter terms, but always upon the evidence before the court. They do not, it is true, confine themselves to a mere recapitulation of the testimony. If an advocate did so there would be no use in wasting time to hear him, for the triers could depend upon their own recollection, or in the case of a jury they would have the assistance of the judge's charge. But a bare recital of the testimony favorable to his cause does not comprehend the duty of the advocate. He must go further and explain the relation of the circumstances of the case to each other, as well as their relation to extraneous facts. He must examine every bit of testimony, testing it by other parts of the testimony, and pointing out its significance in the light of the whole case. The facts in his case are not things by themselves, unrelated to other facts of life. His case is not isolated in the world of experience. And before a just and proper judgment can be reached, his cause must be weighed according to standards of conduct in general. To thus correlate the facts of a case, and explain their meaning in relation to one another, and to human experience in general—to do this well, is oratory. And the lawyer who can do this will not in the argument of questions feel at loss if he cannot find an exact precedent. He will study the principles of the law in order to ascertain its aim. Then he will examine the principles of philosophy, of sociology, of political economy, to find whether a given decision would accomplish the end which the law has set for itself. And when he states a proposition he will not be forced to base it upon his bare assertion, but can establish it by reasoning and enforce and illustrate it with the facts of history and literature.

Erskine became Lord Chancellor of England; yet his fame rests upon his successful assertion of individual liberty, in the State of Trials. And as he was defending rights under the English Constitution he discussed freely its history and its principles. Nor did he refrain from discussing questions of policy. Nor were these excursions irrelevant or merely idealistic. To his speech in support of a new trial for the Dean of St. Asaph it is reported that "old black letter lawyers and polished statesmen alike listened with delight." And the principles he asserted soon found their way into the laws of England. His theory of the rights of the jury in libel cases was adopted by act of Parliament, and to him, more than to any other man, is due the honor of having forever given the death blow to constructive treasons. No mean achievement this for any man. The need for such lawyers has not passed,

and never will pass under a free government. Our own country is especially fruitful of legal questions which are also largely economic and sociological. These questions cannot be settled by newspapers and pamphlets. They must be argued out in the courts, and in arguing them, twice armed is he who, in addition to a knowledge of the law, possesses "the art of speaking well."

Northport, N. Y.

The Appointment of Mr. Justice Hughes

THE appointment of Governor Charles Evans Hughes of New York as Associate Justice of the Supreme Court of the United States, succeeding Judge Brewer, has been enthusiastically received alike by the press of the country and by the legal profession. The press, as a rule, sees nothing to find fault with and everything to praise in the qualities which he has displayed in his public career. Thus the *Outlook* says:—

"His experience in public life has all been gained during the new era in which so many fresh problems of industrial, commercial, and national life have created new conditions to which the interpretation of our constitutional and statutory law must be applied. His creation of the Public Service Commissions, and his veto of the Long Sault Charter, to cite only two examples, indicate that in dealing with the great question of corporation control and regulation, his first thought is for the interest of all the people. But they indicate no less that he recognizes the corporation as a great instrument of modern industry which needs, not to be hampered but to be regulated in the public interest."

There is always danger, however, the *Outlook* continues, that a judge, secluded as he is in his study and isolated from the practical realities of the world, should prefer judge-made precedents and cold abstractions to the warm facts of life. But from this danger it believes that Mr. Justice Hughes will be free:—

"His veto of the two-cent-fare bill and the Coney Island five-cent-fare bill shows his conviction that legislation should be related to the actual facts of life rather than based upon *a priori* theories. He is interested in life. He does not permit his lawyer's love of the law to blind him to vital conditions."

The *New York Times* lays particular emphasis on Mr. Hughes' soundness of judgment and his disinterestedness, and thinks that "the Supreme Court will be strengthened by his appointment." To quote:—

"Governor Hughes is known to us not only as what men call a sound lawyer, learned in the law and experienced in its practice, but he is a man who by nature and acquirement is possessed of those eminent qualities that make up the judicial temperament. Mr. Hughes is a reformer, but he is as far as possible from being a radical. The reforms he advocates are for the public welfare, they are the reforms of common sense, they are reasonable reforms. He has never been in danger of being swept off his feet by unreasoning agitation or hysterical appeal for the immediate and complete reorganization of human society. He has given no evidence of entertaining the belief that whatever has been done in the past was inevitably and hopelessly bad, and that everything to be done in the future must be done in a very different way if it is to be good. Mr. Hughes is not only a good lawyer, a sound and exceedingly capable Executive, but he is as well something of a philosopher; but a philosopher of conservatism and continuance, not of overthrow and destruction."

The Democratic *World* is not less eulogistic, declaring that Governor Hughes has "shown in a marked degree the temperament of a great judge" and that the appointment will "go far toward restoring popular confidence in the Taft administration." There is not room to quote here the praise of other influential newspapers in all parts of the country.

The sentiment of the legal profession is well expressed by the *New York Law Journal*, which observes:—

"There may be expected in Justice Hughes an independence and boldness fully as great as characterized Justice Peckam and perhaps even a greater facility and adeptness than were evinced by Justice Brewer in applying and moulding legal principles to accomplish just and broad-minded results. Governor Hughes's message on the Federal Income Tax Amendment—whether one agrees with him or not—and his recent opinion in the Hoffstot Inter-State Extradition case indicate his calibre upon the important classes of questions he will be called upon to consider. The Bar of New York may be congratulated upon having a representative in the Supreme Court in all respects worthy of the tradition of Nelson and Peckham."

The *Central Law Journal* of St. Louis, speaks of the "excellent appointment," and continues:—

"Strong, independent, clear-headed and comparatively young, Justice Hughes should add considerable strength to the Supreme Bench for many years. . . . He is the people's candidate and, because of that fact alone, the Supreme Court's prestige and hold upon the people have been materially strengthened."

The *Legal Intelligencer* of Philadelphia, referring to Governor Hughes as a sound lawyer and man of unusual moral courage, says that:—

"His professional attainments are very generally recognized; as was said by Senator Root, 'He measures up to the high standard of the Court' . . . His legal training and professional attainments, his broad experience in public life and as a man of affairs, and his sympathy with the best popular ideals 'afford reason to believe that he will measure up to the high standard of the Court' and that his judicial career will be one of exceptional usefulness and distinction."

It is with amusement that one learns of the grounds for Mr. William Jennings Bryan's objections. Mr. Bryan's bigoted denunciation, to Yale students, of their fathers' "ill-gotten gains," years ago, was not more ludicrous than his fantastic conception of Mr. Hughes as the friend and ally of predatory wealth. Says Mr. Bryan:—

"It will be remembered that he vetoed the bill for the reduction of railroad rates after a New York Legislature, and a Republican Legislature, at that, had passed the reduction bill. This measure gave to the congested population of New York the two cent rate now enjoyed by the more scattered populations of the Western States, and his veto of it is conclusive proof that he obeys the dictates of the railway managers instead of listening to the voice of the public."

Mr. Bryan is known to be a doctrinaire of advanced socialistic views, but the striking thing about this criticism is not so much the fact that it shows him unable to view current affairs dispassionately and sensibly, as its revelation of his complete lack of a sense of humor. He goes on to draw a grotesque portrait of Mr. Hughes as the friend of Rockefeller, the beneficiary of campaign contributions from trust magnates, the opponent of the income tax and the friend of monopoly. Finally, to cap the climax:—

"He is a shining illustration of that peculiar type of citizen developed in this country during the present generation—the citizen who personally opposes vice and is a punisher of small crimes, but shows no indignation at the larger forms of legalized robbery."

Such objections, of course, do not deserve to be treated seriously, for they show a painful lack of intelligence if Col. Bryan is to be accredited with any degree of sincerity in expressing himself.

The Boston *Advertiser* well observes that these criticisms "do not reflect in any way on Governor Hughes, but they do reflect decidedly on Mr. Bryan." For Mr. Bryan shows how warped is his judgment:—

"The strict impartiality and poise of the new Justice cannot be shown better than in the very instance that Bryan selects for specific impeachment of the New York man. He says that Governor Hughes 'was the first to oppose the income tax.' As a matter of record he was one of 'the first' to champion the principle of the income tax; but he was too honest to wink at a manifest menace in the amendment as it has been drawn. Bryan, evidently, would swallow the proposition whole, spite of its inconsistencies of phraseology."

The Hearst attack was pitched in much the same way. President Taft well answered both calumnies when he deprecated the "cant of the demagogue" and the "disposition of public journals" to make unjust charges against men in public life.

Not only are the newspapers of the country, on the whole, pleased with Mr. Hughes' acceptance, but their admiration for him is so great that many express an evident willingness to see him at some future time promoted to Chief Justice, or elected President of the United States. The latter contingency, it is declared, is by no means an impossible one. Thus the Minneapolis *Journal* says:—

"It is possible that his peculiar talents may be required in the White House. It is not probable, because his is not the only talent and personality available. But it is easy to conceive a conjunction of events that might render Mr. Hughes the most available man. The people will keep Charles Evans Hughes in mind, and, if they need him, will not hesitate to draft him."

"Other Justices of the Supreme Court," says the Boston *Globe*, "have aspired or conspired to be President, and it cites the examples of John McLean, Salmon P. Chase, David Davis, and Justice Field. And the Providence *Journal* considers that "no insuperable obstacle exists between the Supreme Court and the Presidency."

The Poet Behind the Bars

THE prisoner who has gone by the name of John Carter was released from the state penitentiary at Stillwater, Minnesota, on his twenty-fourth birthday, April 18. The young man, whose real name has been kept secret, belongs to a good English family. He was brought up by a wealthy relative, received an excellent education, and was suddenly left unprovided for by the death of his benefactor. Another relative, a London banker, then took him into his office. His artistic tastes, however, rendered him totally unfit for such employment, and he soon got into disgrace and was sent to Canada to take up farming. He wandered into the United States, and five years ago was sent to prison for stealing $24 from a railroad station while cold and hungry.

His talents soon came to the notice of the prison authorities. He contributed verses to the *Mirror*, the prison paper, acted as librarian of the prison, and taught the prison inmates. Later he sent his poems to the magazines, and they were accepted by the *Century*, *Cassel's*, *Harper's Weekly*, the *St. Louis Mirror*, and other publications.

Former District Judge John W. Willis saw his verses in the *Mirror* and started a movement for his release. Robert Underwood Johnson, the editor of the *Century*, had also become much interested in the young man. Judge Willis and a local clergyman asked that he be pardoned, but a commutation of his ten year sentence to one of five years was preferred by the Pardoning Board. Mr. Johnson sent a telegram to the Board which was to the following effect:—

> Comment of many newspapers and persons convinces me that public opinion will sustain your honorable body in releasing John Carter. My appeal is made not because he is a poet, but because of his manly letters, and because his youthful crime has already been grievously expiated.

Now that he is out of prison, Mr. "Carter" is not likely to write so much. He announced his intention to look for work as a pianist or clarinettist, but he would do magazine work "if tempted." It is said that many magazine editors have expressed their willingness to give him permanent employment.

All of the verses he has published have expressed the feelings of a man in jail, and they testify also to his love of music. Thus in "Con Sordini," printed in the *Century*, the first three stanzas speak of his memories of Chopin's Sixth Polonaise, Isolde's song from Wagner's "Tristan und Isolde," and the music in a cathedral. The poem begins:—

> There is but silence; yet in thought I heard
> The desperate chords of that wild polonaise,
> The sixth of Chopin's wizardry, but blurred,
> As o'er a battlefield a mournful haze
> Blots out the dying from the dead men's gaze.

The release of the poet suggests to the *Boston Transcript* that "there is constantly much literary and journalistic talent shut up within prison walls." It continues:—

> It is certainly true that in various penitentiaries, notably those of Massachusetts, Connecticut and New York, some scintillant little journals give a very interesting reflection of the life within. They have their poets, their wits and their philosophers. The only reason they are not better known is that the circulations are quite limited.

The question whether such a man is not truly useful to society, and should be dealt with differently from other criminals, is considered by the *Boston Herald*, which says:—

> If the poetry shows the existence of a "soul" behind the verse, if it distinctly shows that the singer has profited spiritually by his experience, if he has been made to see the meaning of punishment—however crudely dealt out—if he seems to have it in him now to serve his kind the better because of the mental and spiritual throes through which he has passed, why of course society at large must squarely face the fact, whether his case does not warrant that special dealing with individuals, which criminal science now says is the last word in just dealing with persons who have transgressed law, How any one, reading his "Ballade of Misery and Iron," or "Con Sordini," or "Lux e Tenebris," can fail to detect these desired evidences of greater worth to society in a "John Carter" released, it is difficult to see.

Review of Periodicals

Articles on Topics of Legal Science and Related Subjects

Administration of Criminal Law. "The Failure of Remedial Justice." By Prof. William L. Burdick of the University of Kansas. 19 *Yale Law Journal* 409 (Apr.).

"Being somewhat familiar with this country, and having witnessed arrests in such cities as New York, Chicago, St. Louis and San Francisco, and comparing the treatment accorded to the rougher class of petty wrongdoers in America with the methods of the police in London (White Chapel District), Paris, Berlin, and even Constantinople (during the revolution of 1908), I believe there is no doubt that the American policeman leads the world in his unnecessary and brutal use of the club. . . .

"Brushing aside these minor matters, what about the treatment of prisoners arrested for felonies, from whom the police desire to obtain evidence? The mere arrest may be quietly made, but then comes, in many cases, that American iniquity known as 'the sweat box,' 'the third degree.' . . . A Chinaman is arrested for a heinous crime. He is placed in a cell; continually questioned by a relay of detectives and other officials; forcefully kept without sleep for two or three days, in the expectation that the mental torture and the physical exhaustion will become so acute that he will be glad to 'confess' in order to obtain relief. A woman is arrested for murder; at midnight the corpse of the victim is brought to her cell, that the dramatic horror of the scene may compel her to 'confess.' Another prisoner is denied food; another brutally beaten, 'slugged' is the word, until he is forced to speak. Other atrocities are practised, such as highly salting the food, and denying water to the victims; placing them in solitary confinement; or in bitterly cold cells, when the weather aids; or in frightfully superheated rooms at other times. Red pepper has been blown into their cells, and other indignities, too numerous to mention, perpetrated in order that a 'confession' may be tortured from a helpless wretch."

See Procedure.

"American Corpus Juris." "Simplify the Law." Editorial. *Outlook*, v. 94, p. 792 (Apr. 9).

"It [the proposed statement of the American *Corpus Juris*] is as legitimate a subject for endowment as a library, a hospital, or a university.

"A plan for carrying into execution this great work, long desired by the bar, has now been so far definitely formed as to receive a full exposition and a hearty indorsement from the *Green Bag*, a leading conservative law journal. . . .

"*The Outlook* agrees with the *Green Bag* that 'the undertaking could not be in safer hands.' Demanded alike by the interests of the profession and of business men, indorsed without dissent by the ablest lawyers and jurists, with law scholars of distinguished ability to undertake it, the work needs only some man of financial ability to provide the necessary funds. Such an undertaking carried to completion would be at once a great service and a great honor to the country."

"Wanted—An American Justinian." *American Review of Reviews*, v. 41, p. 474 (Apr.).

"The need of such a work has been felt through more than a century of our history. . . . This matter is just as vital to the public as to the lawyers; for so long as the latter admit their inability to determine what the law really is, litigation is bound to be needlessly expensive and delays unavoidable."

Carriers. See Rate Regulation.

Conflict of Laws. "The *Renvoi* Theory and the Application of Foreign Law, II." By Ernest G. Lorenzen. 10 *Columbia Law Review* 327 (Apr.).

Continued from the March number (reviewed 22 *Green Bag* 288). Having there discussed the subject in its general bearings, the author here takes up "*Renvoi* in Particular Classes of Cases," and "As a Part of English and American Law."

"The courts of the United States," he says, "have never been called upon to deal with the question of *renvoi*." The doctrine was not involved, he declares, in *Harral* v. *Harral* (1884, 39 N. J. Eq. 279), where French rules of private international law were discussed evidently for the purpose of showing that they agreed with American law. The introduction of the *renvoi* doctrine into our law, he concludes, "would be most unfortunate on account of the uncertainty and confusion to which it would give rise in the administration of justice and its demoralizing effect upon the future development of the Conflict of Laws."

"The Individual Liability of Stockholders and the Conflict of Laws." By Wesley Newcomb Hohfeld. 10 *Columbia Law Review* 283 (Apr.).

The second portion of an article not yet concluded. In the June, 1909, issue of the same Review the writer considered "Principles and Authorities Relating Directly to Obligations Other than Those of Stock-

*Periodicals issued later than the first day of the month in which this issue of the *Green Bag* went to press are not ordinarily covered in this department.

holders" (see 21 *Green Bag* 401). He now puts forth a complete discussion of "Principles and Authorities Relating Directly to the Obligations of Stockholders."

Conservation of Natural Resources. "The Advance of Forestry in the United States." By Henry S. Graves, United States Forester. *American Review of Reviews*, v. 41, p. 461 (Apr.).

"In the long run the present system of taxation, if continued, will contribute directly to forest destruction. . . . Forest conservation is a public necessity. The protection of stream flow, the prevention of erosion, and provision of a permanent supply of forest products are required for public welfare. It is the national government and the states which must take the lead."

See Federal and State Powers, War Claims.

Contracts. See Legal History, Public Service Corporations.

Corrupt Practices. "Bribery in the Legislatures." By Judge S. M. Gardenhire. *North American Review*, v. 191, p. 482 (Apr.).

A bribe "never would be accepted if the criminal statute was made effective by putting the burden solely on the man who directly and solemnly assumes it and letting the bribe-giver be immune. Bribe-taking would instantly disappear in the face of such a statute, unless we impute a criminal stupidity to men worth official status. Immune himself and guilty of no offense in so doing, no man would dare approach an officer and ask him to become a criminal, alone, for any sum which might be tendered."

Corporations. See Conflict of Laws, Federal Incorporation.

Cost of Living. "Food Prices and the Cost of Living." By J. D. Magee. *Journal of Political Economy*, v. 18, p. 294 (Apr.).

"As compared with an increase of 22.8 per cent in all commodities in 1908 over the average of 1890–99, we find that barley has risen 61.8 per cent, corn 79.9 per cent, cotton 34.8 per cent, oats 89.5 per cent, potatoes 42.6 per cent, rye 48 per cent, wheat 31.8 per cent, steers 28.1 per cent, hogs 31.4 per cent, butter 24.1 per cent, eggs 42 per cent, flour 26.1 per cent. . . .

"Except in the case of meat, the retailers' margin in the great staples has remained about the same. So we end with the farmer as we began with him. The cost of living is high because farm products are high. Why farm products are high remains to be explained."

"The Increased Cost of Living." By Prof. J. Laurence Laughlin. *Scribner's*, v. 47 p. 539 (May).

"May it not be the psychological hour to call for the creation of a new aristocracy of the simple life, of those who care for the reality and not for the shadow, for the true inward pleasures of the mind rather than for the external, evanescent show? May it not be high time to create a freemasonry of those who do not ask how much one has, nor how much one knows, but what one is? Gold, in the sense of riches, may be the root of all evil; but gold, in the sense of a standard of prices, cannot be the sole root of the evil in our increased cost of living."

Criminal Procedure. See Administration of Criminal Law, Procedure.

Cross-Examination. "The Art of Cross-Examination." By E. F. B. Johnston, K.C. 46 *Canada Law Journal* 233 (Apr. 15).

"I think that in the whole course of over thirty years' experience I have seen about two traps go off. This is a thing that I would advise my brothers at the bar, and particularly those who are engaged in litigious practice, to avoid. It is rarely successful, and if it is not successful it always comes back upon the poor cross-examiner, and through him upon his still poorer client. . . .

"Counsel should always keep to the level of his witness; and I will illustrate that by a well-known story of Lord Jeffrey. The counsel, an academic man, was examining a poor Scotchman at the court in Edinburgh. It was a question of the mental capacity of the testator, and the information he desired to get from this witness was, how well he knew the deceased, and the lawyer put to the witness questions in various forms—'were you on terms of intimate relationship with the deceased '—and the witness looked at him and said, 'Eh '; he repeated the same question, using big words, away over the level of his witness—who didn't understand the question at all.

"Lord Jeffrey finally became impatient and said, 'Now let me ask the witness a question,' and he turned to the witness and he said:

" 'James, did you ken Sandy Thompson in his lifetime?'

" 'Well, I did.'

" 'How well did you ken him?'

" 'Ken him—why me and him sleepit in the same kirk for forty years.'

"Now there was a degree of intimacy that could not be gainsayed, and developed because Lord Jeffrey came to the level of the witness."

Defamation. See Fair Comment.

Direct Legislation. See Legislation.

Disarmament. "Attacking the Rush-Bagot Treaty." By Harry E. Hunt. *Independent*, v. 68, p. 911 (Apr. 28).

"The treaty which causes some one inconvenience was signed in 1817 by the United States and Great Britain. It placed a limit upon the number and equipment of war vessels which each nation was to maintain on the Great Lakes. . . .

"Now that politics and special interests have seized the treaty at one end and the people at the other, in a tug of war, it may be surprising if it snap. If it does, the one treaty that has shown that nations can successfully limit armaments by agreement will have indeed been killed and skinned."

Elections. "Hide-and-Seek Politics." By President Woodrow Wilson. *North American Review*, v. 191, p. 585 (May).

"The nominating machinery has become the backbone of party organization. By it local leaders are rewarded with influence or office, are kept loyal, watchful and energetic. By it national majorities are pieced together. If one goes back to the source of this matter, therefore, it is easy to see that the nominating machine was no barnacle,but a natural growth, the natural fruit of a system which made it necessary to elect every officer of government. The voter has not the leisure and, therefore, has not the knowledge for the difficult and intricate business. He cannot organize a government every year or two, make up its whole personnel, apply its punishments and rewards, effect its dismissals and promotions. . . .

"The short ballot is the short and open way by which we can return to representative government. . . . Such a charter as that of the city of New York, for example, is a mere system of obscurity and of inefficiency. It disperses responsibility, multiplies elective offices beyond all reason or necessity, and makes both of the government itself and of its control by the voters a game of hide-and-seek in a labyrinth. Nothing could have been devised better suited to the uses of the professional politician, nothing susceptible of being more perfectly articulated with the nominating machine. As a means of popular government, it is not worth the bother and expense of an election."

"The Multifarious Australian Ballot." By Philip Loring Allen. *North American Review*, v. 191, p. 602 (May).

The many forms of the so-called "Australian" ballot, as it exists in forty-two states, are here described and exhibited by means of diagrams, and the readiness with which some of these forms lend themselves to manipulation is indicated.

Employer's Liability. See Uniformity of Laws.

Ethics. "A Study of the Popular Attitude Towards Retributive Punishment." By F. C. Sharp and M. C. Otto. *International Journal of Ethics*, v. 20, p. 341 (Apr.).

Questions propounded to upwards of a hundred students in the University of Wisconsin, with the object of ascertaining what proportion of them were under the influence of the idea of retribution in the treatment of crime, showed a very large number to hold the retaliatory theory of punishment.

"The Sociological Basis of Ethics." By Prof. Charles A. Ellwood of the University of Missouri. *International Journal of Ethics*, v. 20, p. 314 (Apr.).

The writer discusses the implications of the thesis of Cooley ("Social Organization," p. 21) that "we live in a system, and to achieve right ends, or any rational ends whatever, we must learn to understand that system."

"The natural sciences," he writes, "whether we like it or not, are establishing certain standards of normality for their own purposes; especially are biology, psychology, and sociology doing this; but these implied norms do not themselves constitute a science of ethics. They must rather be taken and worked over, criticised, and harmonized by a distinct discipline, an independent science, ethics. But one can see at once that the norms and ideals which ethics finally works out cannot be something entirely different from those which the natural sciences have furnished it as its raw material to work over. . . .

"This view of ethics makes the connection between the social and moral life simple and explicit. The moral, indeed, becomes simply the normative aspect of the social; and the moral virtues become, not abstract personal qualities, but concrete social values. The virtues, according to this view, are intimately associated with social and even with institutional life."

Evidence. See Medical Jurisprudence, Procedure.

Expert Testimony. See Medical Jurisprudence.

Fair Comment. "Freedom of Public Discussion." By Van Vechten Veeder. 23 *Harvard Law Review* 413 (Apr.).

"It is now established by recent English cases that 'a personal attack may form part of a fair comment upon given facts truly stated if it be warranted by those facts'; in other words, if it be a reasonable inference from those facts. Whether the personal attack in any given case can reasonably be inferred from the stated facts upon which it purports to be a comment is a matter of law for the determination of the judge before whom the case is tried; but if he should rule that this inference is capable of being reasonably drawn, it is for the jury to determine whether in that particular case it ought to be drawn.

"In this country the weight of judicial *dicta* is undeniable contrary to the English view. In the majority of the cases commonly cited in this connection no distinction between comment and statement of fact is made or involved in the actual determination. They are, almost without exception, cases involving direct statement as distinguished from comment; or, if involving any comment at all, no basis for the comment was proved, and privilege was claimed simply by virtue of the occasion being a matter of public interest. These cases are not, therefore, in opposition to the English rule, for they were not cases of comment properly so called, and privilege would have been equally denied under that rule. They are simply authority for the rule that a direct statement of fact is not privileged by reason of the publicity of the occasion. The difficulty is that these decisions

have generally gone beyond the actual issue, and, often using the term 'criticism' as synonymous with derogatory statements of fact, have expressed the *dictum* that criticism is privileged, or not actionable, so long as it does not attack the private character of the person criticized, or impute evil motives. In other words, while the actual decision is generally unimpeachable, the foundation is delusive, *i. e.*, a distinction is between comment and statement of fact. While this doctrine recognizes some latitude in the discussion of matters of public interest, its practical futility is shown by the conflicting and sometimes fanciful ideas of the sort of imputations which are held to fall within it.

"This doctrine, so far as it is intelligible, would seem to leave little, if any, more practical freedom in the discussion of matters of public interest than that which is permitted in the discussion of the conduct of a private person. It leaves the law very much in the attitude of saying, 'You have full liberty of discussion, provided, however, you say nothing that counts.'

"Other and more carefully considered cases are in substantial agreement with the prevailing English doctrine."

The author's footnote citations in the foregoing extracts are omitted.

Federal and State Powers. "The Other Side of Conservation." By George L. Knapp. *North American Review*, v. 191, p. 465 (Apr.).

"Here, then, we have a system which throughout its sphere of action hampers all forms of industrial development. We have an area larger than many a European kingdom put to its lowest, instead of its highest economic use. We have a policy which is an absolute reversal of more than one hundred years of national habit and tradition; a policy which holds barrenness a blessing and settlement a sin; which fines, instead of encouraging, the man who would develop a natural resource; which looks forward to a population of tenants instead of to a population of proprietors; which seeks to replace the individual initiative that has made our land great by a bureaucratic control that has made many another land small. Surely, the danger must be imminent and terrible which is held to justify such a course. . . .

"It is no more a part of the federal government's business to enter upon the commercial production of lumber than to enter upon the commercial production of wheat, or breakfast bacon, or hand-saws. The judiciary committee of the Sixtieth Congress, reporting on the proposed Appalachian reserve, declared that the sole ground on which Congress could embark in the forest business was the protection of navigable streams. Will any one pretend that a forest reserve on the crest of the Rocky Mountains, with the nearest navigable water a thousand miles away, can be brought under this clause? Even on the Pacific slope, I have not heard that the lumber mills of Washington have seriously impaired the navigability of Puget Sound; nor that the Golden Gate would shoal up if the cutting of timber in the Sierras were unchecked. And will the champions of 'conservation' claim that the federal government has greater rights and powers in the newer states than in the older ones?"

See also Federal Incorporation, Government.

Federal Incorporation. "State and Federal Control of Corporations." By Frederick H. Cooke. 23 *Harvard Law Review* 456 (Apr.).

"Of late there has been no little discussion whether there is any advantage in the creation of corporations under the authority of Congress. As already noted, there are several instances of such creation for the purpose of engaging in commerce or transportation as carriers. So far as concerns the application of the commerce clause, the writer is not aware that such a corporation enjoys any substantial advantage, or is, for that matter, subject to any substantial disadvantage, as compared with corporations created by the states. There has been little or no utilization of such power of Congress to create a corporation for the purpose of transporting as a shipper through the agency of carriers. The exercise of power for that purpose was recently advocated by the learned Attorney-General, who says:—

"Such corporations formed under national law would not be foreign corporations in any of the states, and would therefore be at liberty to transact their business without state permission and free from state interference. . . . If, now, Congress shall enact a law providing for national incorporation to carry on interstate commerce, subject to such restrictions and with such freedom from local state control as Congress shall see fit to prescribe, the state control of foreign corporations, in all probability, will soon cease to be a subject of great importance.

"But if the views already stated are correct, this conclusion seems insufficiently justified. So far as concerns commerce or transportation within the scope of the commerce clause, even corporations created by the states are 'at liberty to transact their business without state permission and free from state interference.' On the other hand, it remains to be established that a corporation created by Congress, at any rate one created to engage in transportation merely as a shipper, is not, to use the language of *Reagan* v. *Mercantile Trust Co.*, as to business done wholly within the state, subject to the control of the state 'in all matters of taxation, rates, and other police regulations.' "

"The Right to Engage in Interstate and Foreign Commerce as an Individual or as a Corporation." By Frederick H. Cooke. 8 *Michigan Law Review* 458 (Apr.).

"It seems not easy to accept on principle the conclusion that the mere power to *regulate* commerce or transportation includes the power to create a corporation for the purpose of engaging therein. Yet, as a matter of

authority, it must be regarded as established that Congress has such power, which was notably exercised in authorizing the construction of the Pacific railroads. (See *California* v. *Central Pacific R. R. Co.*, 127 U. S. 1, 1888.) . . .

"There has existed a widespread impression that much confusion would result from the application of diverse rules in different states to, for instance, a railroad corporation engaged in interstate commerce. . . . But I incline to think that this apprehension is without sufficient basis. Those engaged in interstate commerce are already, and long have been subject to diverse rules in different states, without serious inconvenience necessarily resulting. . . .

"Why, then, should not a state be allowed generally power to regulate interstate and foreign commerce, untrammeled by any supposed prohibition in the commerce clause?"

Government. "Nullification by Indirection." By James M. Beck. 23 *Harvard Law Review* 441 (Apr.).

A short abstract of this paper, which was read before the Rhode Island Bar Association last December, will be found in 22 *Green Bag* 56. The paper treats of the manner in which the constitutional distribution of powers between the nation and the states has been disregarded by Congress and the Supreme Court.

British Constitution. "The New Parliament and the House of Lords." *Edinburgh Review*, v. 211, no. 432, p. 511 (Apr.).

"In this rationalizing age it is impossible to justify to a public audience the soundness of a purely hereditary basis for a legislative assembly. In the multitude of legislatures founded by Englishmen and their descendants in various parts of the world, the hereditary principle has found no place. In former times in England the House of Lords stood for a great fact. The magnates of whom it was composed possessed great power, to which fortunately the Constitution gave legitimate expression. It has been the signal merit of our Constitution that it has been capable of modification so as to keep abreast of the facts. In this twentieth century of ours Great Britain, like the United States, like Canada, and like our other great colonies, can only be governed by the frank acceptance of democratic principles. We have to reconcile old forms with modern sentiment and habit of thought. Everywhere the theory that one man is as good as another is recognized as lying at the base of modern constitutional systems. . . .

"As we have said, everywhere nowadays, and in the House of Lords itself, men accept democracy. Yet the formal constitution of that Chamber has remained unchanged. It reflects much credit on the good sense of the country and of the Peers themselves that a continually reformed House of Commons and an unreformed House of Lords should have been able to work so long side by side, and on the whole satisfactorily. It is now the turn of the House of Lords to be reformed in conformity with the necessities and ideas of our own time; and if English statesmanship is not very inferior to that of past days the country should ultimately get a Second Chamber far better suited than the present one to perform the very important functions that belong to it."

"Revolution or Reform." Editorial. *Quarterly Review*, v. 212, no. 423, p. 586 (Apr.).

"The immediate duty of every patriotic citizen is to guard the Second Chamber against the attack that threatens it, and to stand for the cause of reform as against that of revolution. It is to this broadly outlined policy that the Unionist party is committed."

"Episodes of the Month: Lord Newton's Speech." Editorial. *National Review*, v. 55, p. 199 (Apr.).

"The Duke of Northumberland called attention to one great disadvantage they labored under, namely, the popular idea that the House sitting as a branch of the legislature, and the House sitting as a Court of Law, were one and the same assembly. Consequently the House of Lords was credited with the decisions in the *Taff Vale* and the *Free Church of Scotland* cases, and also, we may add, in the recent case depriving trade unions of the right of enforcing a compulsory levy on their members for Parliamentary purposes. The Court in this latter case was, unfortunately, presided over by Lord Halsbury, as, for one reason or another, the Lord Chancellor stood down, and this decision was used at the last election to poison the whole trade union vote against the Unionist party because it was represented as the handiwork of a Tory Lord Chancellor.

"Among many reforms needed at the present time is the complete separation of the judicial functions of the House of Lords from its legislative functions. But how can this be effected, so long as the Lord Chancellor presides over the legislature and the judiciary, is a member of the Cabinet of the day, and, as such, is expected to take his part in controversial politics? We feel sure that our Olympians have no idea of the immense injury which has accrued to the Unionist party at the last two elections from this most unfortunate arrangement, of which we have never heard any serious defense, and which to unsophisticated outsiders would appear to be a violation of the whole spirit of our institutions."

See Elections, Federal and State Powers, Judicial Interpretation, Legislation, Local Government, War Claims.

History. See Legal History, Taxation.

Income Tax. See Taxation.

Insanity. See Medical Jurisprudence.

Interstate Commerce. "The Application of the Commerce Clause to the Intangible." By Frederick H. Cooke. 58 *Univ. of Pa. Law Review* 411 (Apr.).

"From the standpoint of the earlier conception of the word 'commerce,' as used in the commerce clause, we have, as a definition thereof, '*the transportation of the tangible.*' Such definition came indeed to be applied to the intangible also, conspicuously so to communication by telegraph. Yet such application was but partial and limited, by reason of the continuing influence of the earlier conception. Thus, it is still refused application to the mere negotiation of a contract between persons situated at the time in different states, conspicuously so as to contracts of insurance. But it is allowed application to such negotiation, by reason of its being incidental to what is within the scope of the commerce clause—thus, where performance of the contract involves transportation of the intangible. It is submitted that it likewise has such application where such performance involves transportation of the intangible, but thus far it has been denied such application, especially with respect to contracts to furnish instruction by correspondence."

"The Segregation of White and Colored Passengers on Interstate Trains." By J. Newton Barker. 19 *Yale Law Journal* 445 (Apr.).

"State statutes against the intermingling of white and colored passengers are valid in so far as they are construed and applied to intra-state transportation, but such statutes cannot interfere with interstate trains carrying passengers between interstate points. . . .

"A federal statute is necessary to compel interstate carriers to separate colored and white passengers, and if such legislation could be accomplished the separation of the races in transportation would be a worthy regulation of commerce."

See Federal Incorporation, Rate Regulation.

Judicial Interpretation. "The Joke's on You: How Your Chosen Representatives Work the Joker Game on Legislation." By Samuel Hopkins Adams. *American Magazine*, v. 70, p. 51 (May).

According to this author, "jokers" are not confined exclusively to legislation, but are found in the judicial interpretation of statutes. To illustrate, he says that the United States Supreme Court injected into the commodities clause of the interstate commerce law, prohibiting carriers from owning any interest in the commodities carried, the words "legal or equitable," craftily perverting the meaning of the Act.

Mr. Adams should have labeled this criticism, "This is a joke," as it is too poor a one to laugh at.

Jury Trials. "Right of Trial by Jury." By Lynne Fox Clinton, of Boise, Idaho. 3 *Lawyer and Banker* 120 (Apr.).

"The assertion that the Constitution of the United States does not guarantee to its citizens the right of a trial by jury in the state courts is so foreign to the general belief of most people that it is often startling not only to laymen but to many lawyers. But it is undoubtedly true, whether a salient strength or weakness in our nationality as one may honestly view it."

See Procedure.

Labor Unions. "The Right to Strike: Its Limitations." By Joseph J. Feely. *North American Review*, v. 191, p. 644 (May).

"Certainly the interest of the public should have as prompt and as effective consideration and protection as those of the individual or group of individuals. . . . Such paramount right of the public would seem to be a sufficient justification for legislative action creating tribunals to which matters growing out of industrial disputes *involving the public welfare* should be left for compulsory arbitration and settlement, as soon as the creation of such a tribunal be deemed expedient."

Law Reporting. "Loose Leaf Law Reports." By W. E. Singleton. 26 *Law Quarterly Review* 156 (Apr.).

"While the more complicated portions of Mr. Carden's scheme [see 22 *Green Bag* 182] could not well be adopted by the ordinary subscriber, he has in the suggestion of separate publication of single cases hit on a most valuable idea. It is hoped that it will be speedily acted on."

Legal History. "The Place of Writing in Conveyancing and Contract." By J. Andrew Strahan. 26 *Law Quarterly Review* 113 (Apr.).

"The authority of the deed both in conveyancing and contract was fully established long before the Chancellor began to enforce uses. Now for several centuries after he began to enforce them we have no reports of his decisions. . . . But nevertheless from the very first the Chancellor did make law and did lay down principles. . . .

"The counsel who practised before the Chancellor [at the end of the fourteenth century] who dealt thus freely with the beneficial ownership were the same men who practised before the common law judges who were bound hand and foot by the doctrines of seisin and estoppel by deed in dealing with legal ownership and with contracts. It cannot but be that they were influenced in their practice before the common law judges by their practice before the Chancellors. And it is my contention that it was the notions they derived from their practice before the Chancellor which laid at any rate the foundation of the law of simple contract without deed and without writing. . . .

"To this day, trusts of pure personalty may be made without writing, and trusts of land may be made without deed, though writing is necessary to prove the latter or to alienate any equitable interest. But practice does not always follow the law, and it is now the practice to use deeds in creating trusts and assigning equitable interests in every case where a deed would have been used if the

transaction had been one at law. And even executory contracts between individuals which may be made in writing are now frequently made by deed—a further evidence of the intense conservatism of men who seem never to forget the sanctity which once attached to a practice followed by their ancestors."

"The Continuity of Case Law." By M. C. Klingelsmith. 58 *Univ. of Pa. Law Review* 399 (Apr.).

"The modern lawyer may not know a word of old French; he may never have opened a Year Book; he may not be able to trace a citation through the mazes of an old abridgment; he may not care for the old law, but may care only for 'the practical side' of the law, as he calls it, and the latest decision fresh from the judicial pen. Not less is he dependent upon the older law. He can no more get away from it than he can get away from past history, past development in all the other surroundings and conditions of his life. . . .

"The thoughtful lawyer, the skillful practioner, the student of the law, all need, and should demand, that in this latter day, this day of discovery and enterprise and initiative in all other things, they should have set before them not only a new edition of the already printed Year Books, but that all the unprinted Year Books should be given to them, in some such form as that in which Mr. Maitland gave to the world his translation of that portion of the Maynard, or oldest of the Year Books, which he was able to complete before his death."

"The Exclusion of Attorneys from the Inns of Court." By Hugh H. L. Bellot. 26 *Law Quarterly Review* 137 (Apr.).

"It has been too often assumed that attorneys and solicitors were finally excluded from the Inns of Court in the middle of the sixteenth century. An examination, however, of the records of the four Inns will show that this assumption is erroneous and that these practitioners of the law continued to be members of the greater Houses until the end of the eighteenth century."

See Torts.

Legal Literature. "The Misdating of the Statute of Merton in Bracton." By George E. Woodbine, of Yale University. 26 *Law Quarterly Review* 151 (Apr.).

The writer is of the opinion that Bracton wrote his treatise in the type of writing known as court hand, and that the carelessness of copyists has had a great deal to do with the errors of date if it does not explain all of them.

Legal Plagiarism. Scott's "Hague Conferences of 1899 and 1907." 10 *Columbia Law Review* 374 (Apr.).

The March number of this Review contained a book notice by Professor J. P. Chamberlain of the University of California charging Dr. James Brown Scott with making improper use of the text of Merignhac in his recent work on the Hague conferences (see 22 *Green Bag* 293). The *Columbia Law Review* prints a vigorous editorial disavowal of this accusation, and publishes a favorable comment by Dean George W. Kirchwey of Columbia Law School on the work in question. To quote Dean Kirchwey:—

"It would be only too easy to retort on the critic by calling attention to the ingenious way in which he has arranged his evidence, selecting his quotations from separate and distinct paragraphs of the original and suppressing intervening passages in which Dr. Scott refers to the authorities whom he is paraphrasing or quoting. But this would be to be as unfair to our reviewer as he has been to his author and no more so. The truth is that Dr. Scott's work, along with abundant evidence of an anxious desire to give full credit for the material of which he has rightfully made use, shows instances of carelessness in this regard in a composition which bears other evidences of haste. But to read plagiarism into these instances is the very abnegation of criticism."

Legislation. "The Referendum and its Critics." By A. V. Dicey. *Quarterly Review*, v. 212, no. 423, p. 538 (Apr.).

Prof. Dicey here makes a vigorous and even polemical defense of the referendum, with reference to conditions in English politics.

"From a general election, it is said, you may in substance, though not in so many words, obtain the expression of the nation's will on the leading measures submitted, or to be submitted, by a government to the consideration of the country. This contention has one grave defect: it does not correspond with the facts of English public life. . .

"As the party system is now worked in England, a general election lays before the electorate a huge number of incongruous and confused issues on the whole of which it is absolutely impossible for the ablest and most temperate of electors to give a satisfactory reply; for note in passing that the voter has practically no other means of giving a verdict on the issues which he is supposed to determine than the very awkward and indirect one of voting for either a supporter or an opponent of the government. Put the last point aside and let us consider for a moment a few among the numerous questions raised at the general election of January and February last. . . . The man about to give a vote was in reality in a position as grotesque as would be the situation of a juryman who, being called upon to find a given prisoner 'guilty' or 'not guilty,' was told by the judge at one moment that the man in the dock was being tried for murder, and at another moment that he was being tried for larceny. . . .

"If once Englishmen adopt, not only the Referendum, but also the spirit in which the Referendum is worked in Switzerland, some other changes of considerable benefit to

England might ensue. An administrator, whose talent and character every one respects, might remain in a Cabinet without agreeing with every measure advocated by the Government. There does not appear in the nature of things to be any clear reason why a Chancellor of the highest legal eminence should not remain a member of a Cabinet though he does not agree with all the political views of his colleagues. No doubt this suggestion is foreign to the customs of the English Constitution as they now exist. It is alien to party government as at this moment carried on in England. But it is opposed to no rule either of honesty or of common sense."

Local Government. "The New American City Government." By George Kibbe Turner. *McClure's*, v. 35, p. 97 (May).

A graphic account of the working of commission government in Des Moines.

Marriage and Divorce. "Necessity for Prior Valid Marriage in Prosecution for Bigamy." By Melville Peck. 15 *Virginia Law Register* 905 (Apr.).

"There seems to be no lack of authority on this question, to the effect that the first marriage charged in the indictment must not be void. Where there are only two marriages, and the first is void *ab initio*, the second may be valid, and whether it is valid or not, it is not criminal by reason of the first marriage, though the first husband or wife be living at the time of the second marriage. The foregoing is offered as an answer to the question propounded in the note to sect. 3781, Code of Virginia, 1904."

Medical Jurisprudence. "Tests of Insanity in the Criminal Court." By Dr. J. G. Kiernan, of Chicago. 3 *Lawyer and Banker* 109 (Apr.).

"Notwithstanding the opportunity afforded the legal profession to propound hypothetical questions, it would appear that the physician in making his examination has only the medical points in the case to consider. That is to say, he has nothing whatever to do with the outside circumstances surrounding the act; he has to determine only the condition of the brain cells so that it matters not what the case may be or whether it is due to influences of heredity. In the case of traumatism, syphilitic or alcoholic poisons, epilepsy, dissipation, excesses, tumors, or any other known cause the question is: Are the brain cells properly performing their functions? 'An individual whose brain cells are normal is a responsible being,' says Grasset, 'and that consists in responding as other men do to the influence of ordinary motives of every day life which rule conduct and human action. If the brain cells are wholly diseased and abnormal the individual is irresponsible.'"

"Medical Practice Laws." By Floyd M. Crandall, M. D. *Medical Record*, v. 77, p. 611 (Apr. 9).

Read before the Medical Society of the County of New York, Feb. 28, 1910.

"During the time when the contest between the schools of medicine was at its height, the energies of the profession seem to have been completely exhausted by the strife. Not a single successful effort was made for eighteen years to improve professional conditions by new enactments. . . .

"The laws of New York as they now exist are but a reflection of a tendency that has been active for fully three decades. They recognize physicians only and take no cognizance of medical sects. . . . Few medical practitioners are now willing to place upon themselves either legal or moral bonds to limit their practice to a single method."

Monopolies. "Present Condition and Prospects of the Sherman Act." Editorial. 21 *Bench and Bar* 1 (Apr.).

"The situation presented is that of a statute first construed and used to prevent trade agreements between independent competitors,—agreements, that is, whose illegality is familiar to all lawyers,—but which has later been extended, indefinitely, as it seems to us, in an effort to curb such aggregations of capital as, in the judgment of the Government, are dangerous to the public. Is the statute a fit instrument for the solution of the great industrial problem that confronts the country,—the problem, that is, of obtaining the benefit resulting from co-operation and consolidation, while protecting the public against the danger of monopoly? We think clearly not. . . .

"The plain sense of the matter is, that the act (except where an actual monopoly had been created) was intended to be confined to the condemnation of certain forms of the abolition of competition, long recognized as illegal,—a condemnation made more effective by the use of the writ of injunction, and in other ways. So construed, the act is not only intelligible, but has been used to good and useful purpose. It should not, however, be strained to embrace cases such as the purchase of the property of another, or the formation of a partnership or corporation, merely because a cessation of competition incidentally results which in the particular case is deemed to be mischievous. Once the line is overstepped nothing but confusion can result; and if the judgment in the *American Tobacco Company* case is affirmed in its entirety we look to see the act repealed, for no amendment of which we can conceive could reach the evil. The economic problem is present and vital; but to attempt to solve it by means of this statute is hopeless, resulting merely in the unsettlement both of the law and of legitimate industry."

"The Future of the Telephone." By Herbert N. Casson. *World's Work*, v. 20, p. 12903 (May).

"It is a fact, although now generally forgotten, that the first railroads of the United States were run for ten years or more on an

anti-monopoly plan. The tracks were free to all. Anyone who owned a cart with flanged wheels could drive it on the rails and compete with the locomotives. There was a happy-go-lucky jumble of trains and wagons, all held back by the slowest team; and this continued on some railroads until as late as 1857. By that time the people saw that competition on a railroad track was absurd. They allowed each track to be monopolized by one company, and the era of expansion began. . . .

"By a similar process of evolution, the United States is rapidly outgrowing the small, independent telephone companies. These will eventually, one by one, rise as the teamster did to a higher social value, by clasping wires with the main system of telephony."

Municipal Corporations. See Local Government.

Nomination Reform. See Elections.

Penology. "Ethical Problems of Prison Science." By Prof. Charles Richmond Henderson, of the University of Chicago. *International Journal of Ethics*, v. 20, p. 281 (Apr.).

"As a matter of fact there is no law in any one of our states based upon the principle of the entirely indeterminate sentence, not even the law drawn for the Elmira Reformatory, where a maximum term is fixed by law. . . .

"Many of us confidently believe that much greater flexibility ought to be given in the administration of the sentences of our criminal courts, and that much more ought to be made of the conduct of the prisoner, both in the prison itself and in the conditional liberty which he enjoys on parole, in fixing the period of his punishment. But we have by no means yet worked out the proper administrative and judicial machinery for making this principle effective in the highest degree. Of the value of the parole system, when limited to prisoners of the proper category and vigorously carried out by an adequate corps of competent parole officers, there can be no question."

"Concerning Imprisonment: By One Who Has Suffered It." *Hibbert Journal*, v. 8, p. 582 (April).

A story, by a man of education, of personal experiences in prison. The writer considers imprisonment a great evil both for the prisoner and for society at large, and says that if people could realize what it means "they would free all prisoners by main force, put the personnel at undepraving work and make any continuance of the horrible thing impossible."

The writer has evidently seen the darkest side of prison life. He draws a terrible picture of the prisoner goaded to insanity by cruel torments, robbed of his self-respect by needlessly humiliating treatment, the victim of a system which does its utmost to encompass his physical, moral, and mental destruction. He is right, of course, in his contention that the need for deterrent punishment does not justify, by any moral principle, a mode of treatment which degrades instead of seeking to rehabilitate the criminal and teaching him the means whereby to earn an honest livelihood.

The author thus offers, by indirection, a powerful plea for a more scientific penal system, one which, though subjecting the prisoner to a rigorous and even military discipline, and providing only the simplest fare and most unattractive surroundings, takes care that the prisoner shall be uplifted rather than depraved, that he shall be offered the opportunity to develop self-respect and maintain a sound physique, and that he shall at all times be treated as a man rather than as a brute.

See Ethics.

Police Methods. See Administration of Criminal Law.

Practice. See Cross-Examination.

Procedure. "'Theory of the Case'—Wrecker of the Law, I, II." By Edward D'Arcy. 70 *Central Law Journal* 294 (Apr. 22), 311 Apr. 29).

An interesting and important series of articles.

"The student should be grounded in the great maxims of procedure, like *frustra probatur quod probatum non relevat*. . . . If maxims like this were understood, our reports would not be as they now are a series of unsolvable contradictions, one case recognizing under the "theory of the case rule," as "substantive" rights, everything that crops out in the evidence, whether embraced in the pleadings or not, and the next case refusing to recognize any right not set out in the pleadings.

"A case illustrating what is conceived to be the true rule, under the maxim referred to, that the proof is limited by the pleadings, is *Crockett* v. *Lee*, 7 Wheat. (U. S.) 522, in which Chief Justice Marshall lays down the rule. . . .

"A maxim is nothing but one way of expressing a principle. Its essence is reason. Here the reason is that the state must have a permanent record of what was decided, for the use of the whole public, on questions of *res adjudicata* and collateral attack. Says Marshall: 'Not only does justice require it, but necessity imposes it on courts.' No need to quote 'our statute.' The court's inherent power is sufficient. Nowadays we make idols of 'our statutes,' and worship them as blindly as an Esquimo worships his totem pole."

"Reforms in Judicial Procedure." By Judge Henry C. Hammond. 3 *Lawyer and Banker* 93 (Apr.).

"Let us establish in the different states a real 'Court of Appeals,' one branch of which shall be exclusively devoted to the review of criminal and the other to civil cases; a court that will take a view of the whole case; a court whose broad powers will enable it to terminate litigation by a final judgment; a court in which law making would be incidental

and secondary to deciding cases; a court whose ingenuity would not be taxed to find flaws in the first trial; a court in which a new trial should not be granted on the ground of mis-direction or the improper admission or rejection of evidence, unless in its opinion some substantial wrong or miscarriage has been thereby occasioned. Let this court be designated 'The High Court of Justice,' and in it let substance and not form prevail."

"Where the Law Fails." By Hon. Robert L. Stout, of the Kentucky bar. 3 *Lawyer and Banker* 102 (Apr.).

"Juries are properly the sole judges of fact. When presented by the living witness, it is a different proposition from that same proposition presented by the written record. The court cannot see the witness, his bearing, his physiognomy and his conduct; it cannot hear his voice, nor observe his manner. A look, a tone, an accent, a movement, impossible to put on paper, may and often does compel a jury in its opinion. So I say the appellate court should be loath to dip into the facts as presented to it by the record in a criminal case. For after an excursion into the mazes of record facts, an appellate court, if convinced that wrong has been done, is mighty likely to go mouse-tracking through the more intricate mazes of technicality in order to find a pretext for freeing a criminal unable to bamboozle a jury of his fellow citizens. Let the shoemaker stick to his last. The courts are the best judges of law, the juries are the best judges of facts, and for this reason I am in favor of letting juries try criminal cases."

"Some Follies in Our Criminal Procedure." By Charles B. Brewer. *McClure's*, v. 34, p. 677 (Apr.).

Mr. Brewer shows the many ways in which the criminal in this country may find a happy refuge from the hardships of the penal law. Incidentally he cites some of the examples which led President Taft to declare that "the administration of the criminal law is a disgrace to civilization." Of these we quote only a few:—

"Because the stolen shoes were not a 'pair,' as charged in the indictment. (The thief, in his haste, had picked up two 'rights.') (3d Harring, Del., p. 559.)

"Because one member of a firm of three names from whom goods had been stolen was dead, and the indictment had named all three. (110 S. W. Reporter, p. 909.)

"Because the indictment had charged the burglar with intent to commit a 'theft' instead of intent to commit a 'felony.' (108 S. W. Reporter, p. 371.)

"Because the indictment charged that the thief had entered the house of one Wyatt with intent to steal from him, and the defense was able to prove that Lamb also occupied the house, and it was Lamb's property the thief was looking for. (101 S. W. Reporter, p. 800.)

"Because the accused had been indicted for attempting to murder Kamegay instead of Kornegay, the real name. (103 S. W. Reporter, p. 890.)"

"The Municipal Court of Chicago." By J. Kent Greene, Assistant to the Chief Justice, 58 *Univ. of Pa. Law Review* 335 (Mar.).

"The court has been particularly fortunate in having an able and progressive body of men as judges and a chief justice of untiring energy in whom the qualities of unusual administrative and high judicial ability are peculiarly combined. To these, more than to anything else, may be attributed the phenomenal success of the court."

"A Dangerous Parting of the Legal Ways." By Judge Alfred Emden. *Nineteenth Century and After*, v. 67, p. 676 (Apr.).

"Every one must be anxious to preserve dignity and position of the High Court; that is to say, in the public estimation, for dignity and position can be nothing without it. Put an end, therefore, to the present and only mode that is left to our legislators of carrying out the public requirements by sending all the business they can to the County Courts. Stop the 'tug-of-war' between the bar struggling on one side to keep work in the High Court, and solicitors on the other to get it to the County Court. Bring the work back to the High Court by meeting the public's demand. Let there be one great Court of Civil Jurisdiction, divided into an Upper Division with Central Provincial Courts, and a Lower Division, taking the place of the County Courts. Let the system of the County Court be the foundation upon which to build the practice and procedure for our one judicial system, and thus bring the work of the High Court into line with simplicity. This can be done as surely as the day follows night."

See Administration of Criminal Law.

Professional Ethics. "Legal Ethics." By James B. Brooks. 19 *Yale Law Journal* 441 (Apr.).

"The law school catalogues show a too great indifference to the subject of professional ethics. In a large percentage of the schools there seems to be no provision for it whatever. . . . Instruction in professional ethics, to be effective and to accomplish the results desired, must be of the same quality as instruction in any other course in college. . . .

"The law office of a practising attorney is a powerful adjunct in the education of the student. In no respect is this agency more effective than in the department of professional ethics. It is well understood that each law office maintains an atmosphere in morals peculiar to itself. This atmosphere pervades everything in and about the office and its work. The student takes on more or less completely, the professional moral character maintained in the office where he takes his first lessons. This is natural and must be expected, and must be reckoned with as an element in the educational problem."

Public Service Corporations. "Liability of Water Companies for Losses by Fire." By Arthur L. Corbin. 19 *Yale Law Journal* 425 (Apr.).

"New cases continue to be brought by citizens whose property has been destroyed by fire because of a failure of the water supply. In the recent Florida case of *Woodbury* v. *Tampa Waterworks Co.*, 49 So. 556; 21 L.R.A. (N. S.) 1034, it was held that where a water company, engaged in the public service of supplying water for public and private use, had contracted with a city to furnish water for the putting out of fires, it was liable to a citizen for a loss caused by the company's failure to live up to its contract. This decision has been rather severely criticised, and it is contrary to the great weight of authority, numerically counted. The liability of the company has two possible bases, its contract with the city and its public duty as a public service corporation. These will be considered separately."

Mr. Corbin proceeds to analyze the authorities, dividing his discussion as follows: (1) Liability *ex contractu*, (2) Liability *ex delicto*.

See Rate Regulation.

Race Distinctions. See Interstate Commerce.

Rate Regulation. "The Judicial Test of a Reasonable Railroad Rate, and Its Relation to a Federal Valuation of Railway Property." By Charles G. Fenwick, of Johns Hopkins University. 8 *Michigan Law Review* 445 (Apr.).

"The character of the enterprise and the amount of risk involved in the undertaking may call for larger returns than the normal rate of interest upon safe investments. *Wilcox* v. *Consolidated Gas Co.*, 212 U. S. 19. . . . Hence it is not unreasonable that investments in railway property (we refer to the actual value of the property, not to the amount of securities on the market) should be allowed unusually large returns. . . . There is clearly no call to capitalize this element, for the inflation of a company's securities would go on without limit if we were to include as part of capital those very factors because of which a larger return is allowed to capital.

"There are then certain non-physical values which may properly be capitalized and others which need not be capitalized in making a valuation of railway property for the purpose of fixing rates. But whatever conclusion the Interstate Commerce Commission may come to with regard to the estimate of the non-physical elements of value, . . . the important feature of the undertaking will be the valuation of the physical elements of the property. . . .

"It is evident that the problem of a valuation of railway property can be satisfactorily settled only by careful and prudent action on the part of the Interstate Commerce Commission. No government which has hitherto permitted its railroads to fix their own rates and to control their own captialization unchecked can afford to attempt a sudden and immediate regulation. The methods of railroads in fixing rates and in the issue of capital securities may not have been blameless in the past; but vested interests have in many cases grown up around such methods, and it would seriously affect the credit of the country if these interests were to be lightly dealt with."

"Regulation that Regulates." By Frederick L. Holmes. *Independent*, v. 68, p. 905 (Apr. 28).

"Effective results have been accomplished by the [Wisconsin] commission. Nearly one hundred and fifty orders have been issued, thousands of grievances have been settled, and only three appeals to the courts. The practical features of the Wisconsin commission law, requiring absolute and scientific rate making, have eliminated litigation."

See Interstate Commerce.

Real Property. See Legal History.

Referendum. See Legislation.

Roman-Dutch Law. See Wills.

Social Evolution. "Socialism—In Its Meaning and Origin." *Quarterly Review*, v. 212, no. 423, p. 409 (Apr.).

"Socialism, as we said at the beginning, is an extreme form of a great general movement. The question of the future is whether that general movement of social reform will evolve into socialism, or whether, on the other hand, socialism will be merged in social reform."

The anonymous author adds that the answer to that depends upon the soundness of the premises upon which socialism is based, and proposes to examine the validity of these premises in a second article.

Taxation (In General). "Highways of Progress—Last Article—The Conservation of Capital." By James J. Hill. *World's Work*, v. 20, p. 12919 (May).

"The modern theory that you can safely tax the wealthy is just as obnoxious as the mediæval theory that you can safely oppress or kill the poor. It is obnoxious, not because wealth deserves special consideration, but because capital is the mainspring of all industry and material development; and after you have devoted so much of it to the unproductive purposes that the state represents when it transcends its primary function as keeper of the peace and administrator of justice, there will be just so much less left to pay out in wages and devote to the creation of other wealth. It is a fixed fact, exactly as it is that when you subtract x from y something less than y must remain. Of course the laborer suffers even more than the capitalist. The countries in which such forms of taxation are being carried farthest are precisely those in which employment is scarce and precarious, and labor finds it necessary

to lean more and more heavily each year upon the weakening arm of state and public charity."

"A Statutory Relation Between Insurable and Taxable Values." By Jennings C. Wise. 15 *Virginia Law Register* 914 (Apr.).

"Either the assessors greatly underestimate the value of property, thereby depriving the government of the just compensation for the individual benefits it dispenses to its citizens, or the insurance companies insure property, contrary to the law and their own interests, at excessive valuations. . . .

"Suppose the law of our state prescribed that no insurance company nor individual could insure property for more than 125 per cent of its assessed valuation on the tax books of the preceding year, with a suitable penalty provided for a violation of the law, what would be the effect?"

Taxation (Federal Corporation Tax). "Is the Federal Corporation Tax Law Constitutional?" By Walter K. Tuller, of the California bar. *North American Review*, v. 191, p. 537 (Apr.).

"The tax imposed by this Act . . . *cannot be shifted*. If that be the test, therefore, there is no escape from the conclusion that this is not an excise, but a direct tax. . . .

"The right to act or do business in the form of a corporation, ordinarily termed the corporate franchise, is *property*. The tax, therefore, is in reality a tax upon property, which seems to confirm the conclusion heretofore reached that it is a direct tax. . . .

"It is submitted that it is not within the power of the federal Government, under the Constitution, to tax any corporate franchise granted by the state within the scope of its reserved powers; and it has been shown that this is exactly what the Act in question, if operative, would do. . . .

"The principles sought to be established are:—

"1. That although called an excise, the tax imposed by the Act under consideration is, in reality, simply a tax upon the corporate franchise and as such a direct tax. That not being apportioned among the several states according to population, it is therefore unconstitutional.

"2. That in so far as it attempts to impose a tax upon corporate franchises granted by the several states in the exercise of their constitutionally 'reserved' powers, it is unconstitutional also on the separate and distinct ground that it is beyond the powers granted to the Federal Government and an invasion of those reserved to the states, and

"3. That if held not to be a tax upon the corporate franchise, it is simply a tax on the property held by corporations, and therefore unconstitutional under the principle declared in the *Income Tax* case, *supra*."

Taxation (Proposed Income Tax Amendment). "The Income Tax Amendment." By Dwight W. Morrow. 10 *Columbia Law Review* 379 (May).

American constitutional history has received a somewhat noteworthy contribution in this long and erudite paper, which contains a close analysis of the treatment accorded matters of federal taxation from the very beginning, going back as far as the adoption of the Articles of Confederation.

"Senator Borah of Idaho, in a speech in the Senate on May 4, 1909," said: "'I believe that the fathers, when the history of the surrounding circumstances is clearly studied, will be found to have known and understood precisely the definition of the phrase 'direct taxes,' and that especially would the careful makers of that great instrument have refrained from putting into the Constitution a phrase which was ambiguous after their attention had been called to the fact that it was ambiguous.'

"This does credit to Senator Borah's reverence for the fathers, but it is not history. It ignores the fact that the Convention from which this Constitution was evolved was one long battle, a battle in which men's passions had run high, a battle in which more than the ultimatum had been given. . . . It is to detract from the ability and character of the framers of the Constitution to assume that they were satisfied with their work. To their lasting credit it should always be remembered that they took not what they wanted, but what they could get.

"Rufus King's question was not answered because no man in the Convention was able to answer it. He asked for a 'precise' definition of 'direct taxation.' As a matter of fact no man has yet satisfactorily answered that question."

Mr. Morrow, emphasizing the confusion in the meaning of the words "direct taxes," goes on to show how the Supreme Court progressed toward that practical settlement of the sense of the phrase which Hamilton had hoped might come about by a "species of arbitration." Thus in *Springer* v. *U. S.* (1880), (102 U. S. 586) it was held that "direct taxes" signified capitation taxes and taxes on real estate.

"This was the situation when the income tax provision of the Wilson Tariff Law came before the Supreme Court in 1894 in the *Pollock* case, above referred to. If there were ever a difficult task set before lawyers it was the task set before the able counsel who attempted to show that this income tax was a 'direct tax.' They must begin again the search which Hamilton, one hundred years before, had said would be a vain search. . . . Every possible explanation bearing upon the economic definition was brought before the court. The majority of the court was persuaded. The uncommonly practical question of taxation was turned over to the economists. . . .

"With the above history in mind, what of the proposed Sixteenth Amendment? Governor Hughes sees in the words 'from what-

ever source derived' the possibility, if not the probability, of the Supreme Court holding that income from state securities may be taxed. Senator Root answers that if the amendment is construed in the light of political and judicial history there is no danger of such construction. . . .

"Senator Root has earned the reputation of measuring carefully his words. Is the foregoing statement one upon which he can stand?"

In the *Pollock* case, "the Court apparently agreed with counsel that it was the intention of Congress to tax state and municipal securities. . . . But there was no tax levied upon state and municipal bonds unless the words 'from any source whatever' included such securities. . . . Unless the Supreme Court has changed its mind since 1894, is there not a strong probability that it will hold that the words 'from whatever source derived' mean what the words 'from any other source whatever' then meant? . . .

"What, then, is the solution? In emphasizing the point of difference between Senator Root and Governor Hughes let us not overlook their points of agreement. They both evidently believe that the majority decision in the *Pollock* case was unfortunate. Neither is impressed with the argument that the right to tax incomes should be reserved to the states. Neither shrinks from the added burden that might be thrown upon their own State of New York if the federal Government should be given the power of levying an income tax in a practicable way.

"Does not the history of the direct tax clause suggest the form of amendment? Why not strike out the words 'and direct taxes' from article I, section 2, clause 3? Also strike out the words 'or other direct tax' from article I, section 9, clause 4. Insert in article I, section 8, clause 1, the word 'taxes' before the word 'duties,' to the end that taxes, as well as duties, imposts and excises shall be uniform. The practical effect of this will be to do away with the distinction between direct taxes and duties, imposts and excises. It will, of course, permit a direct tax upon land by the federal Government under the rule of uniformity.

"If the amendments are submitted in the foregoing form, able and patriotic men will be found on both sides. But whether one is for or against the amendment in the form suggested above, the issue will be a clear one. We will cure an ambiguity in the way it should be cured—by going back to the clauses in question and making them mean what we want. . . .

"The phrase 'direct taxes' is confessedly blind. . . . The practical settlement of the words 'by a species of arbitration,' which Hamilton advocated, has been overturned by the *Pollock* decision. A zone has been substituted for a boundary line. The accredited national leaders of both political parties ask the people to cure this trouble; but shall we cure a vague and ambiguous clause by a vague and ambiguous amendment? Are we so pleased with our century of experience with the blind that we must try another century with the one-eyed leading the blind?"

"Shall the Income Tax Amendment Be Ratified?" By Norris Brown, United States Senator from Nebraska. *Editorial Review*, v. 2, p. 354 (Apr.).

"From every standpoint this nation should be clothed with every power necessary to protect itself and to maintain itself under all circumstances and under all possible dangers. To deny this proposition is to put our nation at a disadvantage with every other civilized nation of the globe."

"Third Degree." See Administration of Criminal Law.

Torts. The influence of Social and Economic Ideals on the Law of Malicious Torts." By Gordon Stoner. 8 *Michigan Law Review* 468 (Apr.).

"The courts of this country are coming to adopt the view that the answer to the question, May one, without incurring liability, exercise what has hitherto been regarded as a right in such a manner as to cause loss or damage to another? depends largely on the reasonableness of the purpose for which he exercises it. The most certain way of avoiding difficulty and conflict in cases of this sort is the adoption of the rule that where one is injured or damaged by the act of another he is entitled to be recompensed therefor, unless the said damage is caused by the exercise of an absolute right of the inflictor or unless the purpose sought to be accomplished by such act justifies it, *i. e.*, is reasonable. This rule or an approach to it has been adopted in some of the recent cases. Judge Sanborn in his dissenting opinion in *Passaic Print Works* v. *Walker Dry Goods Company*, says, 'The general rule is that, whenever one injures a man's business, profession, or occupation, he is liable for the damages he inflicts. The exception is that, where the injury is caused by competition in trade, or the lawful exercise of a right which the inflictor has, then the injury is justifiable, and no damages can be recovered. But where such an injury is inflicted, the presumption always is that the rule, and not the exception, applies, and, if the inflictor would justify, he must show that he falls within the exception.' In this statement Judge Sanborn approaches a statement of the rule suggested as a way out of the difficulty. It should not be confined to injuries to one's 'business, profession, or occupation,' but extended so as to embrace injuries to any right, including what Mr. Terry denominates 'the right of pecuniary condition.' An adoption of this rule, with the courts determining the reasonableness of the act causing the injury by comparing its effect on society with the effect of the injury thereby caused, would remove many of the difficulties in the law of malicious torts and would undoubtedly secure more just results in cases involving this law."

"On Negligence and Deceit in the Law of Torts." By Edward Jenks. 26 *Law Quarterly Review* 159 (Apr.).

"It is, then, historically the fact, that malice, fraud, and negligence, as ground of civil liability, became really important in the law of torts with the introduction of the Action on the Case; for, though there were original writs of deceit and conspiracy, they were, as is elsewhere explained, confined to very special classes of complaints, and there never were any original writs of malice or negligence. . . .

"In all probability, it was the general introduction of industrial machinery, and especially of mechanical transit, which, for the first time in the history of the English law of tort, produced the purely non-contractual and non-trespassory action founded on negligence. . . .

"Until the end of the eighteenth century, no one, apart from statute and the possible case of nuisance, could be held civilly liable for the mere omission to perform any positive duty; unless he had, expressly or by implication, undertaken to perform that duty. . . .

"With the appearance of changed industrial conditions in the early nineteenth century, the law of negligence began to expand; but, with all allowance for this recent expansion, the legal scope of non-contractual negligence is still far narrower than is commonly supposed—so narrow, in fact, as to be capable of very brief treatment in any summary of the law of torts. Incidentally, the narrowness of that scope is another testimony to the strongly individualistic character of the common law, and its unwillingness to trespass on the domain of morality."

See Public Service Corporations.

Uniformity of Laws. "Uniform State Laws." By Hon. Alton B. Parker. 19 *Yale Law Journal* 401 (Apr.).

This is the address which Judge Parker delivered upon being chosen President of the National Civic Federation, which met in Washington, D. C., on January 17. (See 22 *Green Bag* 202.)

"We do not aim to absolute uniformity of law throughout the states, but a wise and conservative uniformity. There is danger in pressing uniformity to extreme lengths. There are diversities of climate, of production, of tradition, of heredity, of population, of pursuits among the people of our several commonwealths which should be generally respected."

Referring to workmen's compensation in England and Germany, "Surely this country," he said, "ought not to lag behind those enlightened nations in righting what is now the most monstrous injustice of the age. Nevertheless that is likely to happen unless there be uniform legislation in many, if not all, the states on the subject. For in the absence of a general movement for uniform legislation, New Jersey, for instance, would hesitate to place her contractors at a disadvantage in competing with New York contractors."

War Claims. "Driftwood or Torrent—A Potent Party Factor." By Henry Edwin Tremain. *Editorial Review*, v. 2, p. 337 (Apr.).

"Power naturally gravitates towards power; and the Group that lives and flourishes on the pabulum of public appropriations for favored parties, strong enough at home to compel a representative to espouse its cause so that the body of such representative units shall silently combine in seeking the mastery of the United States Government in all its branches, with all the power which this implies, becomes *more than a personal factor in Democratic party politics* and *is a national element* that will bear watching and suppressing by its political adversaries. Tariff and income tax discussions are a foil, and are as driftwood on the torrent whose turbulent waters are supplied from unceasing reservoirs."

Waters. "Report of Committee Appointed to Collect Data Relating to Awards for Water and Water-Power Diversion." *Journal of the New England Water Works Association*, v. 24, p. 1 (Mar.).

A committee of five well-known consulting engineers submits an extended report here printed, which includes many pages of important tabular data showing, with much fullness of detail, the amount of damages obtained for the diversion of water in upwards of two hundred cases. A valuable bibliography of articles relating to damages paid for the diversion of water or water-power is also given. Among the conclusions reached in the report is the following:—

"Your committee has considered carefully, as instructed by the original vote passed by this Association, 'the practicability of joint action with the National Cotton Manufacturers Association, or other organizations of mill owners, relating to the formulation of standard rules of computing or assessing damages for the diversion of water,' and has conferred with officials of various associations, and regrets that it must now report the impracticability of such action. The questions involved are so much a matter of law, the outgrowth of centuries of experience, and the nature of the problems to be passed upon is so diverse, and the interests involved are so many and even so antagonistic as to make it absolutely hopeless to attempt to formulate, or even to outline, any standard rules as suggested."

At the invitation of this committee, a leading Massachusetts attorney prepared the following paper on the legal aspects of the subject:—

"The Underlying Principles Governing Riparian Water Rights and Diversion Suits." By Charles F. Choate, Jr. *Journal of the New England Water Works Association*, v. 24, p. 187 (Mar.).

A model of clear, simple exposition of a somewhat intricate subject. On the matter of expert testimony by hydraulic engineers he says:—

"The area of the watershed of course must be a thing that can be ascertained with a great degree of accuracy, and upon which two men cannot vary very much; second, the yield of the watershed is also something that can be ascertained with a very reasonable degree of accuracy. . . . It is in the step that follows next that professional men seem to differ most, and where the courts have varied and seemed to vacillate to the largest extent. There often occurs a situation where a power is taken which has never been developed but which it is obvious to everybody possesses advantages for development which are very great and valuable. It is exceedingly probable that nowhere in the vicinity have any similar powers been developed, and yet men who are engaged in that kind of business, men who have built and operated mills and carried on the mill business, and men who have been engaged in your profession, know that that undeveloped power has value, and great value, as a mill site. The suggestion was made to me, Is the value which exists in that undeveloped power at that particular place a subject which is within the province of an hydraulic engineer to give expert testimony upon, and, if it is within his province, will the courts permit it? . . .

"In answer to that suggestion, I should submit that the wiser plan for our courts to follow, and the wiser course for our engineers to advocate, is the admission in evidence of carefully worked out estimates of the value of a situation, consisting really insignificantly of land and very largely of water and of power, which their particular training gives them an opportunity to know the possibilities of the development of and the value of for practical use."

Wills. "The Vesting and Divesting of Rights Under a Will in Roman-Dutch Law." By A. J. McGregor. 26 *Law Quarterly Review* 126 (Apr.).

"On the authorities at present under review—and having regard more especially to the decision of the Privy Council in *Duffill's* case [1903] A. C. 491; 89 L. T. 92—one might be disposed to say that, as a matter of form and phraseology, the Roman-Dutch law has recognized, and still recognizes, the doctrine that a person can be divested (wholly or partially) of a right which had theretofore vested in him. But at what point or epoch can the divesting take place?"

Workmen's Compensation. See Uniformity of Laws.

Miscellaneous Articles of Interest to the Legal Profession

Aerial Navigation. "Over Sea by Air-Ship: Surprising Progress of German Plans for Transatlantic Service." By T. R. MacMechen and Carl Dienstbach. *Century*, v. 80, p. 113 (May).

"At forty miles an hour, air-ships can cross the Atlantic on the trade-wind in less than two days. Driven thirty-five miles on the twenty-seven-mile wind, they should make the trip in fifty hours. If blowing eighteen miles in summer, the faster craft should come over in fifty-two hours. Even on a ten-mile current, the slower air-ship should arrive on the western side in two and three-quarter days."

Alaska. "Shall Alaska Become a 'Morganheim' Barony?" By Benjamin B. Hampton. *Hampton's*, v. 24, p. 631 (May).

"The whole thing is simple, plain. Whoever controls its transportation controls Alaska. The Guggenheim-Morgan Syndicate, we have shown, *does* control the transportation. It controls the coal. It controls the copper."

Anarchism. "The Anarchists at Home, Washington." By J. W. Gaskine. *Independent*, v. 68, p. 914 (Apr. 28).

"The association had troubles after the assassination of President McKinley. A hue and cry was raised against them in Tacoma and it was proposed to go out and raid the colony. Charges were trumped up against the paper *Discontent*, as printing immoral articles in favor of free love, and a United States marshal was sent out to arrest the publishers and bring them to trial before a federal court. . . .

"The case came into court before Judge Handford, who luckily was a man of broad intelligence. He stopped the harrangues of the lawyers for the defense, who had been hired at a considerable cost. He said it was not necessary to talk so much. He had looked through the offending paper at his lunch and he took it out of his pocket and read the article to the jury. And then he requested the jury to sign a directed verdict of acquittal, which they did."

Anthropology. "The Skulls of Our Immigrants." By Burton J. Hendrick. *McClure's*, v. 35, p. 36 (May).

"An interesting sign of Americanization is brought out in the size of the families of both Italians and Jews. There is a popular impression that immigrants have larger families than the native-born; and this is true of the earlier settlers. Professor Boas finds, however, that, in the second generation, the size of families is about the same among the immigrants as it is among the native stock—two or three children to a family. Whatever bearing this fact may have upon individual morality and the future of the nation, Pro-

fessor Boas clearly shows that race suicide also spells race improvement. He finds the finest physical types, as a rule, in the smallest families."

Biography. Ames, James Barr. Editorial. 26 *Law Quarterly Review* 109 (Apr.).

"Only his written work is known to us here; it shows great power of minute and accurate research combined with the faculty —perhaps the most indispensable faculty for a teacher—of never letting the main purpose become obscure. In unsettled matters he was prepared to take a bold line on principle. He condemned *Doe d. Carter* v. *Barnard*, 78 R. R. 564, 13 Q B. 945, several years before it was disapproved by the Judicial Committee in *Perry* v. *Clissold* [1907] A. C. 73. His convincing historical exposition has left a deep impression on the legal thought of America, and will doubtless gain wider appreciation here now that it is made easily accessible. No one has thrown so much light on the growth of English legal conceptions in the later Middle Ages and the sixteenth century."

Canals. "English Waterways." *Edinburgh Review*, v. 211, no. 432, p. 273 (Apr.).

"It is now proposed to expend a large sum of public money in buying the canals and running them to compete with railways. . . . If we are to nationalize our whole transport system, let it be done in a thorough and comprehensive manner and not in the haphazard fashion in which we allowed railways to grow up and canals to be ruined. To take canals and leave railways would involve much bitter controversy."

Foreign Relations. "Mr. Knox's Scheme Bears the Germs of a World-Revolution." By Dr. E. J. Dillon. *Contemporary Review*, v. 97, p. 502 (Apr.).

"As the fox that lost his tail convinced his comrades that the tailless state was a higher stage of perfection, and persuaded them to imitate him, the Government of the United States is striving to extend the stretch of territory on our planet from which the rifles and heavy guns of the military Powers shall be ever excluded. The entire continent of America, the islands of Cuba and the Philippines are already taboo. Manchuria and China are marked to follow. . . .

"Whatever immediate objects may have been floating in the minds of Messrs. Taft and Knox when they agreed to put forward their gigantic scheme for neutralizing Manchuria, they have inaugurated a policy which seems destined to revolutionize the world."

Germany. "The Economic Position of Germany." By Edgar Crammond. *Quarterly Review*, v. 212, no. 423, p. 480 (Apr.).

"Germany is rapidly accomplishing the purpose set out in the preamble of her navy bill of 1900, and it has not weakeded her military position nor has it crippled her national finances. . . .

"The taxable resources of the United Kingdom are greater than those of Germany, and our taxes at similar rates are more productive. Germany has tapped, if she has not already practically exhausted, certain sources of taxation which this country has not yet ventured to touch. On the other hand, Germany has not yet pressed so far certain of the principal taxes on which we largely depend, namely, the death duties and the income tax. But we have to reckon with another factor, and that is the greater thirft and self-sacrifice of the German people."

Journalism. "The Case for the Newspapers." By William Peter Hamilton, editor of the *Wall Street Journal*. *Atlantic Monthly*, v. 105, p. 646 (May).

"So far as the cases of unfair practice instanced in a previous *Atlantic* article by Professor Ross (see *Green Bag* 242) are concerned, any newspaper man of experience could oblige him with further material of the same character. What that writer entirely fails to prove is his main contention, that the public does not get the news. No newspaper can afford to ignore news which contemporaries print, and any practical man knows how difficult it would be to organize an effective conspiracy of silence. The public is protected in the best possible way by the most rigorous competition."

Mexico. "Industrial Mexico." By Othernan Stevens. *Cosmopolitan*, v. 48, p. 731 (May).

"The man without money could not possibly be in a worse place than Mexico. The man with money could not possibly be in a better place. Here are the riches of the earth for exploitation, with every encouragement given to the man with money and energy. And not only encouragement but protection."

Political Corruption. "The Beast and the Jungle." By Judge Ben B. Lindsey. *Everybody's*, v. 72, p. 632 (May).

The concluding instalment of Judge Lindsey's sensational articles. Many of his charges of political corruption could no doubt be proved, but the articles leave an impression of reckless and irresponsible vilification of corporations and political leaders, and have too strong a Populistic flavor.

Railways. "Probing the Pullman Company." By Lynn Haines. *American Magazine*, v. 70, p. 114 (May).

The writer charges the Pullman company with monopoly, but does not adduce facts showing any improper suppression of competition; he also claims that there has been nearly five hundred per cent profit on the original investment, ignoring what seems obvious, that the real invested capital is much more than $100,000.

Scotland Yard. "The Lighter Side of My Official Life, VII." By Sir Robert Anderson, K.C.B. *Blackwood's*, v. 187, p. 508 (Apr.).

A highly entertaining series of reminiscences by the former head of Scotland Yard. Incidentally, some attention is paid to the careers of Powell and "Shrimps," the Channel boat thieves. Professional criminals of this class, says the writer, never turn over a new leaf:—

"During their spells of liberty they live in comfort, under the protection of the laws they systematically violate; and if and when they are convicted of crime, they receive a sentence of a few years' duration, and are then let loose upon society. How long will the public tolerate this scandalous and stupid system?"

Sugar Trust. "The Secret of the Sugar Trust's Power." By Judson C. Welliver. *Hampton's*, v. 24, p. 717 (May).

"For twenty-six years one cryptic little phrase has been regularly written and rewritten into tariff acts as the real protection of sugar monopoly. The little phrase is this: '*Not above No.* 16 *Dutch Standard in color.*' . . .

"'Dutch standard' is the sacred white ox of the industry. No lawmaker may dare the feeblest yelp to scare the precious bovine off the tariff statutes. It is for the Trust the essential part of the sugar schedule, for everybody else it is an insoluble riddle."

Taft's Administration. "American Affairs." By A. Maurice Low. *National Review*, v. 55, p. 286 (Apr.).

"President Taft has been in office a year, and perhaps he regrets that his devotion to the public service caused him to set aside his ambition and decline the place on the Supreme bench offered him by Mr. Roosevelt. On the bench his duties and his associates would have been congenial, his reputation as a jurist would have widened, he would have been freed from the anxieties, the annoyances and the criticisms that fret the soul of a sensitive man whose ideals are high and who is trying to do his duty according to the dictates of his conscience. There is perhaps no more heart-breaking place than the Presidency; there is perhaps no man less to be envied than the President. . . .

"There are grave dissensions in the party, there is an outcry against the high cost of living, there is that general discontent and restlessness to which reference has already been made. There is a feeling among Republicans that they are about to experience a reverse, and they look forward with apprehension to the election for the House next November. Republican newspapers tell the President that he must be held responsible."

Tariff. "A Battle Royal in Wool." "An Answer to 'Schedule K,'" by William Whitman; "A Defense," by Richard Washburn Child; "In Further Rebuttal of William Whitman," by Edward Moir. *Everybody's*, v. 22, p. 656a (May).

Mr. Whitman here meets and effectively disposes of critics who have sought to prove that the wool schedule of the tariff act is iniquitous. He says:—

"I do not hold Schedule K as perfect, but I do not believe that it gives the worsted manufacturer any important advantage over the carded woolen manufacturer, even supposing that the interests of the two classes could be differentiated. Modern improvements in combing machinery, of which my critics seem totally unaware, have made available to the worsted mills a wide range of wools that were once regarded as fit only for carded woolen purposes. This process is certain to continue, and any change in the form of the duty on raw wool would effect almost alike the worsted and the carded woolen manufacturer."

An Amusing Story

"AN amusing story is told of Mr. Sergeant Hill, who was not only the most eccentric, but also one of the most learned of the English lawyers of his time," says Francis S. Wellman in his "Day in Court." "He had the habit of becoming so absorbed in his profession that it rendered him perfectly insensible to all objects around him. He was engaged to an English heiress, and on the morning appointed for the wedding went down to his chambers as usual, but becoming immersed in business forgot entirely the engagement that he had for that morning. The bride waited for him so long that a messenger was dispatched to his chambers. He obeyed the summons, and having been married returned to his work. At about dinner time, his clerk, suspecting that the Sergeant had entirely forgotten the proceedings of the morning, ventured to recall them to his recollection, and sent him home to his dinner!"

Reviews of Books

WELLMAN'S "DAY IN COURT."

Day in Court; or, The Subtle Arts of Great Advocates. By Francis L. Wellman. Macmillan Company, New York. Pp. 257. ($2 *net.*)

THE law is the most interesting and humane of all studies, and the lawyer who fully rose to the opportunities of his calling would be the most humane and many-sided of men. Like the author's earlier book, "The Art of Cross-Examination," Mr. Wellman's "Day of Court" is a brilliant example of the humanizing influences of the law. The profession in America holds no more fascinating and well-read *raconteur* than he. He not only entertains, but informs, illuminating every subject with an extraordinary wealth of anecdote and illustration. The result is that laymen must gain quite as much pleasure and profit as lawyers from his pages. Truly, as he quotes Sir Henry Finch as saying, "Sparks of all sciences in the world are taken up in the ashes of the law." Would that there were more legal writers to make one feel the force of that aphorism.

The book will be found unusually readable, sensible and entertaining. Considered, however, from a utilitarian standpoint, it will enable young men, by a process of self-examination, to determine whether they possess the qualifications, physical, mental and educational, which are required for the making of a successful trial lawyer, for the opening chapters are devoted to this subject. It will enable them to weigh carefully the opportunities and rewards of the trial lawyer, in the light of the broad experience of one of the keenest-witted practitioners at the New York bar. It will also give the lay reader that insight into the actual work of the Courts and methods of the profession which cannot fail to have wholesome results. Furthermore, it will provide the trial lawyer with most helpful, sound advice as to the best way to prepare a case, to select the jury, to examine and cross-examine witnesses, and to sum up the evidence. The striking thing about the book is the skill with which these purposes are all carried out, and the breadth of its appeal.

Such a book cannot fail to benefit the administration of the law, by awaking interest in the importance of skilful specialization in the arts of advocacy. The author shows how there has been an approach to the English system of barristers and solicitors in New York. His observations on methods of English practice have been criticized as in some respects incorrect, but what he says about meritorious features of the English system will antagonize no one. He tells how, in New York, twenty-five or more advocates assign junior partners to most of the work of preparation for the trial. There can scarcely be any more effective way to improve the administration of justice in this country than by inculcating a high standard of advocacy which few can hope to attain, and thus helping to advance that subdivision of labor in the legal profession which is essential to the highest interests of both the lawyer and the community.

ECONOMIC HISTORY ILLUSTRATED

Selections from the Economic History of the United States, 1765–1860; with Introductory Essays. By Guy Stevens Callender, Professor of Political Economy in the Sheffield Scientific School, Yale University. Ginn & Co., Boston, New York, Chicago and London. Pp. xviii, 819. ($2.75.)

THIS is a compilation of readings designed to accompany and illustrate a text-book or course of lectures on economic history. The compiler is of the opinion that knowledge of political and social history affords a valuable foundation for comprehension of economic facts. The scope of the collection is therefore broad, so broad that it will be prized not only by students of economics but by those interested in that political and social evolution which accompanies if it does not underly economic evolution. Material is brought together which will suggest an answer to Professor Callender's own question, "Why has the Anglo-Saxon developed a different character in the United States than in other new countries, like Canada and Australia?" The work does not purport to be a source book of economic history. But it comes near to realizing that end.

The selections are taken from the writings of travelers and contemporary observers of historians, and of standard authorities. What is sought is to give the impression of writers who were on the spot, rather than the point

of view of the modern historian, but interpretations by living writers of past events have not been excluded. The book is, however, to be considered as treating of economic history rather than of the economic conditions of the present day. The editor has himself furnished little of the text. His short introductions to the chapters, however, are distinctly worth while.

The chapter titles are as follows: (1) " The United States in the Economic History of the World"; (2) "Colonial Economy"; (3) "Colonial Policy"; (4) "Economic Aspects of the Revolution"; (5) "Economic Situation and the New Government"; (6) "Foreign Influences"; (7) "Rise of Internal Commerce"; (8) "Transportation"; (9) "Rise of Manufactures"; (10) "Representative Views of the Protective Tariff"; (11) "Currency"; (12) "Settlement of the West"; (13) "The Public Land Policy"; (14) "The Organization of Labor and Capital"; (15) "The Economics of Slavery."

CONANT'S MODERN BANKS OF ISSUE

A History of Modern Banks of Issue; with an Account of the Economic Crises of the Nineteenth Century and the crisis of 1907. By Charles A. Conant. 4th ed. G. P. Putnam's Sons, New York and London. Pp. 721+bibliography and index 30. ($3.50.)

THIS treatise, the first edition of which appeared in 1896, is the best and almost the only work in English which treats fully of the history of modern banking in all parts of the world. The book is a compact volume which contains an enormous amount of well-sifted information invaluable to students of banking and currency problems.

In this new edition, Mr. Conant did well to omit three chapters on banking theory, owing to the fact that he had presented his views more fully in his two volumes on "The Principles of Money and Banking," published in 1905. He thus saved fifty pages, adding in place of them one hundred and fifty pages of new matter. There is a new chapter on banking in Japan, one on exchange in the Orient, one on the events of 1907–8, and a helpful though incidental passage about the Vreeland–Aldrich Emergency Currency bill. Since the appearance of the original edition, the gold standard has been successively adopted in the United States, Russia, Austria-Hungary, Japan and Mexico. In all respects the work has been brought down to date, and several phases of banking development have received more special attention, such as the growth of the discount policy, the division of profits between the bank and the state, and revision of charters so as to deprive shareholders of a portion of the privileges and profits which they previously enjoyed.

HOLDSWORTH'S ENGLISH LAW

A History of English Law. By W. S. Holdsworth, M.A., D.C.L., Fellow and Lecturer in Law in St. John's College, Oxford. Little, Brown & Co., Boston. V. 1, xl, 421, appendix and index 38; v. 2, xxvii, 507, appendix and index 64; v. 3, pp. xxxiv, 495, appendix and index 34. ($4 per volume.)

THESE well printed volumes deal with the history of English law up to the reign of Henry VII (1485). The author discovered on the completion of the first volume that more than two would be necessary to cover the field. The work is not yet complete. A fourth will be necessary to bring the treatise down to the present time, and in that we may reasonably look for an account of the expansion of the common law brought down to the twentieth century.

Dr. Holdsworth has not devoted much of his labor to the investigation of original sources, but his work is distinctly valuable as a summing up and impartial review of the widely scattered contributions of other scholars. Pollock and Maitland's history forms the basis of the work, and he freely acknowledges his indebtedness to it. As a history of English law up to Edward I, the period with which Pollock and Maitland's work closes, it is apparent that his history offers scant improvement on their invaluable researches. Apart from this objection, which may or may not be serious, it does assemble in a single work materials never before brought together, and will be prized for its comprehensive and luminous account of the growth of institutions which will always excite the profound interest of all Anglo-Saxon peoples. The style, though it misses something of dramatic vividness, is suited to the comprehension of the lay reader, but the work will primarily serve the needs of the profound student.

The first volume is devoted to the history of the courts and of the jurisdiction exercised by them at various periods. The second volume covers "Anglo-Saxon Antiquities, and the Mediæval Common Law," the latter topic being also treated in the third volume, and being subdivided into two parts, (1) "Sources

and General Development," and (2) "The Rules of Law."

The work can be considerably improved in a subsequent edition. Some condensation could perhaps be effected by transferring the treatment of judicial organization during each period to the history of that period. The results of some modern German researches might advantageously be embodied in the text. Furthermore, certain errors evidently due to haste can be corrected. For example, these errors have been pointed out: "Shard" for Shaedelowe, "Candish" for Cavendish, "Trewitt" or "Trewith" for Trewithosa, and "Hervey J." for Harvey le Stanton. But the scholarly accuracy of the work in general is commended.

If the worthiest aim of the historical scholar is to unlock the mysteries of the past with the key of scientific analysis, this work may not be quite up to the standard set by the late Professor Maitland and the late Dean Ames, not to mention several contemporary American scholars. But it is learned, thorough, and judicious, and will doubtless remain for many years the best treatment, in a single work, of the history of English legal institutions. As a book of reference it must prove useful, the material being rendered accessible by full tables of contents and indices.

DRAWING OF WILLS

Drawing Wills and Settlement of Estates in Pennsylvania. By John Marshall Gest, of the Philadelphia bar. T. and J. W. Johnson Company, Philadelphia. Pp. xx, 152, with index and tables of cases and statutes. ($2.)

WHETHER or not the legal profession "is an occupation which dries the blood," as our author suggests, certain it is that the reader of this work—unless lost to all sense of the humorous—will often be compelled to dry his eyes. Every chapter evidences that in the author's veins there surges the rich red blood which intensifies the joy of living—and his spirit is infectious. Now and again, sparkling wit enlivens the dry pages of our law reports; but rare indeed is it to find a valuable treatise on any part of the law bedecked with gems of trenchant humor. Yet Gest has succeeded in enriching even so melancholy a theme as the drawing of wills and settlement of estates with brilliant witticisms and humor.

The author, the sole candidate of the Law Association of Philadelphia for an approaching vacancy upon the local bench, has brought to bear upon his subject the experience of a large and active practice in the Surrogate's Courts of Pennsylvania, there known as the Orphans' Courts, coupled with a command of literature possessed by few not occupying a chair of *belles lettres* or having the benefits of a year's sojourn in the heart of Africa with the "Pig-skin Library." The results of the author's research are published with but little change from the form in which they were delivered as lectures to the students of the law department of the University of Pennsylvania. While embellished with extensive citations of authority, there is scarcely a page which is not illumined by some quotation or citation of apt but quaint out-of-the-way information and lore.

The book is divided into two parts: the first fifty pages discuss from an intensely practical standpoint the difficult problem of drawing wills, and the remainder of the work relates to the settlement of the estates of the dead. It is replete with suggestion and authority, which, while of particular value to the Pennsylvania lawyer, sets forth those immutable principles which are the basis of our common Anglo-Saxon Jurisprudence. It does not attempt to be a complete scientific text-book or monograph upon the subject of which it treats, but is a series of readable and entertaining lectures which few lawyers, having commenced, will lay down until the last page is turned. The book will prove stimulating to any lawyer, filled as it is with suggestive points of practice, and no member of the profession in active practice will read it without marking many parts for future reference.

The lighter side of the author's style will be apparent from the following quotation *in re* the revered Bentham:—

> It was on a Wednesday, the seventh day of November, in the year of our Lord one thousand nine hundred and six, and at three o'clock in the afternoon, Greenwich time (I like to be exact in matters of absolutely no importance) that I saw Jeremy Bentham in London. It is generally supposed he was dead and buried years ago, but that is a mistake. He died to be sure; that was not merely his right, but even his duty, but he left his body to be dissected, which it seems was accounted his privilege, and this having been done, the undissectible parts of his mortal frame, clothed in his philosopher's garb, were given a snug and quiet resting place in a wooden cupboard in the Anatomical Museum of University College. There he still sits, and sits still, dressed in a black coat, white shirt and stockings, drab waistcoat and small clothes. His mummied head is on the floor between his beslippered feet, and the wax

counterfeit of his face, decorated with a broad brimmed and high crowned felt hat, wears a life-like and benignant expression with the inscrutable and complacent semi-smile of a modern Buddha. And as I gazed, my strained ears could almost hear the echo of the mystic words Chrestomathia, Confrontation, Prophylactic, Panopticon.

And throughout this readable little book, as here, the reader will gather bits of quaint and entertaining information. On the shelves of public libraries it should prove popular with laymen and would do much to impress upon those ignorant of law, the dangers which beset them in attempting to draw their own wills.

MASTERS AND AUDITORS IN MASSACHUSETTS PRACTICE

Notes on Massachusetts Practice with Reference to Proceedings before Masters and Auditors and their Reports. By Frank Paul, of the Suffolk County Bar. Little, Brown & Co., Boston. Pp. xxvi, 183 + index 48. ($3 *net.*)

THE growing importance of the practice before masters and auditors is readily apparent by a mere glance at the citation of authorities in Massachusetts on this subject. It is safe to say that seventy-five per cent of the law concerning masters, auditors and their reports is in the cases decided since 1899. The value of a reliable text-book dealing with this practice is obvious. Mr. Paul has produced a good book. Clear, succinct, and direct, he presents the law in a form that is easily accessible. The discussion is intelligent, and when the law is not perfectly clear or well settled the author is at some pains to present his own views.

The work is more than a mere digest or index of decisions. Rules of court, decisions, and the unwritten practice are carefully and skilfully brought together for the first time so as to be readily available. The arrangement of the book is excellent, while a full and practical index puts its complete contents at the service of its readers.

The only fault of the book is a tendency to repeat the same principle under different headings, but even this has its advantages for a busy practitioner who consults the work hurriedly to lay his hands on a point of immediate importance to him.

So good a book should be kept up to date by including the new decisions of the court as they appear. Since its publication, in the last Massachusetts Report (204) already two decisions of some value have settled some points of practice which were still doubtful—*Fisher* v. *Doe* and *Jaquith* v. *Morrill*. It is to be hoped that when a new edition of the work is contemplated its scope may be enlarged to include such kindred subjects as the Practice before Commissioners to Prove Exceptions, Assessors, Arbitrators, etc., which in Massachusetts are as yet not treated by any text-book.

ARCHER ON LAW OFFICE AND COURT PROCEDURE

Law Office and Court Procedure. By Gleason L. Archer, LL.B., Dean of the Suffolk School of Law. Little, Brown & Company, Boston Pp. xxxv 291 + appendix 20 and index 16. ($3 *net.*)

LAW schools have so largely supplanted office apprenticeship as a means of preparation for entrance to legal practice, that the young lawyer starting upon his profession is handicapped by a lack of technical knowledge regarding the proper conduct of a lawsuit. For such young men this volume is primarily designed. It is also intended to be of assistance to older lawyers whose practice has been mainly advisory. To all such the book presents a clear, easily read narrative of the usual events in the conduct of a case, and a collection of numerous illustrations of the way in which the client should be advised, what court should be chosen, what process should be selected, how the writ and declaration should be drawn, and how witnesses should be examined. A good tone is maintained throughout, and the style of the book is simple and free from any attempt at a display of learning. Moreover, the treatment is intensely interesting; the book is almost as absorbing as a novel. It will prove highly useful notwithstanding its rudimentary character.

The author, a law teacher of experience evidently well versed in practice, has sought to show how a lawsuit is handled in a typical common law jurisdiction. He has Massachusetts chiefly in mind, though an effort is made to make the volume more than merely local in scope. There are some references to code provisions in other states. The volume will be most useful as an elementary handbook of Massachusetts practice. Judiciously used, it will prove helpful in other jurisdictions, though hardly in the same degree.

The many illustrative examples of direct and cross-examination will be found highly suggestive by the lawyer ambitious to master these difficult arts of the advocate.

AMERICAN ELECTRICAL CASES

American Electrical Cases; being a collection of all the important cases (excepting patent cases) decided in the state and federal courts of the United States from 1873, on subjects relating to the telegraph, the telephone, electric light and power, electrical railway, and all other practical uses of electricity; with annotations. Edited by Austin B. Griffin, of the Albany bar V. ix (1904–1908). Matthew Bender & Company, Albany. Pp. viii, 1140 + index 47. ($6.)

THE ninth volume of American Electrical Cases contains the reports of two or three hundred cases decided since 1904 in both state and federal courts. By far the greater proportion deal with the law of negligence and have grown out of suits brought for injuries to employees or other persons. Other subjects represented in the collection embrace contracts, eminent domain, municipal ordinances, restraint of trade, taxation, evidence, pleadings, etc. The footnotes digest important doctrines in easily read type, and usefully supplement the headnotes in extracting the meat of the decisions. Much matter of great importance is embraced in the annotations. Cross-references to cases and notes in other volumes of the series are introduced. There is a serviceable index which is really a collection of the leading rules laid down in the cases.

EWELL'S MEDICAL JURISPRUDENCE.

A Manual of Medical Jurisprudence, for the Use of Students at Law and of Medicine. By Marshall D. Ewell, M.D., LL.D. 2d ed. Little, Brown & Co., Boston. Pp. 407 (index). ($2.50 *net.*)

THIS is the second edition of a work by the lecturer on medical jurisprudence in the university of Michigan and former president and dean of the Kent College of Law, Chicago. Dr. Ewell states in a preface that the changes in the text have been relatively few, those having been made which were deemed "necessary to conform to the present state of the science." The book remains, in fact, an old treatise corrected rather than fully brought down to date. The chapter on insanity, from a medical point of view, has not been brought up to the times. The latest editions of works named in the bibliography are not mentioned. From the lawyer's point of view, moreover, there are several subjects, such as legal responsibility for crime, and the punishment of the criminal insane, which might have received more attention.

The book retains its usefulness, however, as a short, inexpensive treatise well suited as a basis for the instruction of students of medicine and law in a subject on which few works exist which are not executed on a larger and costlier scale. The author is a well-equipped specialist. The usual topics are briefly treated: evidence, experts, compensation, signs, modes and causes of death, personal identity, abortion, infanticide, rape, legitimacy, life insurance, feigned diseases, malpractice, toxicology, insanity, etc.

BOOKS RECEIVED

RECEIPT of the following books, which will be reviewed later, is acknowledged:—

The Old Order Changeth: A View of American Democracy. By William Allen White. Macmillan Company, New York. Pp. 254 + appendix 12. ($1.25 *net.*)

Marriage and Divorce, 1867–1906: Special Reports of the Department of Commerce and Labor, Bureau of the Census, S.N.D. North, Director. Part I—Summary, Laws, Foreign Statistics. Pp. xii, 520 + index 15. Part II—General Tables. Pp. vii, 825 + explanatory notes and index 15.

Modern Jury Trials and Advocates: Containing Condensed Cases, with Sketches and Speeches of American Advocates; The Art of Winning Cases and Manner of Counsel Described, with Notes and Rules of Practice. By Judge Joseph W. Donovan. Fourth revised edition, enlarged. Banks Law Publishing Co., New York. Pp. xxi, 719. ($4.50.)

Municipal Franchises; A Description of the Terms and Conditions upon which Private Corporations enjoy Special Privileges in the Streets of American Cities. By Delos F. Wilcox, Ph.D., Chief of the Bureau of Franchises of the Public Service Commission for the First District of New York. (In two volumes.) V. I, Introductory, Pipe and Wire Franchises. Gervaise Press, Rochester; Engineering News Book Department, New York, sales agents. Pp. xix, 662 + bibliography and index 48. ($5.)

NOTES

James L. Tryon, secretary of the American Peace Society, of Boston, has issued a second edition of his leaflet describing "The Interparliamentary Union and its Work," which will be found interesting by those who are following the various phases of the movement for international arbitration.

The "Notable Scottish Trial Series" (William Hodge & Co., London), issued in nine volumes, contains the record of interesting *causes celebres*. Special interest attaches to "The Douglas Cause," "The Trial of Deacon Brodie," "The Appin Murder" and "The Trial of Captain Porteous."

The brief proposed by William L. McDonald of 49 Wall street, New York City, attorney for the appellant in the case of *Cosmides* v. *People*, on trial in the New York Court of Appeals, is a noteworthy document. The case is a somewhat remarkable one of mistaken identity, and a learned and vigorous argument on the important constitutional questions involved is submitted to the court.

Latest Important Cases

Admiralty. *Federal Jurisdiction of Crimes—Territory of Hawaii Not Within Clause Protecting the Jurisdiction of Territories of the American Union.* U. S.

Where a murder had been committed on board an American vessel lying in the harbor of Honolulu, and a statute of the United States (§ 5339, Rev. Stat., U. S. Comp. Stat. 1901, p. 3627) gave the federal courts jurisdiction over offenses committed in a haven or bay "out of the jurisdiction of any particular state," it was held by the United States Supreme Court, in *Wynne* v. *U. S.*, decided April 4, that while "state" had been construed as including territories of the American Union (*Talbott* v. *Silver Bow County*, 139 U. S. 438, 35 L. ed. 210, 11 Sup. Ct. Rep. 594) it did not include territories outside the United States, and consequently the federal courts had jurisdiction of offenses committed in the harbor of a port of Hawaii. Mr. Justice Lurton wrote the opinion.

Contracts. *Construction of Proviso in Building Contract Allowing Termination for Unreasonable Delay—A Strike of Labor Unions to Cause Such Delay and Injure the Contractor an Unlawful Combination.* Mass.

An injunction was granted by the Supreme Judicial Court of Massachusetts May 13, in the proceedings growing out of the bill in equity brought by *L. P. Soule & Son Co.* against the *Fargo Real Estate Trust*, certain labor unions, and an architect. The complainant held a contract for the erection of a wool warehouse in Boston, and because he employed non-union labor, certain of the defendants refused to work, in consequence of which the owners of the building, the chief defendants, gave notice of their intention to terminate the contract by securing a certificate from the architect showing unreasonable delay, by means of a proviso which it contained.

The Court (Rugg, J.) said in part: "The plaintiff had in all material respects conformed to the terms of its contract and was prosecuting the work with reasonable diligence, and the grounds stated in the certificate signed by the architect and owners were pretexts and not the real motive actuating him. The owners have no preference between union and non-union labor, but they are extremely anxious to have the building completed at an early date."

The Court found that the calling of the strike of the defendant labor unions was unjustifiable and constituted an unlawful combination to injure the complainant; that the certificate of the architect was not warranted by the facts, and that being given solely by reason of the strike was not given in good faith, and afforded no justification for notice of owners to terminate the employment of the complainant; that the certificate of the architect, because of the illegal combination, is void.

See Public Policy.

Conspiracy. See Contracts.

Eminent Domain. *Measure of Damages—Right of Owner of an Estate to Pool His Interests with Those of Owner of an Easement and Recover for Full Value of the Estate as if Unencumbered, Denied—Fourteenth Amendment.* U. S.

Where the owner of land in fee granted an easement of way, light and air to a corporation, and mortgaged the land to a savings bank subject to an easement, and the city afterward took by eminent domain the land for a public street, it was held by the United States Supreme Court, in *Boston Chamber of Commerce* v. *Boston*, decided April 4, that the jury had the right to consider the improbability of the easement being released, and to consider the actual damage to the market value of the servient estate, and consequently the three parties owning the interests in the land were not entitled to pool their interests and recover damages assessed as if the land was the sole property of one donor, nor were they denied the protection of the Fourteenth Amendment because the city had caused the land to be valued as an encumbered property instead of an unencumbered property, and had inquired What has the owner lost, not What has the taker gained. The opinion of the Court was delivered by Mr. Justice Holmes.

Full Faith and Credit Clause. See Marriage and Divorce.

Interstate Commerce. *Business of Correspondence Schools Interstate Commerce.* U. S.

The United States Supreme Court held the business of correspondence schools, involving the solicitation of students in other states by local agents, who are also to collect tuition fees, the systematic intercourse between the corporation and its scholars and agents, and the transportation of books and papers, to be interstate commerce within the meaning of the Constitution, in *International Text-Book Co.* v. *Pigg*, decided April 4. The Court (Harlan, J.) said:—

"Referring to the constitutional power of Congress to regulate commerce among the States and with foreign countries, this court said in the *Pensacola* case just cited (96 U. S. 1) that 'it is not only the right but the duty of Congress to see to it that *intercourse* among the states and *the transmission of intelligence* are not obstructed or unnecessarily incumbered by state legislation.' This principle has never been modified by any subsequent decision of this court."

Labor Laws. See Police Power.

Labor Unions. See Contracts.

Marriage and Divorce. *Full Faith and Credit Clause—Decree of Divorce Obtained in State of Matrimonial Domicile a Bar to Action for Maintenance Brought Outside the State.* D. C.

Where the appellant had secured a decree of divorce from his wife in the state of Virginia on the ground of desertion, Virginia being the matrimonial domicile of both parties, and the divorced wife, taking up her residence in the District of Columbia, filed a bill against the husband for maintenance in the Supreme Court of the District of Columbia, the Court of Appeals of the District of Columbia held, in *Thompson* v. *Thompson*, decided April 5 (Washington Law Reporter, May 6), that a decree of divorce legally obtained is entitled to the protection of the full faith and credit clause, and is a bar to actions for maintenance brought outside the state.

The Court (Van Orsdel, J.) examined the cases of *Atherton* v. *Atherton*, 181 U. S. 155, and *Haddock* v. *Haddock*, 201 U. S. 562, and declared that the facts of the case at bar brought it within the rule of the former of those two decisions rather than the latter, the facts of the *Haddock* case being "the exact antithesis" of those in the case at bar. The Court said:—

"The question of whose conduct it was that led to the abandonment of the husband and the matrimonial domicile by the wife becomes immaterial, since in the *Atherton* case, as we have observed, the Court refused to permit that question to be inquired into in New York for the purpose of impeaching the Kentucky decree. The Kentucky decree having been secured in the state of the matrimonial domicile at the time of the separation upon the ground of desertion by the wife, it foreclosed all inquiry in New York as to the offending party. So here, the Virginia decree having been awarded upón evidence to the satisfaction of the courts of the state that the wife wrongfully deserted the husband, full faith and credit would not be accorded by permitting an inquiry into the same question in this District for the purpose of impeaching the foreign decree. We must treat this question as foreclosed by the Virginia decree."

Negroes. *An Octoroon not a Negro—Louisiana Concubinage Law Construed.* La.

The Supreme Court of Louisiana rendered a decision in April construing the meaning of the word "negro," in the concubinage laws of the state directed toward the separation of the races. The Court sustained the decision of Judge Chrétien in *Matter of Josephine Lightell*, in denying that the Act 87, 1908, could be extended to include an octoroon or any other person having one-half or more of Caucasian blood. The Court (Provosty, J.) said in effect that if the legislature intended that an octoroon was a negro it should have said so, and that in the absence of such a definition in the statute, a person seven-eights white is not affected by its provisions.

There was a dissenting opinion, however, holding the word "Negro" to prove the same significance as "colored," as a term applicable to all persons of African descent, mixed or unmixed.

Penal Law. *Eighth Amendment—Philippine Bill of Rights—Cruel and Unusual Punishments.* U. S.

In the case of *Paul Weems*, decided May 2, the United States Supreme Court construed the Eighth Amendment to the Constitution, providing that "cruel and unusual punishments" shall not be inflicted. The appellant, an official in the lighthouse service in the Philippines, had been sentenced to a long

term of imprisonment, and the bill of rights of the islands contains a provision similar to the Eighth Amendment. The Court declared that it must give the same interpretation to the bill of rights as to the Eighth Amendment and construed the latter as prohibiting not merely methods of torture long since discarded, but all punishment palpably disproportionate to the offense. The opinion of the court was announced by Mr. Justice McKenna.

Perpetuities. *Statute Authorizing Religious Corporations to Provide for Perpetual Care of Cemetery Lots—Implied Legislative Intent to Abrogate Rule Against Perpetuities.* N. Y.

In *Driscoll* v. *Hawlett*, decided April 26, the New York Court of Appeals (see N. Y. Law Jour., May 4), held that the effect of the provision of the Religious Corporation Law of 1895 of New York State, authorizing such corporations to hold property devised to them in trust and apply the income thereof for the care of cemetery lots, was to abrogate, to that extent, the rule against perpetuities. A testamentary bequest, therefore, to a religious corporation for such a purpose, which became operative while that law was in force, was decided to be valid and not to be affected by the statute against perpetuities.

Police Power. *Ten-Hour Law for Women Constitutional.* Ill.

The Supreme Court of Illinois, following the example of the Supreme Court of Oregon and the Supreme Court of the United States in upholding the Oregon ten-hour labor law for women, has sustained the constitutionality of a similar statute of the state of Illinois (1909 Hurd, p. 1109). In the case of *Ritchie et al.* v. *Wayman et al.*, decided April 21, the Court (Hand, J.) reversed its own ruling of fifteen years ago in a case brought by the same party then, and declared:—

"That while a man can work for more than ten hours a day without injury to himself, a woman, especially when the burdens of womanhood are placed upon her, cannot. . . .

"And as weakly and sickly women cannot be the mothers of vigorous children, it is of the greatest importance to the public that the state take such measures as may be necessary to protect its women from the consequences produced by long-continued manual labor in those occupations which tend to break them down physically." (See *Chicago Legal News*, April 30.)

Statute Fixing Milk Standard Constitutional—Ignorance of Non-Compliance with Law no Excuse. Mass.

The milk standard of Massachusetts was upheld by the Supreme Judicial Court of that state in the case of *Commonwealth* v. *Wheeler et al.*, decided March 22. The defendants had in their possession to sell, milk containing only 11.65 per cent of solids, the statute requiring 12 per cent. They wanted to show in evidence that they did not know and had no reason to know that the milk contained less than the statutory requirement of solids, that the milk was nutritious, unadulterated, and not injurious to health. This was held immaterial.

The court decided that it is within the power of the legislature to fix a standard as the best way of preventing adulteration.

Public Health. See Police Power.

Public Policy. *Contract to Provide Aged Woman with Medical Attendance During Her Lifetime not Unlawful.* Ill.

The appellant in an action brought in the Supreme Court of Illinois had contracted with an aged woman patient to furnish her with such medical attendance as should be required during her lifetime for $100,000, payable in ten annual instalments after her death. The Probate Court refusing to allow the claim, and an appeal being taken to the Supreme Court, the latter, in *Zeigler* v. *Illinois Trust & Savings Bank, Exr.* (opinion filed April 21, see *Chicago Legal News*, May 7) held such a contract not against public policy, and said:—

"It cannot be seriously contended but that, in order to comply with the terms of this contract and be entitled to receive the benefits of it, the appellant was bound to give Mrs. McVicker the best treatment within his power and skill and to prolong her life as long as possible. Should he fail to do this, either through neglect, by wilfully treating her in an improper manner or by directly causing her death, appellant would be unable to recover upon the contract. There can be no doubt that a contract to commit murder or any other crime, or a contract to give a reward to one for the commission of a crime, is void, as against public policy. This contract does not contemplate the commission of a crime or the doing of anything which is unlawful or contrary to good public morals."

Restraint of Trade. See Contracts.

The Editor's Bag

THE SALARIES OF JUDGES

IT is safe to say that the preponderance of sentiment, in the legal profession, is in favor of more adequate salaries to the judiciary than are now paid. The Moon bill, now before Congress, really is not much more than an expression of the respect of the bar for the bench, and of the desire of the bar that the state shall offer fitting recognition of the dignity of the bench. The layman, because he is not familiar with the traditions of courts of law, and because he is not in a position to comprehend the lofty ideals of the common law, can acquire no such veneration for the bench, in the ordinary course of things, as the lawyer, whose education and experience have taught him the full significance of the powers and responsibilities of the judiciary. It is doubtless for this reason that lawyers are more active than any other class of men in upholding the tradition of a lofty, disinterested administration of justice, that they do more than any other class for the selection of worthy candidates for judicial office, and that they are foremost in advocating the proper compensation of judicial officers. Any agitation such as that of which the Moon bill is the outcome serves two purposes—it not alone improves the position of the judiciary if successful, but it also reacts favorably upon the community, teaching it to feel deeper respect for that judicial establishment which is the chief support of a well governed state.

The theory upon which the government of the United States seems to have proceeded seems to have been that as able men will be found who are glad to accept judicial office for the honor, the country can obtain good judges without paying them the full value of their services. Such a theory, however, contains its own refutation. This country does not want a judiciary of visionary altruists willing to sacrifice the welfare of their families and descendants to the gratification of their own aspirations, but a judiciary of thoroughly prudent, practical men who are keenly alive to those duties of well-directed endeavor and intelligent foresight which devolve upon every man of ability in an intensely competitive age. Something is wrong, when only fairly successful practice at the bar commands an income twice or even four times as great as that of the judges of our highest courts. While that policy lasts, the country is surely on the road to strengthening its bar at the expense of its judiciary, and is in danger of the evils of a top-heavy system of administering justice, in which the astuteness of counsel constantly triumphs over the sagacity of judges. Already, in fact, it is generally commented upon that the bench is a much less powerful factor in bringing about the swift and certain administration of justice in this country than in England.

Many pathetic instances have occurred in the Supreme Court of the United States, where judges have died leaving their families practically penniless or even insolvent. A judgeship, in a large proportion of cases, in both federal and state courts, is virtually a life tenure; it is offered with the expectation that the recipient will not find it necessary to retire to some more lucrative pursuit after a short period. Under such conditions, the government owes it to the life incumbent so to provide for his temporal wants that his family will not be left in poverty. Salaries that impoverish work harm not only to the judges individually, but imperil the state itself by diminishing popular respect for an efficient administration of the law.

THE UNHOLY FETICH OF "POLITICAL CRIME"

ASSASSINATIONS not long ago reported from India, Russia and Corea emphasize the need of such restriction of immigration as shall keep from our shores the scum of Europe. A remarkable ruling of the Treasury Department admits of the entrance into this country, at all American ports, of self-confessed murderers from the anarchist groups, on the ground that such murders are merely "political offenses."

Surely we need a more satisfactory definition of "political offenses." Are the most despicable and deliberately treacheous crimes of which men are capable to be condoned merely on the ground that they spring from political passion? While political passion can account for many departures from the strict letter of an upright ethical code, and can excuse many irregularities of speech and action, it cannot justify flagrant defiance of the most rudimentary commands of morality and social order. An *attentat* is not justifiable homicide merely because the assassin belongs to a revolutionary party. The laws and institutions of this country do not grant immunity to those in our own midst who perpetrate political assassination. Political crimes are merely one particular form of crime, and are not the less heinous because they are due to an inflamed condition of opinion on the part of certain irreconcilable groups.

The definition of political crime needs to be narrowed, so as to include only those crimes which are in truth of a class by themselves and have characteristics distinguishing them from ordinary crimes. Any other justification for such crimes but a real upheaval of society and the turmoil and violence induced by an actual state of internal rebellion is repugnant to the spirit of American institutions. Until our immigration laws are so modified that we can exclude undesirables, and until our extradition policy is so modified that we can return to Europe those found, after their residence in this country, to be fugitives from justice from foreign countries, we are actively promoting the growth of a cancer in the body-politic of the American people. We are not encouraging but endangering the cause of liberty by sentimentalizing about political grievances which can never incite downtrodden innocence to acts of dastardly and cold-blooded brutality.

TWO MISSOURI STORIES

MR. EDGAR WHITE, of Macon, Mo., furnishes us with the two following stories:—

A FAIR LAWYER

Witnesses who have been dragged many miles over the country to testify before justices and notaries will appreciate the vigorous kick registered by Farmer Hiram Watterson

of Marion county before Notary D. R. Hughes, recently. Depositions were being taken in a land case and attorneys were here from Kirksville, Palmyra and Canton. Samuel Ellison and Joseph Reiger of Kirksville represented the plaintiffs.

When the witnesses were lined up before the notary to take the oath Mr. Watterson refused to hold up his hand.

"Raise your hand and be sworn with the rest, Mr. Watterson," said Ellison, pleasantly.

"I come a long ways," replied Mr. Watterson, "leaving the farm and everything, and I don't do any testifying till I get my money! I live in another county."

"Your money's good," returned the attorney. "The plaintiffs have a bond and you'll be paid well for your trip and your day in court. Raise your hand, please."

"I want my money right now," said the farmer, determinedly. "You can't yank me over the country and make me give evidence without you pay me for my time."

"Mr. Stenographer," said Ellison, with astonishing good humor, "please make a note on the record there that Mr. Watterson has come a long ways and he formally demands his mileage right now because of that fact. Now, that fixes it all right, Mr. Watterson. Hold up your right hand."

"I want my money right there," said the witness holding out his hand. "You can send me to jail if you like, but I won't testify till I'm paid my fees."

"I take it you're a law-abiding citizen and a fair man, Mr. Watterson, and that you want to do what is right?" said the lawyer, adopting a new tack.

"Of course. I try to deal fair with everybody."

"I knew it," said Ellison. "The minute I laid eyes on you I knew there was a man we could trust—a straightforward, honest citizen who always did right by his fellowmen."

"You're right there, mister," returned the farmer, evidently pleased.

"I felt sure of it. And being that sort of a man you are always open to reason. Now, I take it further, that you believe in the good old Democratic principle of the greatest good to the greatest number—in other words, that majority rules?"

"I—I guess so."

"Quite right. That being true, I'm going to ask all those present who think Mr. Watterson ought to testify in this case to hold up their hands."

"The two attorneys for plaintiffs held up their hands.

"Two in favor of his testifying," said Ellison. "Now those who don't want to hear Mr. Watterson testify will please make it known by the same sign."

No hands were raised in approval of this curious proposition.

"The motion seems to have carried, Mr. Watterson," said the attorney, calmly; "will you please hold up your hand now and be sworn?"

It all happened so smoothly that Watterson's hand went up and he took the oath with the rest almost before he had time to know what had happened.

"I lost my fees on a case of this kind once," he explained afterwards, "and I vowed and declared I'd never be caught again, but that fellow acted so fair about it that it looked mean to stand out any longer."

A SONG IN EVIDENCE

"Sam Dysart and I were law partners at Lancaster, Mo., some twenty-five or thirty years ago, and it was one of the most congenial associations I have ever enjoyed," remarked Judge N. M. Shelton of the Second Judicial Circuit, recently. "Sam had served his country in the Civil War, and came out with badly affected lungs and a shattered arm. But he was full of animation, and had the faculty of getting more out of life than the average man. He was a born humorist, and as often won cases by his keen satire as by his knowledge of law.

"One spring Sam was employed to defend a lot of country boys and girls who were charged with disturbing religious worship. The information alleged that by their boisterous laughter and unseemly conduct they had broken up the meeting. The worst of it was there seemed be to no defense. They admitted they laughed loudly right in the midst of the services.

"Brother T. Spears, the preacher, was the prosecuting witness. He was a tall, serious man, and dreadfully in earnest about this case. The prosecutor, T. C. Tadlock, shared Brother Spears's indignation over the 'outrage'; nothing could be more sacrilegious than for youngsters to cut up in church. In his opening statement to the jury in Justice Bailey's court the prosecutor said here was a

splendid opportunity to teach budding anarchists a lesson lest they go on and on in their evil ways and become confirmed lawbreakers.

"The young defendants all belonged to good families of the neighborhood, and they were much impressed by their grave predicament at the conclusion of the prosecutor's incisive statement.

" 'Call Mr. Spears!' said the prosecuting attorney.

"The tall preacher, with dignified step and solemn countenance, took the witness-box, placed the palms of his hands together, a picture of persecuted innocence. With pious earnestness he described the little assembly in the back country, how he had striven to develop a desire for right living and the commendable progress being made. He spoke more in sorrow than in anger concerning the inexcusable conduct of the young disturbers of his meeting, and felt certain that the only way to save them from a life of crime would be to inflict such punishment here as would cause them to remember ever after; he did not mean to be harsh; he was only actuated by a feeling of good towards the defendants—to be just to them.

"This was a most serious way of putting it, and the big crowd—everybody in the adjoining townships was there—wondered what Sam was going to do about it.

"When the witness was turned over to him Sam coughed in that dry way he had, and then began the examination:—

" 'Brother Spears, you led the meetin' that night?'

" 'I did, sir.'

" 'You prayed?'

" 'I did, sir.'

" 'And preached?'

" 'I tried to.'

" 'And sung?'

" 'I sung.'

" 'What did you sing?'

" 'There is a Fountain Filled with Blood,' sir.'

"Here Sam pulled a hymn book out of his pocket and handed it to the witness, with the remark:—

" 'Please turn to that song, Brother Spears.'

"The witness did so.

" 'That's what you sung that night?'

" 'It is, sir.'

" 'Well, stand up and sing it now, if you please.'

" 'What!'

" 'You heard what I said, Brother Spears.'

" 'But I can't sing before this sort of crowd!'

" 'Brother Spears,' with much apparent indignation, 'do I understand that you refuse to furnish legitimate evidence to this jury?'

" 'No—no—but, you see—'

" 'Your Honor,' said Sam, turning to the Court, 'I insist that the witness shall sing the song denominated in the evidence just as he did on the night of the alleged disturbance. It is a part of our evidence, and very important. The reason for it will be disclosed later on.'

"There was a long jangle between the lawyers, and the court finally ordered the witness to get up and sing.

" 'And, mind you, Brother Spears,' said Sam, seriously, 'you must sing it just as you did that night; if you change a note you will have to go back and do it over again.'

"The witness got up and opened the book. There is a difference between singing to a congregation in sympathy with you and a crowd of people in a court room. Brother Spears was painfully conscious of the fact. You know how those old-time hymns are sung in the backwoods settlements. You begin in the basement and work up to the roof and then leap off from the dizzy height and finish the line in the basement. That's the way the witness did. He had a good voice—that is, it was strong. If Gabriel's trumpet ever gets out of whack he could utilize that voice and wake the dead just as readily. It seemed to threaten the window lights. The crowd didn't smile—it just yelled with laughter. The jurymen bent double and almost rolled from their seats. The Court bit his cob pipe harder and tried hard to look solemn. It wasn't any use. There was only two straight faces in the house, and one belonged to a deaf man and the other to Sam Dysart. The singer finished and sat down. He looked tired. Sam immediately excused him. When the time for speechmaking came Sam remarked to the jury: 'If you gentlemen think you could go to one of Brother Spears's meetings and behave better than you have here, why, you may be justified in convicting these boys and girls.' That was all he said. It was plenty. The jurymen acquitted the young defendants before they got their faces straight."

EDITIONS OF MAGNA CARTA

AN inquiry with regard to moderate priced editions and facsimiles of Magna Carta, recently addressed to the librarian of one of the leading college law libraries in the country, brought the following reply:—

I cannot tell you of any publication containing a translation of the Magna Carta and a facsimile reproduction of it, issued at a moderate price. There are plenty of translations and some facsimile copies.

There is a facsimile by A. P. Harrison, published in London, 1859; this is a single sheet folio. There is also a facsimile of Magna Carta, lithographed by J. Netherclift, London, 1822; this is a single sheet folio. There is another by Prichard Harrison, London, 1830, single sheet, folio. There is a book entitled "History and Defense of Magna Carta," which contains a copy of the original charter at large, with the English translation, published in London in 1769.

There are so many editions of translations of the Magna Carta that I cannot attempt to give them. Perhaps as useful an edition as any is Thompson, Richard, "Historical Essay on the Magna Carta, to which is added the Great Charter," etc., published in 1829. This is a beautiful edition and can be bought for about $5.00.

THE PLURAL OF *CESTUI QUE TRUST*

A *CORRESPONDENT* of the *Solicitor's Journal and Weekly Reporter* recently reminded the readers of that paper that the plural *cestuis que trustent* is quite wrong, as the last word is a noun rather than a verb, the term being equivalent to *cestuis qui ont le trust*.

The *Legal Intelligencer* of Philadelphia considers it useless to try to apply the rules of modern French grammar to a Norman barbarism, and quotes the sensible view expressed by Judge Penrose in an article published in that journal seventeen years ago:—

"It has become a fashion within a comparatively recent period to use the term *cestuis que trustent* as the plural of *cestui que trust* and some of the younger lawyers, either ignorant of the fact that the syllable 'ent' at the end of the third person plural of a French verb is silent, or because of the profound contempt of foreign rules which characterizes the Anglo-maniac, whose valet is now always a valett, pronounce the word just as it is written.

"Whether the rules of modern French grammar are applicable to the Norman barbarism *cestui que trust* is not very material, for it is perfectly certain that, as a term of law, it has been Anglicized by long if not immemorial usage, and the plural, according to the authority of the sages of the law, is made simply by the addition of the letter *s*, either to the first or the last syllable. Lord Redesdale, Mr. Hill, Mr. Jeremy and Mr. Gresley write the plural *cestui que trusts*; Mr. Lewin, Mr. Perry, Mr. Smith, Mr. Adams, Mr. Roberts, Mr. Daniel, Mr. Vesey, Mr. Cruise and Judge Story, *cestui que trust*."

SPEEDY PROCEDURE FOR POOR LITIGANTS IN PANAMA

A READER in Panama has been kind enough to send us the record of a curious case which attracted considerable attention from the lawyers of that republic recently. This case is remarkable for the fact that the judge himself drew the necessary papers for an indigent plaintiff whose cause his court did not have jurisdiction to try.

Four washerwomen in the Canal Zone hung out their washing to dry, whereupon a horse appeared and damaged the clothes, for which injury this action was brought. Under the laws of the Canal Zone, the District Judge, whose functions are like those of a Justice of the Peace, has no jurisdiction to try a case where the amount involved is *unliquidated*. For reasons which we are at a loss to understand, the District Judge in this instance himself wrote up the pleadings, in which damages in the sum of $4, United States currency, were asked for. He also drew up an assignment of the whole claims of three of the parties to the plaintiff, and prepared an affidavit for the plaintiff that she was a poor person, so that she could sue without payment of costs. When the case came to trial, he found for the plaintiff, awarding her $4 damages and $2.55 costs.

The defendant, the owner of the horse, appealed. When the case reached the circuit court, the plaintiff moved to dismiss, and the litigation stopped.

The judge in this important case came from a place spelled by the judge in the original papers as "Missouro." Our corre-

spondent has sent the details to the *Green Bag*, and requests us to "show the world that we have judges down here, as well as you have in the States."

HOW SPEAKER CANNON DESTROYED HIS DIPLOMA

SPEAKER CANNON told a delegation of college men recently of his experience in beginning the practice of law. Years ago, he said, he received a degree in a law college in Indiana. He started to Chicago to make his fortune, accompanied by his diploma and $6. He was put off the train in central Illinois when his money gave out, and that was why he wound up in Danville instead of in Chicago.

He hung up his diploma in his little law office and waited for clients. For six months he had little to do aside from looking at the diploma and twirling his thumbs. Finally one day in a fit of rage he pulled down the diploma and destroyed it.

"The diploma in itself was of no use to me," said Uncle Joe. "I kept my courage, however, and by and by began to make my way in the world."

USELESS BUT ENTERTAINING

Representative Nye of Minnesota has much of the wit of his lamented brother, Bill Nye. Himself a lawyer, Representative Nye said at a lawyers' banquet in Minneapolis:—

"Lawyers have grand reputations for energy and perseverance. A lad said to his father one day:

"'Father, do lawyers tell the truth?'

"'Yes, my boy,' the father answered, 'Lawyers will do anything to win a case.'"

Samuel Untermyer was being congratulated at the Manhattan Club on his recent successful conduct of a murder case.

The distinguished corporation lawyer modestly evaded all these compliments by the narration of a number of anecdotes of criminal law.

"One case in my native Lynchburg," he said, "implicated a planter of sinister repute. The planter's chief witness was a servant named Calhoun White. The prosecution believed that Calhoun White knew much about his master's shady side. It also believed that Calhoun, in his misplaced affection, would lie in the planter's behalf.

"When on the stand Calhoun was ready for cross-examination, the prosecuting counsel said to him, sternly:—

"'Now, Calhoun, I want you to understand the importance of telling the truth, the whole truth, and nothing but the truth in this case.'

"'Yas, sah,' said Calhoun.

"'You know what will happen, I suppose, if you don't tell the truth?'

"'Yas, sah' said Calhoun, promptly. 'Our side'll win de case.'"—*National Corporation Reporter.*

An incident which Judge Brewer enjoyed greatly occurred in the old Copeland Hotel at Topeka. "I arrived in Topeka," said Brewer in telling the story, "and went to the Copeland. As I entered the office I passed the cigar stand and noticed several pictures of myself on cigar box lids, and above them the words, 'Our Judge.' After I registered the clerk called a small boy, very black, to carry my satchel to my room, and I accompanied him. He looked me over from head to foot, and before we had walked very far stopped and addressed me.

"'Ain't you de man what manufactuahs dem dere 'Ouah Judge' cigahs?'" he asked, as his big eyes sparkled.

"'Yes, I'm the man,' I said, but I could not keep from laughing. It was too good a joke."—*Kansas City Journal.*

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

Correspondence

HUGHES' "GROUNDS AND RUDIMENTS OF LAW"

To the Editor of the Green Bag:—

Sir: I am obliged to you for the space you have given to the review of my Grounds and Rudiments of Law in your edition for May, 1910. I am glad to see that, while you criticise the work in a number of respects, you appreciate the labor it has entailed in assembling the great Leading Cases of the law, and that you approve of its reasoning in many respects. It is, I assure you, extremely gratifying to me that I have treated any part of the work in the illuminating manner you state.

I know that you will give me space, in reply to your candid criticism, to suggest some answers to your various positions.

You say, in the first place, that the book

is radical in that it puts forward theories as to the fundamental principles of jurisprudence in contempt for the commonly accepted sources and for the doctrine of judicial precedent. In reply to this I will say merely that the work embraces all of Smith's Leading Cases, White & Tudor's Leading Equity Cases, Broom's Maxims, Thompson's Cases Negligence, American Leading Cases, Hare & Wallace, besides hundreds of the most notable Federal and best State cases. The doctrines advanced in the work are based upon these cases and upon the works of such writers as Story, Kent, Greenleaf, Bispham, Pomeroy, and the sources of Field's New York Code.

You further say: "The theory that the leading principles of the Roman law furnish the basis for our entire legal system is certainly surprising."

I must certainly say that I fail to see why this position should be surprising to you, even though you may differ from it, since it has been advanced by such men as Mansfield Kenyon, Ellenborough, Marshall, Kent and Story. See collated the departments of our law that have sprung from the Roman, Section 28, 1 Grounds and Rudiments of Law.

What Judge Story thought about this matter is indicated in his Miscellanous Writings, pp. 820, 821.

Further, we must not forget how Lord Holt built *Coggs* v. *Bernard* out of the Roman law (Smith's Lead. Cas.), and also how Story founded *Bright* v. *Boyd*, one of his most notable cases, on four Roman maxims. The latter was practically reprinted in *Valle's Heirs* v. *Fleming's Heirs*, 29 Mo. 152, 77 Amer. Dec. 557–565, with extended notes. See, also, cases like *Davies* v. *Mann*, 10 Mees. & Wels. 546; 2 Grounds and Rudiments, 476, affirming the Roman maxim, *Alterum non ladere*. That the maxims of the civil law underlie many of the branches of the English law, see Kent's Commentaries, 546. Chancellor Kent says that even "that strict English lawyer, Lord Holt, admitted that the laws of all nations were raised out of the ruins of the civil law, and that the principles of the English law were borrowed from that system, and grounded upon the same reasons." I must say that, in view of the authorities on this question, I think you do yourself an injustice to say that you are surprised at my reiteration of them. The great maxims of construction, by which all documents are adjudged, are Roman. 2 Inst. 365, Bacon Max. Reg. 1, etc.; 1.

You further say that but one third of Bracton's treatise shows any considerable trace of Roman influence. Of course, authorities may differ on this question, and it is not necessary to enter into lengthy dispute about it. Sir William Jones, however, says of Bracton that he is certainly one of the best of the English juridical classics, and that he copied Justinian almost word for word. And Mr. Spence, in his Equitable Jurisdiction of the Court of Chancery, 1, c. 132, considers that Bracton drew the learning of his treatises, not from the Anglo-Saxon or Anglo-Norman jurisprudence, but essentially from the Roman law. (1 Kent, 13 Ed. 500.)

As to whether I have or have not taken a prejudiced view of Coke, I will leave to the decision of the candid reader who has read the facts set forth in Chapter I of Grounds and Rudiments: The Fountains of the Law.

You say that there is lack of proportion in the work, "far too little space being allowed to the substantive law and far too much to procedure to preserve proper symmetry of treatment." The history of our law has been stated by Pollock and Maitland in their history of English law to be more than anything else a history of forms and methods of procedure. If it be, the practical lawyer must concede that an attempted distinction between the substantive and the adjective law is illusory. I frankly admit that I so consider it. See 70 Central Law Journal, 311; 25 American Bar Ass'n, 549, by Prof. Henry Redfield of Columbia College; also address of Franklin W. Danaher, 34 Amer. Bar Ass'n (1910), 787.

But this does not mean at all that what is known as "substantive" law is not properly treated in my work. It merely means that I have not attempted to separate "substantive" from "adjective" law, but have treated them as I think they should be treated, indivisibly. The experiments of some of our large publishing houses seem to be forcing them to the same conclusion. The Edward Thompson Company put out the first edition of its Encylopædia in thirty-one large volumes on "Substantive Law"; then in a second edition they spread the work into thirty-two volumes on "Substantive Law" and twenty-three on "Adjective," in all eighty-six volumes. After all these were widely sold, the American Law Book Company, seeing the first mistake, put out their forty volumes C Y C, treating the law

as an entirety, as it should be. Then the Edward Thompson Company followed suit and are now offering the law as an entirety in fifty-five volumes.

In view of these irrefragable facts, you should not treat me too harshly for an imagined slighting of substantive law. If, however, on consideration you still think the "substantive" law has been slighted, I will thank you to reply to this letter, setting out some, or any, fundamental principles of "substantive" law which have been omitted from my work. If you can do this, your criticism is well-founded. Otherwise I know that, in justice to me, you will candidly admit your mistake.

Whatever may be said about the points I have just mentioned, you certainly do the work an injustice in saying that "the typography of all four volumes is of a cheapness unworthy of the text." As a matter of fact, the electro plates, paper, and binding in the work are more expensive and finer than those in any practical law book on the market today. Let the book be compared with Bouvier's Law Dictionary or with any other high-grade work. An examination will show that the impressions from the electro plates cannot be surpassed.

I will thank you to give your candid consideration to these matters.

W. T. HUGHES.

St. Louis, Mo., May 9, 1910.

[A reviewer's opinions must stand or fall in accordance with their obvious fairness or unfairness, and it is not necessary for him to enter into debate concerning questions which much space would be required to discuss adequately. It is even the less necessary, when the views advanced in the publication reviewed are at variance with generally accepted doctrine and the burden of proof rests on the author to sustain the propositions advanced, rather than on the reviewer to demolish them.

The question of the precise historical relation of the common law to the Roman law is by no means a settled question. Each year the researches of eminent scholars are shedding new light upon it, nor do we discount the value of some of Mr. Hughes's own labors in this field; but it will be long before it will be possible to construct the complete story of the origin and growth of Anglo-Saxon jurisprudence. Much, however, as the discoveries of such investigators as Vinogradoff, Seebohm, and Coote may clash, at certain points, with the traditional view of the indigenous origin of the common law, we do not anticipate any truly startling new discoveries as the outcome of the studies of this school. At all events, the time has not arrived when an author can argue, from the latest results of historical scholarship, that the common law is based solely on Roman jurisprudence. (He certainly cannot argue it from the authority of Kent and Story.) And even if that point in historical research is ever to be reached, which we very much doubt, it is still a long way off.

We pass now to another matter, that of the much greater attention devoted by Mr. Hughes in his treatise to rules of procedure than to substantive law. Our criticism was not that he had treated of the substantive and the adjective law in the same place, under the same headings, but that a disproportionate amount of space had been allotted to the latter. If the two subjects be, as he contends, "indivisible," we are at a loss to see how, when a writer gives such emphasis to forms and methods of procedure as to make it appear that his treatise is concerned with them chiefly and primarily, he cannot himself be accused of subdividing the law and of subordinating the substantive to the procedural. If the substantive law is there, and is merely hidden behind a film of procedural rules without really being subordinated, then it can be discovered only by a much more penetrating scrutiny than the majority of readers will be found to possess. THE EDITOR.]

The Legal World

Important Litigation

A federal jury at Covington, Ky., has found the Kentucky tobacco farmers who had been indicted for taking part in the Night Rider persecutions guilty of a violation of the Sherman law. In the same court, $6,000 damages was awarded to W. S. Henderson, a merchant who had sued twelve tobacco farmers of Bracken county.

Another trust was indicted April 8, when the directors of the Imperial Window Glass Company were charged at Pittsburg with acts in violation of the Sherman anti-trust law. The indictment charged the establishment of a combination and the maintenance of unreasonable and non-competitive prices in excess of those which would have prevailed if the defendant had not engaged in an unlawful conspiracy.

In the noted case of *Loewe* v. *United Hatters of North America* it will be recalled that the defendants were found guilty last February at Hartford, Conn., of injuring the business of the plaintiff in violation of the Sherman act by means of a boycott (see 22 *Green Bag* 259). An appeal to the United States Circuit Court of Appeals has now been taken on behalf of the American Federation of Labor, with which the Hatters' National Union is affiliated.

Attorney-General Wickersham, in his speech delivered at Chicago April 9 in defense of Mr. Taft's administration, gave the first intimation of the fact that the Government was planning to break up the combination of dealers in bituminous coal. He laid much stress on the Government's prosecution of the *Standard Oil* and *Tobacco* cases, and also showed his interest in the proceedings brought in the United States Circuit Court at Philadelphia against the anthracite coal combination.

The Interstate Commerce Commission made an important ruling April 10 reducing Pullman rates and ordering differential charges between upper and lower berths, which is likely to be carried to the courts by the Pullman Company. Chairman Knapp and Commissioner Heslam dissented. The uniform rate of $12 for upper or lower berths from St. Paul to the Pacific Coast was ordered reduced to $10 for lower berths and $8.50 for upper berths The Commission also took the position that a short night's journey should not carry a rate of more than $1.50 for a lower berth and $1.10 for an upper, and ordered other reductions.

The United States Circuit Court last summer at Chicago permanently enjoined the Interstate Commerce Commission from enforcing a lower through rate from the Atlantic seaboard to the Missouri River, in the so-called *Missouri River Rate* cases (see 21 *Green Bag* 533). Appeals both by the Commission and by Missouri River shippers were taken into the Supreme Court of the United States, and on April 1 what is likely to prove the biggest rate fight since the passage of the Hepburn bill entered upon its final stages when the Government filed a brief in the same court. If the litigation is successful, the order of the Commission will lose its effect because of the two-year limitation, but the Government will have achieved a victory in a controversy in which the power of the Commission is felt to be at stake.

Judge Holt, after a verdict had been brought in for the defendant April 13 in the suit brought by Clifford W. Hartridge against Mrs. Mary Copley Thaw for $93,000 for counsel fees, considered the facts which had been brought to his attention sufficiently grave to require him to make the unusual move of ordering the record and exhibits impounded for presentation to the District Attorney and the Grievance Committee of the Bar Association. The evidence of the defendant had included payments made to women to keep them from telling to the prosecuting officials stories detrimental to Thaw's case, and covered work for one hundred and eighty nights in the Tenderloin district. Judge Holt remarked that if these payments were not correctly stated, the defendant was subject to a charge of perjury, and if they had been made there ought to be an investigation to determine whether the defendant had obstructed justice or been guilty of professional misconduct.

The anti-bucket shop crusade of the Department of Justice indicates the belief of the officials of that department that they have power not only to prosecute those conducting bucket shops in the District of Columbia, but persons in other cities connected in any way with the firms having offices or representatives in the District. The twenty-nine persons indicted by the federal grand jury of the District of Columbia, whose offices in New York, Philadelphia, Jersey City, Baltimore, Cincinnati and St. Louis, were raided at the same hour on April 2, were all connected with three firms, the first maintaining offices in New York and Philadelphia, the second in Baltimore and New York, and the third in the four other cities above named, all three firms maintaining numerous branch offices. The principal charge is that of conspiracy to commit an offense in violation of

section 5440 of the Revised Statutes, prohibiting the keeping of bucket shops in the District of Columbia.

Important Legislation

The Rhode Island legislature ended its session April 29, one of its final acts being the rejection of the federal income tax proposal. A proposition to submit to the voters a constitutional amendment providing for biennial elections of state officers was approved at this session, as was also a child-labor bill, making it illegal for stores as well as factories to employ children after 8 p. m. and prohibiting the employment of any child under sixteen unless able to read and write simple English sentences.

Louis D. Brandeis of Boston, whose success in the noted *Oregon Laundry* case attracted some attention, has won a similar case in the Supreme Court of Illinois, a decision having been rendered April 21 upholding the constitutionality of the statute of 1909 of that state, limiting hours of labor for women to ten hours a day. The brief in this case was noteworthy as a scientific production, reviewing as it does a vast amount of evidence gathered from all parts of the world with regard to the effects of long hours of labor upon the health of women (see 22 *Green Bag* 247, and the Latest Important Decisions in this issue.)

Personal—The Bench

Justice Leslie C. Cornish of Augusta, Me., was given a dinner by the Bangor Legal Club April 22.

E. Stanley Toadvin has been appointed to succeed Judge Charles F. Holland, as Associate Judge for the first judicial circuit of Maryland.

Judge Charles E. Jenney, recently raised to the Massachusetts Superior Court bench, was the chief guest of the Norfolk County Bar Association at its annual banquet April 7.

John B. Clayberg of Helena received the unanimous endorsement of the Yellowstone Bar Association for the position of Chief Justice of the Supreme Court of Montana at a meeting held at Helena April 6.

The Senate has lately confirmed the appointment of John C. Rose, to be United States District Judge, district of Maryland (an original vacancy provided by a recent act of Congress).

Judge John F. Philips of the United States District Court for the western district of Missouri has announced his intention to retire from the bench on June 25 next. He has served on the federal bench since 1888.

A. H. Whitfield, for many years Chief Justice of the Mississippi Supreme Court, and F. A. McLain, have been made Supreme Court Commissioners of Mississippi, with duties similar to those of the justices of the court.

Members of the bar of the Supreme Court of the United States held a meeting in the court room at the Capitol on April 30 and paid tribute to the memory of the late Justice Brewer. The Justices were present. Several eulogies were pronounced, including a striking tribute by Hon. Hannis Taylor.

Judge E. C. Hart, Associate Justice of the Court of Appeals for the third district of California, located at Sacramento, was tendered a reception March 28 by the seventeen San Francisco lodges of the Knights of Pythias, of which order he is grand chancellor.

Judge George W. Wheeler gave a reception on April 15 at his home in Bridgeport, Conn., in honor of Chief Justice Frederick B. Hall, who recently succeeded Hon. Simeon E. Baldwin, Justice Alberto T. Roraback, who was made a member of the court in 1908, and Judge Silas A. Robinson, who has just been elevated to the Supreme bench.

Sir Samuel T. Evans, K.C., M.P., has been appointed to the office of the Probate, Divorce and Admiralty Division, to succeed Sir John Bigham, resigned. He was the last Q. C. to receive that honor during the reign of Queen Victoria. He was appointed recorder of Swansea in 1906. Two years ago he was made solicitor-general, from which office he has now been elevated to the bench.

Personal—The Bar

Herbert M. Heath of Augusta, Me., gave a very profitable talk on "Cross-Examination," before students of the University of Maine Law School April 5.

George E. Hill of Bridgeport, Conn., president of the Connecticut Bar Association, was married April 19 at Grace Church, New York, to Miss Catherine M. Utley of New York, daughter of the late James Seward Utley.

Moritz Rosenthal, one of the best-known and most successful corporation lawyers in the country, has entered the banking business as a partner in the firm of Ladenburg, Thalmann & Co., New York. He will, however, retain his connection with the Chicago law firm of which he has long been a member.

Charles F. Libby of Portland, Me., president of the American Bar Association, gave an address before the Portland Club on April 25, on the proposed income tax amendment. His argument was in opposition to the concentration of too much power at Washington, and in favor of the preservation of our dual system of government in its present form.

Frederick W. Lehmann of St. Louis and Henry L. Doherty of New York discussed corporations from opposite points of view at the Mercantile Club in St. Louis April 21. Mr. Doherty complained of "visionaries" who wish to limit the earnings of corporations to certain rates of interest and to fix railroad rates, and compared them to bulls in a china shop. "There never was a railroad rate advocated by a reformer," said Mr. Lehmann, "so low as the rates formerly accorded voluntarily by the railroads themselves to favored shippers."

The following Presidential appointments have been confirmed by the Senate: Farish Carter Tate, United States Attorney, northern district of Georgia (re-appointed); Clarence R. Wilson, United States Attorney, the District of Columbia; John Philip Hill, United States Attorney, district of Maryland; William A. Northcott, United States Attorney (re-appointed), southern district of Illinois; Casey Todd, United States Attorney, western district of Tennessee; James B. Cox, United States Attorney, eastern district of Tennessee; Foster V. Brown, Attorney-General of Porto Rico; Charles A. Boynton, United States Attorney (re-appointed), western district of Texas.

Bar Associations

The Utah Bar Association has decided, instead of having annual meetings in January, to hold two meetings a year, during the months of April and October. At the adjourned meeting in Salt Lake City, April 2, action favoring an increase in the salaries of state judges was also taken. The principal address at the evening banquet was made by Joseph Chez of Ogden, who responded to a toast, "Lawyers' Veracity."

Several of the state associations are to hold their annual meetings in June. Besides the New Hampshire and Pennsylvania Bar Associations (see *supra*), the Georgia Bar Association will meet at Athens on the 9th and 10th; Iowa, at Des Moines, on the 23d and 24th; Illinois, at the Chicago Beach Hotel on the 23d and 24th; and North Carolina at Wrightsville Beach and Pennsylvania at Cape May, on the 28th, 29th and 30th.

Justices of the Supreme Court of California were guests of the Los Angeles Bar Association at a banquet April 14. "The Administration of the Criminal Law" was discussed by Judge George W. Church of Fresno and Clarence Darrow of Chicago, the former upholding and the latter decrying present conditions. James DeWitt Andrews of New York made an appeal for unity of laws throughout the United States.

The next annual meeting of the New Hampshire Bar Association will be held at the Hotel Wentworth, Newcastle, June 25. The program will include the president's address, given by Judge William M. Chase of Concord; the annual address, by Judge Alton B. Parker of New York; a paper upon the "Admiralty Courts of New Hampshire," by Judge Edgar Aldrich of Littleton; and a paper upon an early New Hampshire pamphlet entitled "General Regulation for the Gentlemen of the Bar of New Hampshire" by Wallace Hackett of Portsmouth. There will be a banquet in the evening.

The annual meeting of the South Dakota Bar Association was held at Sioux Falls March 29–31. Judge Horace A. Deemer of Des Moines, Iowa, made the annual address, on "Some Proposed Reforms in Criminal Procedure," Hon. John B. Hanten of Watertown read a paper on "State Taxation," and James Brown, of Chamberlain, on "The Laggard Science." The following officers were elected: President, Carl G. Sherwood of Clark; vice-presidents, S. W. Clark of Redfield, and W. G. Rice of Deadwood; secretary, John H. Voorhees of Sioux Falls; treasurer, L. M. Simons of Belle Fourche.

The sixteenth annual meeting of the Pennsylvania Bar Association will be held at the Hotel Cape May, Cape May, N. J., June 28, 29 and 30. Hon. Gustav A. Endlich of Reading, Pa., will deliver the President's address. The annual address will be delivered by Hon. James Pennewill, Chief Justice of Delaware, on "The Layman and the Law." Papers will be read by Hon. Hampton L. Carson of Philadelphia, on "The Genesis of Blackstone's Commentaries and Their Place in Legal Literature," and by H. Frank Eshleman, Esq., of Lancaster, on "The Constructive Genius of David Lloyd in Early Colonial Pennsylvania Legislation and Jurisprudence—1686–1731."

Moorfield Story at the sixteenth dinner of the Bar Association of Boston, held April 8, took issue with Ex-President Roosevelt's statement, word of which came recently from Egypt, that "no people have ever permanently amounted to anything whose sole public leaders were clerks, politicians and lawyers." He referred to the legal work of Justinian, to the Code of Napoleon, and to such leaders as Hamilton, Adams, Lincoln and Marshall, but the reform of the law, he said, has not kept pace with the progress of science, and it is the duty of lawyers to put their houses in order by setting themselves to the work of reducing the expense and delays of litigation. He foresaw a severe strain for the judiciary. "There are coming some of the fiercest contests which we have ever known—struggles against executives who would substitute their own will for law, struggles against judges who think they have a right to amend the Constitution whenever they wish, struggles against the combinations of capital and labor, struggles against everybody who undertakes

to deny his fellow citizens equal rights." Brief addresses were also made by Justice Henry N. Sheldon of the Supreme Judicial Court, Charles F. Libby of Portalnd, Me., president of the American Bar Association; Henry J. Elliot, K. C., of Montreal, representing the Montreal Bar Association; Judge Charles MacIntyre, president of the Maryland Bar Association; Judge Robert Grant of the Probate Court and President R. C. Maclaurin of the Massachusetts Institute of Technology. Judge Grant read some original verses full of local satire which would be lost on any one but a Bostonian.

The annual report of the New York State Probation Commission transmitted to the Legislature April 15 stated that over 11,000 offenders were under the care of probation officers in the state last year, over 9,000 being placed on probation during 1909. The report showed that an increasing number of courts are using the system, and that the standards of probation work are improving, and good results are being obtained. The Commission recommends, among other things, that probation be used more generally in rural sections; that greater use be made of probation as a means of obliging offenders to make restitution for losses or damages caused by their offense; that children in juvenile courts be examined by physicians, so far as is practicable, to learn whether their delinquency is due to physical defects which can be remedied; and that more careful investigations be made of the character and history of defendants before being placed on probation. The Commission also favors, so far as is practicable, the hearing of children's cases in juvenile courts by civil procedure instead of by criminal procedure.

The action of Governor Patterson of Tennessee on April 13, in pardoning Col. Duncan B. Cooper immediately after the latter was sentenced by the Supreme Court of the state for murder in the second degree, has given rise to general denunciation. Governor Patterson's act shows exactly the same barbarous spirit as that of his friend, the pardoned man, when the latter wrote to ex-Senator Carmack shortly before he was murdered, "If my name appears in the *Tennessean* again, one of us must die." In defense of this extraordinary proceeding, Gov. Patterson has foolishly argued that he is throughly familiar with the records, and it is "repugnant to every principle of justice that a man should be found guilty of murder who was not in a conspiracy to kill, and who in fact did not kill." He has not, however, offered any argument in support of his own ability to discharge the functions of a court of law in adjudicating a matter of which he could not pose as a disinterested judge. As the *New York Times* has observed, "every consideration that should have weighed with a civilized Governor in a civilized community ought to have restrained him from this act." It is possible, however, that even more serious charges of abetting lawlessness can be framed against this Governor. For the *Tennessean* figures that since his inauguration in 1907 he has issued 956 pardons. The *New York World* says his average has been six pardons a week, with a record of 38 for one day.

The Steel Corporation's Plan for Voluntary Accident Relief

The plan for voluntary accident relief adopted by the United States Steel Corporation and experimentally put into operation for one year beginning May 1, 1910, is an interesting effort to solve the problem of just compensation for industrial accidents outside the sphere of legislation.

A scale of compensation has been drawn up fixing the amounts to be paid for temporary disablement, for permanent disablement, and for death. Thus single men temporarily disabled will receive 35% and married men 50% of their daily wages at the time of the accident. An additional 2% for each year of service above five years is added to the foregoing amounts, and in the case of married men, 5% more is added for each child under sixteen, provided the total relief does not exceed $2 per day.

Relief for permanent disablement will depend upon the special circumstances of each case, and will approximate as closely as possible to the following standard: for the loss of an arm, eighteen months' wages; for the loss of a hand or leg, twelve months' wages; for the loss of a foot, nine months' wages; for the loss of an eye, six months' wages.

Death relief will depend upon how long the deceased has been in the service of the company, and the number of children under sixteen, but is in no case to exceed $3,000.

To entitle an employee to any of the foregoing relief, the execution of a release to the company will be insisted on. No relief will be paid if suit is brought. The period for which relief is paid is not to exceed fifty-two weeks, and all injured men must obey the surgeon's instructions to be entitled to it. The company will under no circumstances deal with an attorney, or with any one except the injured man or some member of his family, "because it is part of the plan that the whole amount paid shall be received by the employee and his family."

Relief will be paid only for disablement sustained while acting within the scope of employment or while voluntarily protecting the company's property or interests, nor will it be paid for injuries caused or contributed to by the intoxication of the employee injured or his use of stimulants or narcotics or his taking part in any illegal or immoral acts.

The company in no way binds itself to grant the relief, for no contract is assumed nor right of action conferred on the employee. The expense of carrying out the plan will be met by the company with no contribution whatsoever from the employees.

A committee of the managers of the casualty departments of all the various subsidiary companies of the United States Steel Corporation was at work for eighteen months seeking to devise some satisfactory plan of relief, regardless of legal liability. The present plan, which was first announced April 16, is the result.

International Law and Politics

Prof. George Grafton Wilson of Brown University, who was one of this country's two representatives at the international conference on maritime law held in London early in 1909, has been honored by election to associate membership in the Institut de Droit International.

By proclamation of the President issued April 9, the reciprocal benefits of the Copyright Act of 1909 were extended to the works of citizens of the following countries which have granted to citizens of the United States the benefit of copyright on substantially the same basis as their own citizens: Austria, Belgium, Chile, Costa Rica, Cuba, Denmark, France, Germany, Great Britain and her possessions, Italy, Mexico, the Netherlands and possessions, Norway, Portugal, Spain, and Switzerland.

Andrew Carnegie, presiding at the annual meeting of the Peace Society of the City of New York, held on April 16, attributed greater importance to arbitration than to disarmament as a means of ending all wars. He declared that President Taft had placed himself in the forefront of the friends of peace by his declaration that all nations should be required to submit every possible question to arbitration, not even excepting questions of vital interest and national honor. Mr. Carnegie was re-elected president of the Society.

The new marble palace of the International Bureau of American Republics donated by Andrew Carnegie, was dedicated at Washington April 26 in the name of universal peace. President Taft joined with Andrew Carnegie, Secretary of State Knox, Senator Root and Senor De La Barra, the Mexican ambassador, the latter as representative of the Latin-American republics, in prophecies of peace among the twenty-one American republics. All the speakers pledged themselves always to strive to bring about that happy state. Mr. Carnegie expressed the hope that some day Canada, with the consent of Great Britian, would join the family of peaceful American republics.

The fourth annual meeting of the American Society of International Law was held in Washington, D. C., April 28–30. Senator Root and Prof. G. W. Scott discussed the protection of American citizens residing abroad, and Prof. Raleigh C. Minor considered the relative citizenship of persons and corporations. Prof. Theodore S. Woolsey and Arthur Kuhn discussed the effect of unfriendly acts. Prof. S. M. Macvane offered a paper on the question of domicil rights, and Prof. John H. Latane discussed the same issue. Other important papers were read. At the White House the delegates were addressed by President Taft, who urged the improtance of legislation for the federal protection of aliens under treaty provisions, and who also indorsed Senator Root's plea for a tribunal that would allow the peaceful settlement of international disputes.

Several of the more important governments are now known to have approved Secretary Knox's suggestion, made in his identic note to the powers recently, that the Court of Arbitral Justice provided for at the second Hague Conference be made a permanent tribunal. While the proposition was unfavorably received by Great Britain, owing doubtless partly to the unsettled condition of the entire subject of international arbitration pending the approval of the conclusions reached by the International Maritime Conference held at London a year ago, France and Japan are known to approve of the plan, and unofficial reports make it evident that other nations have expressed a similar attitude. The idea originated with Senator Root, and was first advanced at the London Conference but was withdrawn for the reason that it could better be taken up through diplomatic channels. Even though the plan may meet with some opposition, it is believed that if the more important powers agree to it the proportion may be so large as to justify the expectation that the court may possibly be established before the next conference meets in 1915.

The American Philosophical Society's Prize Competition

The announcement is made by the American Philosophical Society of Philadelphia that the Henry M. Phillips prize will be awarded during the year 1912. The subject upon which essays are to be furnished by competitors is: "The Treaty-Making Power of the United States and the Methods of its Enforcement as Affecting the Police Powers of the States." The essays shall contain not more than one hundred thousand words, excluding notes, and must be in the possession of the Society before Jan. 1, 1912. The prize for the crowned essay will be $2,000.

Essays may be written in English, French, German, Dutch, Italian, Spanish, or Latin, but if in any language except English must be accompanied by an English translation. No treatise or essay is to be entitled to compete for the prize that has been already published or printed, or for which the author has received already any prize, profit, or honor of any nature whatsoever.

The fund from which this prize is offered was presented to the American Philosophical Society held at Philadelphia for Promoting Useful Knowledge, by Miss Emily Phillips of Philadelphia, in honor of her brother, Hon. Henry M. Phillips, who was a member of the Society.

Information regarding the terms of the competition may be obtained by writing to the American Philosophical Society, 104 South Fifth street, Philadelphia.

Miscellaneous

Prof. Paul S. Reinsch of the University of Wisconsin, one of the best known contemporary writers on political science, has been appointed Theodore Roosevelt Professor at the University of Berlin for 1911 and 1912. He will lecture on "The Expansion of the United States."

Harvard University has decided to give a new law degree, "Juris Doctor," to graduates of approved colleges for one additional year's work in the Law School after they have completed the regular three years' course and received the degree of LL.B. For those who hold the degree of LL.B. from other universities two years' work will be required. The new degree is designed to fulfil the needs of those who desire to specialize in such subjects as legal history and jurisprudence, international law, Roman and modern civil law, etc.

Professor William Graham Sumner of Yale died in Englewood, N. J., April 12 of apoplexy. He was stricken in New York City on December 27, when he went there to address the American Sociological Society, of which he was president. Professor Sumner was a native of Paterson, N. J., and was graduated from Yale in 1863. Going abroad, he studied at the universities of Göttingen, Germany, and Oxford, England. On his return, he was engaged as tutor in Yale College. He took orders in the Protestant Episcopal Church, and for a short time he was at Calvary Church, in New York. In 1870 he was called to the rectorship of the Church of the Redeemer, Morristown, N. J., and remained there for two years. In 1872 he was called to Yale as professor of political and social science, and was the first American professor to offer a course in that subject. He occupied that chair continuously up to the time of his retirement in 1908 as professor emeritus. He translated Lange's "Commentary on the Second Book of Kings" (1872), and he was the author of "A History of American Currency" (1874), "Lectures on the History of Protection in the United States" (1875), "Life of Andrew Jackson" (1882), "What Social Classes Owe to Each Other" (1883), "Protectionism" (1885), "Collected Essays on Social and Political Science" (1885), "Life of Alexander Hamilton" (1891), "Life of Robert Morris," "The Financier and Finances of the Revolution," and a "History of Banking in the United States."

The proceedings of the American Academy of Political and Social Science at its fourteenth annual meeting, held in Philadelphia April 8–9, were devoted to consideration of the topic "The Administration of Justice in the United States." Justice John P. Elkin, of the Supreme Court of Pennsylvania, in his introductory remarks on this subject said that while judicial decisions may not always be popular they are always right under the law. A few years' experience on the bench, he observed, has the tendency to increase a man's respect for the doctrine of judicial precedent, and to teach him that it is better to know the settled law than to speculate about what it ought to be. The "third degree" was discussed and some police experts denied that this practice was resorted to in the brutal manner that has been alleged. Several prison, charity, and probation officials spoke on the treatment of the offender, and juvenile court work was considered by a number of prominent children's court judges and others. On the second day of the meeting a lively controversy was precipitated by the opposed views of Ex-Congressman Charles E. Littlefield, who defended the injunction, and J. H. Ralston, one of the attorneys for Messrs. Gompers, Mitchell and Morrison in the *Bucks Stove* case. Samuel Gompers also spoke, declaring Mr. Littlefield's speech to have been "insulting and abusive." Samuel Untermyer of New York presented a notable paper on "The Administration of the Criminal Law." He proposed remedies for what he termed the "unbridled license of the press in commenting upon and trying pending cases." Arthur C. Train of New York spoke in a similar strain. Everett P. Wheeler of New York criticized the misuse of insanity pleas in criminal cases and suggested that the homicidal insane be put to death if convicted.

Necrology—The Bench

Barkalow, John S.—At Paterson, N. J., Mar. 29, aged 76. Served as City Attorney of Paterson, 1864–1867; as Presiding Judge of the County Courts, 1871–1881; appointed Judge of the Court of Errors and Appeals in 1897.

Beecher, Edwin E.—At Fairfield, Ill., Apr. 13, aged 90. Prominent for many years in the politics of southern Illinois.

Donohue, Charles.—At New York City, Apr. 17, aged 87. Former Supreme Court Justice; specialist in maritime law.

Dow, Duncan.—At Bellefontaine, O., Apr. 15. Author of Dow liquor tax law; served two terms in state senate.

Fursman, Edgar L.—At Troy, Apr. 2, aged 73. County judge of Rensselaer county 1882–1888; Justice of the Supreme Court, 1889–1902.

Hart, John T.—At Coatopa, Ala., Apr. 7, aged 55. Prominent member of Orange county bar.

Haskell, Alex C.—At Columbia, S. C., Apr. 13, aged 71. Confederate colonel; served two terms in legislature; judge of district court at Abbeville; professor of law in South Carolina University; Associate Justice of the South Carolina Supreme Court, 1877–1879.

Henderson, J. H.—At Columbus, Ga., Apr. 25, aged 64. State and county tax receiver for twelve years.

Law, Thomas J.—At Shullsburg, Wis., Apr. 1. Served as county judge of LaFayette county, 1873–1877; again elected in 1905.

Magruder, Benjamin Drake.—At Chicago, Apr. 21, aged 72. Formerly Justice of the Supreme Court of Illinois; one of the most influential members of the Illinois bar; educated at Yale and in law department of University of Indiana; master in chancery, 1868–1885; elected to Supreme bench in 1885; wrote the opinion in Haymarket riot cases and other noted decisions; received degree of LL.D. from Yale in 1906.

Montague, E. J.—At Leavenworth, Kan., Apr. 7, aged 78. Practised many years in Carthage, Mo.; at one time judge of common pleas at St. Joseph.

Patterson, N. A.—At Vineland, Tenn., Apr. 27, aged 83. Circuit judge at the close of the Civil War; writer on historical subjects.

Spink, Joseph E.—At Providence, R. I., Apr. 16, aged 67. Had served continuously as judge of the municipal court of Providence since 1884; expert in probate law.

Upson, William H.—At Akron, O., Apr. 13, aged 87. Former judge of Ohio Supreme Court; twice elected to circuit court; state senator and Congressman.

Washburn, James M.—At Marion, Ill., Apr. 3, aged 83.

Wilson, Thomas.—At St. Paul, Apr. 3, aged 83. Former Chief Justice of Minnesota Supreme Court; regent of University of Minnesota; district judge in Winona, 1857–1864; Associate Justice of Supreme Court, 1864–1865; Chief Justice, 1865–1869; served in both branches of state legislature; elected to Congress in 1886.

Young, Thomas, Sr.—At Broxton, Ga. Apr. 16, aged 71. Formerly ordinary of Coffee county; pioneer citizen of Broxton.

Necrology—The Bar

Barboux, Henri.—At Paris, Apr. 25, aged 76. Elected a member of the French Academy three years ago; one of the most distinguished of French advocates; eminent pleader before the Court of Appeals; a corporation lawyer of high rank; for many years president of the French Bar Association and vice-president of the Prison Acsociation; author of several authoritative legal works.

Brandt, George W.—At Chicago, Apr. 15, aged 68. Founder of law firm of Brandt & Hoffman, Chicago; author of Brandt on Suretyship.

Buell, Roswell.—At Middletown Springs, Vt., Apr. 4, aged 97. Admitted to bar seventy years ago; oldest member Vermont bar and oldest ex-member of state legislature.

Burrell, A. M.—At Canesto, N. Y., Apr. 28, aged 82. One of the oldest practising lawyers in Steuben county.

Clendinen, T. R.—At Riverdale, Md., Mar. 26, aged 63. Served in Confederate army; practised in Baltimore; United States Attorney for a year during the illness of his partner, Thomas G. Hayes.

Connor, Jesse G.—At Dublin, Tex., Mar. 28. Well-known in his section of the state.

Crawford, Henry.—At Chicago, Apr. 12, aged 74. Railway organizer and corporation lawyer.

Currier, Sereno E. D.—At Roxbury, Mass., Mar. 31, aged 76. Had practised for over forty years in Boston.

Engley, Gen. Eugene.—At Denver, Colo., Apr. 19, aged 59. For three years Attorney-General of Colorado; had been counsel for the miners and their unions.

Ferguson, William W.—At Detroit, Mar. 30, aged 53. First negro ever elected to Michigan legislature.

French, Gen. Winsor Brown.—At Saratoga Springs, N. Y., Mar. 24, aged 78. Attained rank of Brigadier-General in Civil War; served as District Attorney of Saratoga county, N. Y.

Gallinger, George W.—At New York City, May 1, aged 60.

Giffen, Sir Robert.—At London, Apr. 12, aged 73. Journalist, financial writer, solicitor, and statistician; author of "American Railways as Investments," "Stock Exchange Securities," "Essays in Finance," and other works.

Goeller, Robert.—At Brooklyn, Apr. 9, aged 41. Authority in tax cases; member of the firm of Goeller, Schaffer and Eisler of New York City; part owner of Hotel Savoy.

Green, John R.—At Jefferson City, Mo. Chief Clerk of the Missouri Supreme Court.

Haskins, Daniel.—At Worcester, Mass., Apr. 13, aged 81. Practised law in Boston and Worcester; formerly counsel for West End Street Railway Co.

Helm, James P.—At Louisville, Ky., Mar. 29, aged 56. Corporation attorney and leader of municipal reform movement.

Holman, Joseph H.—At Rochester, Mich., Apr. 25. Well-known attorney and promoter.

Linnoy, Romulus Z.—At Taylorsville, N. C., Apr. 15. Formerly in Congress; orator and politician; one of the most picturesque men North Carolina ever produced.

Logan, Hollister.—At New York City, Apr. 23. Of the law firm of Logan, Desmond, Hanford & Read.

McCauley, Calvin H.—At Ridgway, Pa., Apr. 15, aged 59.

O'Brien, Frank N.—At Brooklyn, Apr. 28. Descendent of a family of lawyers, and well known in Brooklyn.

Owens, J. Beatty.—At Greensburg, Pa., Apr. 15, aged 48. Practised at Greensburg; served as Coroner, 1897–1900.

Page, Samuel B.—At Woodsville, N. H., Apr. 6, aged 73. Dean of Grafton county bar; prominent in politics; formerly counsel for Boston & Maine Railroad.

Pennington, Samuel H.—At Newark, N. J., Apr. 17, aged 68. General Belknap, Secretary of War under Grant, said of him: "Pennington served in my brigade during the Civil War, and he was the bravest man I ever knew."

Randall, Samuel H.—At New York City, Apr. 25, aged 73. Practised several years in Boston, where he was born; went to New York in 1866; for many years identified with Republican politics.

Rose, Edward T.—At Athens, O., Mar. 27. Justice of the peace in Athens for the past twenty-eight years.

Speir, Archibald W.—At New York City, Mar. 30, aged 70. Retired lawyer of social prominence.

Stewart, Major Robert E.—At Pittsburgh, Mar. 30, aged 69. Civil War veteran; formerly District Attorney of Allegheny county.

Sullivan, William.—At Brooklyn, Apr. 20, aged 63.

Thorndike, Charles.—At Boston, Apr. 8, aged 76. Old-time Boston lawyer, member of Harvard class of '54.

White, Peregrine.—At Bangor, Me., Apr. 10, aged 64. Lineal descendant of Peregrine White, the first white child born in Massachusetts Bay Colony.

Wilson, Jesse H., Sr.—At Washington, D. C., Apr. 15, aged 55. Prominently identified with the civic life of the capital; formerly trustee of the school board.

His Clever Son

By Harry R. Blythe

A LAWYER let his son
Draw up a will he had
And when the job was done
Asked, "How about it, lad?"

And straight the boy replied,
"I drew it safe and tight,
I hear the client died,
He passed away tonight."

"You drew it safe, you ass!"
(He heard the pater sob)
"Well, that's a pretty pass,
Next time I'll do the job."

THE LATE JUDGE WILLIAM T. WALLACE

FORMER CHIEF JUSTICE OF THE SUPREME COURT OF CALIFORNIA

By courtesy of the *San Francisco Call*

The Green Bag

Volume XXII July, 1910 Number 7

The Life and Character of William T. Wallace[1]

By Hon. Barclay Henley, of the San Francisco Bar

EDITOR'S PREFATORY NOTE

TO the judge of hallowed memory whose noble, leonine countenance looks out from the opposite page, the *Green Bag* offers its tribute of appreciation. It is a pleasure to think of a life so eventful and useful, a personality so masterful and strong, a character of such honor and wisdom. A prominent Californian has remarked, that if this generation knew Judge Wallace as he ought to have been known, there is no question that he would have been entitled to be classed among the few who the world calls "illustrious."

Judge Wallace was a man of commanding talents and conspicuous learning, and his career in the state of California was long and distinguished. He was a dominant factor in the upbuilding of that state. He was born in Mt. Sterling, Kentucky, March 22, 1828, and died at his home in San Francisco August 11, 1909, at the age of eighty-one, in consequence of a stroke of paralysis.

The Bar Association of San Francisco passed appropriate commemorative resolutions, from which we quote the following extract:—

"As a member of the bar, by his unvarying and courteous deportment he furnished an example of amenity to his professional brethren at the bar. By his learning and the clear phraseology in which it was manifest; by the wide scope of his studies and his robust and masterful grasp of the intricate problems of the law; by his well known and oft expressed disapproval of all trick and devious practices; by his elevation of tone and grace of bearing, noted and marked by all who knew him; by the patient indulgence with which he treated unintentional error and tolerated unfortunate incompetency; by these qualities and many others, which adorned and elevated his character, he becomes entitled to the permanent and lasting esteem of this Association."

JUDGE WALLACE was born in the state of Kentucky, and although in his teens when the war with Mexico broke out, at the tap of the drum he enlisted as a private soldier, serving throughout the war, and until American valor carried the stars and stripes to Mexico's capital. On the termination of that conflict, he applied himself to the study of law, and obtaining admission to the bar, migrated to California in the year 1850, where he settled at San Jose in Santa Clara County. He was then elected District Attorney of that county, during the term of which office, he married the daughter of the late Peter H. Burnett, the first Governor of California who subsequently himself was elevated to the Supreme Bench of the state. On the expiration

[1]Extracts from a memorial address delivered before the San Francisco Bar Association.

of his term of office as District Attorney, he was elected on what was known as the "Know Nothing Ticket" as Attorney-General of the state—at that time being twenty-seven years of age.

In the year 1870 he ascended to the bench of the Supreme Court of California, where he served two years as Associate Justice, subsequently becoming Chief Justice, which position he held for eight years; as to his well merited distinction as a jurist one need only point to the evidence furnished by his various opinions to be found from the 39th volume of the California Reports, to the 53d. There will be found, in imperishable shape, proofs which account for and justify the remark which has more than once been made, that his presence upon the bench of the Supreme Court of the United States would have been a valued accession to that august tribunal.

Upon the termination of his term upon the Supreme Bench, and in 1880, the Democratic party nominated and elected him as a Presidential elector in the Garfield-Hancock campaign. I was also then elected as an elector, and have a very vivid recollection which will abide with me through life, of the speeches made by him during that campaign, characterized as they were by an eloquence, force and patriotism which must have exercised a powerful influence upon the voters of the state, and contributed largely to the election of the Democratic electors. The parties, however, were so evenly balanced at that time, that it was the first and only time in the history of the state that the electoral ticket, as between the two parties was divided, the Republican party electing one Republican elector, the Hon. Henry Edgerton, himself a man of rare persuasive power as a public speaker, and the Democrats electing the others. I remember quite distinctly that when the electors assembled in Sacramento to discharge their official duties, Judge Wallace, seemingly familiar with the minutiæ of those duties, himself wrote out the various necessary official papers, and by his apparent ready comprehension of the law, took control of affairs. While Judge Wallace was not an active man in the bustling sense, he was so constituted that total abstention from participation in public affairs was wholly impossible; hence it was that his party afterwards prevailed upon him to accept a nomination, which resulted in his election to the lower house of the Legislature of the state.

A casual reader of these words may marvel at the acceptance by this man of an office, which in view of his conspicuous merits and his antecedent honors was of small importance. But not so, in the estimation of Judge Wallace. He was born and reared in the school of Henry Clay, the great Commoner of Kentucky—drank in his inspiration from the tuition of that great statesman, and had the almost idolatrous regard for his chief that ever moved and animated the followers of Clay; from all of which there became embedded in his moral constitution, which governed him all through life, a deep and abiding loyalty to the rights of the people; this devotion was constant, unswerving and attended upon every step of his political career. Therefore it was that when the call of the people of his immediate vicinage was heard, he responded with zeal, and being elected rendered such service in the Legislature as his descendants and friends may well contemplate with gratification and pride. Important legislation, it was anticipated, would come before the then ensuing Legislature,

which anticipation was verified; and in the moulding and shaping, and in the advocacy of such measures as were then presented, the varied resources of Judge Wallace were called into play and I may say without derogation to others, made him the chiefest legislative factor in that body; in fact wherever he lived and moved, the baton of leadership was without dissent placed in his grasp.

The debates in both houses of Congress are preserved in what is known as the *Congressional Record* and constitute an invaluable magazine of essays, law, and facts, such as cannot be found, owing to the entire freedom of speech permitted in that body, in any other deliberative body in the world, unless it be that of Great Britain and some of the British dependencies. I have often thought, because I was an observer upon several occasions of the proceedings of the California Legislature, during his term of service, that it would have been a priceless legacy if the debates of that body had been preserved in volume form as is the case with reference to those of the federal Congress. Judge Wallace's mind was so stored, as it were, so surcharged, with the great, salient, important facts of history; his wonderful and varied knowledge of the law of the land, and the common law of England upon which it is based, was such—so replete with the beauties of literature, ancient and modern, a knowledge enabling him to embellish every subject with which he dealt, that no lawyer or student could lay down unfinished any of his literary or forensic productions.

Riding along in the carriage attending the obsequies of Judge Wallace, I was struck with the justice and soundness of the remark of Dr. Taylor, Mayor of San Francisco, himself a man of diversified accomplishments, of high rank as a lawyer and of long abiding observation of and friendship for Judge Wallace, who said:—

"Judge Wallace verified the truthfulness of the Baconian pronouncement that "talking made a ready man, reading a full man and writing an exact man."

I do not hesitate to avow (and it is not trenching upon the license accorded mortuary encomium when I declare) that I have never known, in a career of some diversity of experience, a more felicitous talker or a reader of wider research, or a writer of more painstaking exactitude than the man of whom I speak.

I recall and reproduce with great pleasure an extract from his commemorative remarks upon Chief Justice Sprague, upon the death of that distinguished man, at the time when Judge Wallace was an Associate Justice upon our Supreme Bench. Judge Sprague had theretofore been a prominent member of the state senate, from which he had retired; alluding to that fact and commenting thereon, Judge Wallace said:—

"But though retired from the senate, Sprague had not become inattentive to passing public events. Though he had declined to be any longer a senator, he was still a citizen and bound to the performance of what he esteemed the great duties imposed upon him by that relation. His soul was too ardent, his nature too earnest, and his sense of duty too high, to admit of inattention or indifference upon his part, to principle asserted or measures projected, which he believed to involve the wellbeing of his country. It was therefore, and only therefore, that he was ready to enter the arena and do battle for what he deemed the right, and was willing to bear the standard which was the emblem of the principles he cherished, even though impending defeat and disaster were sure to whelm and trail it in the dust."

Or again let me quote a gem from his eulogy upon the death of Hon. Edward Norton, *nomen clare et*

venerabile, who was an Associate Justice at the time of Judge Wallace's service as Chief Justice. Speaking of Judge Norton, he said:—

"His nature was earnest, his convictions deep, his purpose firm; he had a comprehension of his whole duty, in which, as Seneca thought, is to be found the true felicity of life, and with the spirit of that great philosopher, he might with confidence have appealed to the Gods, both as the witnesses and the judges of his words and deeds . . . The records of the courts in which he sat will forever attest the public services he rendered, and tradition handing him down to posterity will repeat his eulogy and embalm his memory as a learned judge and an honest man."

What instinct or what limner's spirit inspired Judge Wallace, when in painting the picture of those two distinguished men, he imparted to the canvas his own lofty characteristics? Who will say that the attributes ascribed in the foregoing quotations to these men do not properly pertain to any truthful presentation of the lineaments and traits of character of William T. Wallace?

It would be a labor of love, perhaps here of supererogation, to point out and dwell upon his various opinions contained in the eleven volumes of Reports of this state, wherein by his unequaled diction and his inexorable logic as well as legal knowledge, he was enabled to impart to cherished principles the force of established law, but time does not permit. But the work speaks for itself; panegyric may stimulate the memory, but the sheen of his genius, as seen from those opinions, will continue to glow and sparkle as generations of men shall pass. The decisions and opinions of great judges seem, more than anything else of earth unless we except poetry and oratory, to defy the ravages of time. Generally speaking the sad truth cannot be gainsaid, that evanescence attaches to all of earth—upon everything beneath the bending firmament is stamped the ghostly mark of mortality. Stability and permanence is but an Utopian dream if ascribed to the work of human hands. But not so with great principles. The laws of Justinian live in our decisions and books today; the lofty structure from whence they were promulgated is dust; but with principles "the tooth of time and razure of oblivion" go for naught. The opinions of Lord Mansfield, Stowell and Lord Eldon and other great English judges, covered with the *débris* of many generations, are as frequently quoted today in our courts as at any time succeeding their rendition; and so it is with the decisions of our great American judges of whom in unchallenged supremacy, John Marshall stands at the head. And so generations to come will point to Judge Wallace as being one of the great masters of juridical science. His fame is written with an "iron pen" in our judicial history, and detraction, if its hiss is ever heard, shall never shake the foundations upon which it rests. Judge Murasky has remarked that as a constitutional expounder Judge Wallace bears the same relation to the constitution of the state of California that Judge Marshall bears to the federal Constitution.

He was a lawyer and it was from the altar of the law that his orisons ascended. His conceptions of professional ethics constitute a high moral code.

If there were any element of resentment—any disposition to Draconian judgment existing in his composition, nothing could so effectually call it into action as professional turpitude. With the tricky, vulpine practitioner he had no patience, although such a thing as a passionate or wrathful exhibition of temper from the bench never escaped him. Calm, cool, judicial in demeanor and urbane withal, his equilibrium

never disturbed—self-poised, he was an ideal presiding officer. No impatience nor temperamental defects marred his abilities. He was alike to all. No cloud of injustice to a litigant ever obscured the pure sunlight of his administration of the law. He was one of those characters whose life was fashioned upon the theory that anything that was worth doing at all was worth doing well. Therefore it was that due caution, care, yes, infinite circumspection, attended him in all his performances. Supplementing that disposition was the possession of a broad, liberal and all-comprehensive nature. His was no circumscribed horizon. I think that he was the most *unprovincial* man I ever met; he understood human nature and made charitable allowance for faults due to men's environment. I never heard him in my life speak in condemnatory phrase of the people of any particular section or any particular race. One distinguishing characteristic of his was his worshipful love of forensic achievement; of all men of whom I have heard him speak probably his highest regard was for Judge Jeremiah Black of Pennsylvania, upon whose genius and life he so loved to dwell, and with whom he had intimate personal relations. I have often myself thought that Judge Black had not been assigned the niche in the Pantheon of American history to which his commanding talents entitled him. This was my friend's opinion.

I know of no such literature in the English tongue as Black's eulogy on Andrew Jackson, which was delivered on July 28, 1845. Reading Judge Black's non-forensic efforts, you would be impressed with the belief that his studies in literature had been confined to the Bible and Shakspere. There is a thread of both running through all that Judge Black touched. And to some extent may that be said of Wallace, but his writings, as his talk, evince a wide scope of reading.

Wallace lamented what seems to be a moral deterioration overspreading the land. An overmastering and an all-pervading greed devours and renders nugatory the experiences of the past, the signs of which are visible whithersoever you may look; its malign influence penetrates everywhere; it alienates the patriotic impulses of men, crushes the budding honesty of youth, invades the sanctuary of home; fatally infests the marts of commerce; lures women from their domestic duties; strikes its poisonous fang deep into the vitals of our governments; and in short, unchains every infernal form of deviltry by which empires and political systems have been wrecked in bygone times. You may look around among the citizens of eminence in this metropolis, and you will observe men of family and fortune who so far as their duty as citizens is concerned, do absolutely nothing, and are as to those matters as idle "as a painted ship upon a painted ocean."

These are things upon which I have often heard Judge Wallace descant by the hour. .

In 1891 a condition existed well calculated to arouse the keenest apprehension in the minds of every well-wisher of our institutions. Our city government was almost completely dominated by as corrupt a gang of political brigands as ever plundered a municipality. Scorning disguise they hoisted the black flag as their emblem while their methods and operations, were strictly responsive to what it symbolized; their scheme of operations embraced every form of diabolism, but a large source of revenue was derived from a per cent that they

collected by way of tribute from the salaries of the city employees. In the patronage offices, no one was eligible to employment unless indorsed by the bosses. The city was steeped to its eyelids in shame; the governing body, the Board of Supervisors, was subject to the control of these robbers—and hence all manner of mischief could be perpetrated. But it must not be inferred from these facts that all selections for public position were unworthy; those positions having no patronage were frequently bestowed upon reputable citizens—this to popularize and give respectability to a ticket. Unless blackmail were yielded up, such rates of charges were threatened as would drive public service corporations from business. In such circumstances, looking over the field, Judge Wallace concluded to impanel a grand jury, delivering to that body a charge that emphasized the demand for an overthrow of these malign influences.

The task for any one man to undertake was a mighty one; but in that man's blood and nature there was an unconquerable abhorrence of wrongdoing and of all of the Protean forms which dishonesty assumes; his soul was in stern and indignant revolt against it. Therefore it was that, being face to face with this state of affairs, without consultation with any one so far as I know, finding himself in the position of Presiding Judge of the Superior Bench, charged with the duty of impaneling a grand jury, he resolved to employ every instrumentality at hand consistent with his position, to the end that criminals should be punished. It took the loftiest courage to do it. It took an invincible determination to proceed with this crusade to the end—because, of course, he had a foreknowledge that the effort would turn loose myriads of hostile, vindictive and resourceful agencies with whom he would be challenged to do battle; but these impending terrors failed to stop the man—because as I heard a gentleman say of him "You would as well attempt to swerve the sun from his course through the sky as to divert Wallace from the pathway of public duty." His sole and only aim was to vindicate the law.

The grand jury being organized and consisting of some of the most distinguished men in the city, their investigations commenced; indictments were presented and the prospect seemed to be ominous of disaster to persons in the community of power and influence.

After considerable satisfactory progress had been made, a proceeding was instituted in our Supreme Court charging the invalidity of the grand jury, which resulted in a decision by the Court, by a vote of four to three, adjudging the creation of that body to be invalid. When the remittitur was sent down the grand jury received its discharge.

It was then that a somewhat memorable scene was witnessed. Now it must be borne in mind that before entering upon this scheme for the overthrowing of triumphant villainy, it is well known that Judge Wallace had made exhaustive investigation of the various legal questions that were likely to arise and was fully convinced of the soundness of the conclusion that he had reached. Hence upon the discharge of the grand jury he read an opinion which amounted to a legal disquisition upon the questions treated by the Supreme Court and upon which were based the grounds of impeachment of the validity of the grand jury. Of course Judge Wallace was too well disciplined as a lawyer and too mindful of the obedience due a decision of the Supreme Court to undertake to

assume a rebellious attitude as to the binding force of the judgment of the Court. His object in giving to the world his views upon the legal proposition involved was that in the estimation of the members of the bar, and the public generally, he should stand vindicated as far as the integrity of his motives was concerned. But the work that he did was not unfruitful of wholesome consequences. The fear inspired by the movement penetrated to the abodes of wrongdoing, and for many years good government prevailed in our city.

The paper above referred to which he read upon the dissolution of the grand jury found its way into the legal literature of the times, and received widespread recognition as a masterpiece of forensic discussion.

One way of testing a man's intellectual stature is by comparison with others; in fact it is by that method that we reach conclusions upon controverted questions of fact, such as the beauty of a picture, physical dimensions of an object, the character of a people and so forth. Adventitiously it has occurred that I have tested the deceased by the method of comparison. Immediately after the inauguration of Grover Cleveland, upon his first election to the Presidency, I was in a public position in Washington. At the election of Mr. Cleveland, by a coalition of circumstances involving no merit of my own, I was the only Democratic Congressman that was elected west of the Missouri River. Judge Wallace at that time held no public position, and to assist me by his counsel he came to Washington and was brought into daily intercourse with cabinet ministers and others distinguished in the annals of the country.

It may have chanced that you have seen a man of talents and character placed alongside of one who is really great, the result of which is, that the first shrivels up, and the last increases in stature. But when I saw Judge Wallace marshaled alongside of the nation's chieftains, he was not the one to shrivel. His qualities, upon his introduction to President Cleveland, were of a nature so captivating, and his greatness was so readily discerned, that as I know from the President himself, Wallace became installed at once as one whose wisdom and patriotism could be implicitly relied upon. I betray no confidence at this day in view of my knowledge of the fact, that if a vacancy had occurred upon the Supreme Bench of the United States during Cleveland's first administration, Judge Wallace would have been appointed.

Now let me be understood respecting one matter. I have said that if Judge Wallace had anything to do, he did it well; but I have further said that his industry was not of the bustling, restless character; to the enjoyments of *belles-lettres* and particularly the biographies of great men he was keenly alive.

I remember to have spent an evening with him just as he had completed reading the life of Daniel Webster by Harvey, a work which presents with great fidelity the true Webster; upon my stating that I had never read the book, he poured forth, until the evening was gone, a stream of quotation from and comment upon the work—giving me its very essence in a way that I shall long hold in memory.

The task were a vain one to attempt to place upon paper the multiform endowments of this man. By one of higher capabilities than myself an approach to it might be made. Not by me. Much might be said, but the effort only demonstrates the limitations of the language. The canvas invites the

artist, the implements of art are at hand, the theme is a mighty one, but the genius of the artist is wanting.

Turning the leaves of the volume of his life, where is the chapter or paragraph that his family or friends would wish effaced—where are the acts public or private in his diversified career that we would sweep into oblivion? There are none—nothing to erase, nothing to revise, no step to retrace, nothing that were his life to live again we would not wish to see repeated.

He is gone and his loss will not be supplied; we shall not look upon his like again; his example to lead, to counsel, to revive the drooping spirit, to strengthen the weary and to sustain the step that falters will still be with us—but not his magnetic presence, not the voice to the expressions of which our unconstrained homage yielded glad obedience.

As a judge, in the books he leaves indestructible memorials of his learning and his intellectual power—these will live co-existent with the matchless institutions bequeathed us by the fathers of which he was the sturdiest champion.

To Lord Coke

By Harry R. Blythe

WE prate of greatness in our age,
Vaunting our peerless legal sage
As if another king could reign
In thy well-won domain.

All, all is treason,—we are clowns
Who think to wear a monarch's crowns,
Yet vassals are we, none the less,
Forgive our littleness.

The times may change, the king lives on;
So shalt thou live when we are gone,
Robed in the matchless purple gown
Of thy undimmed renown.

Uniform Divorce Legislation—A Reply

By E. DeForest Leach

THE desirability of uniform divorce legislation is obviously a much larger question than whether the states should adopt the uniform law proposed by the Divorce Congress, and advocated by the Hon. Walter George Smith in his article in the May number of this magazine. But owing to the limited space at my disposal, I shall confine my discussion to the proposed law and the reasons therefor as presented by Mr. Smith without any attempt to consider the various features of the bill or the many purely legal objections thereto which are patent to any experienced lawyer.

There is probably but one point concerning this recommendation upon which Mr. Smith and I are agreed, *i.e.*, that it is not perfect or satisfactory to any one at all interested in the subject. According to Mr. Smith's idea, the only good divorce law is one which absolutely prohibits divorce, and that is the only kind of an uniform divorce law with which he and many of those who assisted him in the Divorce Congress will ever be satisfied. Their zeal in this behalf has exceeded their discretion, for they now boldly announce that it is not desired that states having stricter laws than the one recommended should adopt the recommendation. It would seem that the only way to obtain uniformity is to have all states adopt the same law. Consequently, I think I am justified in charging that these gentlemen are not sincere in their desire for uniform divorce legislation. They are simply taking advantage of the state of the public mind, and, under the pretense of securing uniformity, are urging only states with more lenient laws to adopt what they claim is soon going to become the prevailing style in divorce legislation. I openly made this charge on the floor of the Divorce Congress, and subsequent events have only confirmed what was then but a suspicion.

It is always more profitable to study the conditions under which legislation is secured than it is to analyze the enactments. Consequently we may learn something worth while about the recommendations of the Divorce Congress by glancing at the Congress itself. The session which met in Washington is conceded to have been one of the most distinguished gatherings ever assembled in that city. There were learned lawyers, judges, Governors, United States Senators and Congressmen, distinguished representatives of various religious denominations, including several varieties of bishops. The most notable thing, however, about the gathering was the absence of persons who had distinguished themselves as authorities upon the scientific questions involved in the solution of the problems considered by the Congress. There was but one physician, a lady, who left before the Congress closed because she became disgusted with the manner in which the discussion of the conditions well known to her profession was received by some of the more ecclesiastically inclined members of the Congress. The majority of the delegates seemed actuated by a desire to advertise their orthodoxy rather than to consider facts or do what was for the greatest good. These were the people who, having been

in the majority, presumed to act as arbiters of one of the greatest social problems that has ever confronted the race. What they did not know about the divorce question is very clearly shown by the recommendations and the address accompanying the same.

I suppose I am one of the "very few radical individuals" referred to by Mr. Smith, for I do not admit that divorce is of itself an evil. While I care nothing about the name, I maintain that a man may be just as radical in insisting that divorce is an evil as in holding the opposite opinion, and that he may be no more "sane, conservative and moderate" in urging an uniform divorce law as a means of suppressing the evils incident to divorce than in opposing such means. Especially is this true when he admits in the same article in which he is urging the adoption of his cherished plan of uniformity, that it will not "stop divorce or materially reduce the number of decrees." At any rate, I never could see why it is always necessary to inject so much of the teachings of Christianity or of any other religion into a discussion of the divorce question. The phenomena involved are not religious, theological or ecclesiastical, and the legal problems seldom arise except as to methods of procedure. While it is true that the Church has attempted to assume control of the matter and settle all problems incident to marriage and divorce, yet it is also true that these problems have very stubbornly refused to be thus settled.

The loosening of the ties of dogmatic faith is only a necessary result of increasing civilization, and the fault is with the dogma. It may be safe enough to dogmatize as to the unknowable, but it is mighty risky to dogmatize on matters within the range of human experience because of the probability of the loss of respect for both the dogma and the dogmatizer. Our present day methods of intercommunication are materially increasing such risks, too. People are just beginning to learn that divorces, in some form or other, have been co-existent with marriage; that they existed long before Christianity or Christian dogma, and that they will probably continue to be an element in the social organization a long time after Christianity has ceased to dogmatize. We are also learning that a man's religion, regardless of any claims he may make for it, is never any better than he makes it or any worse than he permits it to become; so, if his religious dogma does not conform to well attested social requirements, it is very good evidence that his religion needs reforming rather than society. In making this statement I trust I am not insensible to the great service Christianity has rendered to civilization, but I also recognize that civilization has rendered a great service to Christianity. Happily the work of neither is yet ended.

I deny, however, that the separation of marriage and divorce from religion—or, more strictly speaking, from ecclesiasticism—has robbed the former of any of its intrinsic sacredness. A marriage is, and always has been, sacred just to the extent that the man and woman who jointly assume the obligation make it so, and there is no power yet known which can alter this. Neither is there any power which can give sacredness to a marriage independent of the parties thereto. When it does not exist, both public and private morality demand that the marriage contract—for, under the conditions, that is about all there is left of it—be dissolved.

Of course, this view necessarily requires a different conception of morality from that invented for us by the theologians of the middle ages. While religionists have always denounced any moral ideals which either conflict with or have a tendency to supersede their religious teachings, yet it must not be overlooked that when their own morality or that of their doctrines is in question they take refuge in the statement that religion and morality are separate and distinct and that religion is their business.

But the statement that men and women cannot live moral lives because of their own innate sense of honor and justice and without unconsciously becoming indebted to Christianity necessarily implies that there was no morality before Christianity and can be none outside of Christian influences. Of course, a doctrine of this kind is not unexpected from so misanthropic a religion as orthodox Christianity, and we are therefore not surprised, although appalled, at the hardship, suffering and misery which a portion of the race has endured because of the influence of these teachings. Whatever may be the true criterion of morality, it is sufficient for this discussion to say that there are many who have come to believe that morality does not consist entirely in being continually uncomfortable.

The proposition that "the same act done under color of law, when divorce is permitted, is not more moral than when forbidden in a country where no divorce law obtains," while true, causes me to suggest that an act, which in itself is not immoral, is not made so by the enactment of prohibitive legislation, by religious dogma or social conventions. It is naturally expected that a man who opposes divorce because of its immorality and attempts to hide behind the statement above quoted as a cause for so doing, would be prepared to give some reason for his conception of immorality other than that the granting of divorce is in conflict with ecclesiastical or state legislation as well as traditional social ideals. Never having heard those who delight to call themselves "conservatives" attempt this feat, I therefore challenge them to show wherein divorce is of itself any more immoral than the marriages which it terminates.

Indeed, the best authorities upon social problems are agreed that divorce, instead of being a disease, is the only remedy for many far worse social conditions which are conspicuous in societies where divorce does not exist. I think this view is rapidly gaining ground among all peoples except those who are still encumbered by their heritage of dogmatic faith. The large increase of divorce in foreign countries and the important role which a demand for more liberal divorce legislation is at present playing in English politics, is very good evidence that the changing of opinions upon these matters is not due solely to American legislation or to the absence of uniformity therein.

The extension of this conception of divorce naturally affects the number of statutory causes therefor. For, as soon as it is recognized that there may be conditions in matrimony which are unavoidable and essentially immoral, the reasonable expectation would be for legislation to meet them and avoid the undesirable consequences certain to result from their continuation. While adultery, desertion, insanity and other statutory grounds each play their part in court as being the cause for divorce, it is not unlikely that there are more deep-seated and influential causes which are never considered by the court.

This conclusion may be drawn both

from an examination of individual cases as well as from the fact that about the same proportion of divorces are granted regardless of the number of statutory grounds or their nature. People usually decide to get a divorce and then do whatever the legislature, in its wisdom, may require of them to obtain the decree. In fact, the more numerous the statutory causes and the more liberal the procedure the less need there is for misrepresentation or attempts to beat the law, and the less the immorality connected with divorce. Because New York has seen fit to require one of the parties to a marriage contract to commit adultery in order to have the marriage dissolved, instead of decreasing immorality, has resulted in forcing upon the good people of that state the stigma of having nearly five times as many cases of adultery proven against them in proportion to their population as has their sister state, Pennsylvania. A man must be trained to dogmatic conceptions of things, and insensible to both reason and humane impulses, who can boldly persist in pleading for an extension of that type of morality.

It is only people of this class who recommend divorce without right of remarriage, little considering the consequences of having a considerable proportion of society capable of doing anything except to lawfully marry. The experience of England for over half a century with a system of this kind and the results therefrom, which are many times worse than any condition caused by our legislation, ought to silence forever any such agitation. The method of curing immorality by more serious immorality is no longer popular in a civilized society.

Personally, I had much rather assume the consequences of introducing into society a condition which will raise the standard of morality in marriage than to assume the responsibility for conditions in a society where marriage exists without divorce.

The scandal in the case of *Haddock* v. *Haddock*, (201 U. S. 562) while regrettable, lies with the Supreme Court. That five of the members of the highest judicial tribunal of the land should be so dominated by ecclesiastical or other prejudice as to pervert the express terms of the Constitution and overrule the well established intrepretations formerly laid down by the same court when otherwise constituted, and then attempt to justify such action by an apology of over fifteen thousand words, is, indeed, little short of scandalous. Especially is this to be condemned when such a decision is certain to work great hardship to multitudes of innocent persons and cannot possibly benefit anyone further than to tickle individual prejudices. That four of the members of this court refused to concur shows how nearly this scandal came to being avoided.

While the number of migratory divorces has been greatly overestimated, there is still a very great evil connected therewith. Statistics show that there never have been over three per cent of the divorces granted of a migratory nature, yet there is necessarily a great wrong committed when a citizen of one state feels that his rights can be better adjudicated elsewhere. New York, because of its very strict law, has, perhaps, furnished more victims than any other state, for there are many people in that state who have too much self-respect to stoop to the act the legislature has named as the price of a divorce. Some who have the means, swallowed their pride and changed their residences to other jurisdictions. Many did not have the means to do that and they

were forced to meet the legal requirements. No one knows how much suffering has resulted to those who could not do either. Is society any the better for their sufferings?

While I submit that there is not a single argument in Mr. Smith's article in favor of the adoption of the proposed law which is founded upon human experience or accumulated data—and I doubt whether such arguments can be secured from such sources,—the mere fact of the publication of such an article by so distinguished and zealous a publicist as its author is recognized to be, is of itself one of the strongest arguments against the adoption of the recommendation. We today know nothing about the cause for divorce. The importance to society of the scientific study of sexual phenomena is recognized by only a few. The authoritative works upon sexology have all been written within the past generation, and are few in number. Yet there are those, who, without considering causes, have allowed changing moral and social ideals to so irritate their imaginations that they can see nothing but dire disaster to any form of society as a result thereof and are eager to prepare and urge the adoption of laws to prohibit the inevitable.

There always have been and probably always will be those whose very god is tradition. To them the unpardonable sin consists in expressing dissatisfaction with the old. If the proposed law were adopted by all the states, it would be practically impossible to ever thereafter secure any better legislation, unless conditions became absolutely intolerable. The fact that the law had been prepared and recommended by so distinguished a body of men and women as the Divorce Congress and adopted by each of the states would make it sacrilegious for any one to attack it. The reverence for the Congress would increase with age, until, in time, it would be considered to have been inspired and its work as sacred.

Moundsville, West Virginia.

The Position of Attorneys-at-Law in Germany

By Dr. Otto Simon

Attorney and Counsellor-at-Law, Mannheim-on-Rhine

THE United States and Germany are countries between which an important commercial and industrial intercourse exists. This is easily proved by the fact that for instance in the year 1908 the United States exported to Germany goods amounting to 1,282,000,000 marks and imported from Germany merchandise amounting to 507,000,000 marks. Consequently many lawsuits, questions of law, compromises, etc., must needs arise between the two countries. If we further consider that a large percentage of the population of the United States is of German origin (probably about ten millions) and on account of this fact many matters of inheritance are constantly to be settled on both sides of the Atlantic, there can be no doubt that laws and customs in

the United States and *vice versa* (in Germany) ought to be of interest to lawyers of both nations.

Lawyers in the United States are very well placed in regard to cases (of their clients) which concern the United Kingdom because the language in both countries is the same, which is a matter of great importance. In consequence, lawyers of the United States are also more or less intimately acquainted with the English laws. It is quite different in regard to the legal matters which lawyers of the United States have to settle in Germany. It would be of great interest to many lawyers in the United States to acquire some information regarding the position of their professional brethren in Germany (their fees, etc.). In this respect there still exist many erroneous opinions in most quarters. For instance, in many publications in the United States there is little difficulty in finding such assertions as: "Lawyers of the United States forwarding business to their German colleagues are entitled to claim a part of the fee." In other instances lawyers and private people in the United States, applying to German attorneys, want to know "if he works for a percentage or what fees he asks," etc., confounding the system of fees used in the United States with that of our German laws. The following most important fact is therefore worthy of note:—

The German Law (*Gebrehun Ordnung für Rechtsanwälte — Reichsgesetz vom 7. Juli* 1879) fixes the exact fees which a German attorney-at-law has to claim for all kinds of professional work. Thus the *Rechtsanwalt* can charge his client neither more nor less than these fees fixed by law which applies to all matters of the Civil Code and of criminal cases. The amount of the *Rechtsanwalt* fee depends exclusively on the value of the object of contention, so that the very moderate fees rise proportionately to the amounts involved.

It is an old though still unfulfilled wish of German lawyers to have a new fixed list of fees;—not made after the old and low standard of the year 1879, but made with consideration to the changes—the numerous decided changes —which have taken place since that year.

To understand the position of a German attorney the following may further be mentioned:—

In connection with the *Landgericht* (*Oberlandesgericht*) the Supreme Court of Germany (*Reichsgericht*) at Leipzig, there is a rule for lawyers called *Anwaltszwang*, by which no one can appear for himself before a court. Hence he must be represented by an attorney and only by an attorney recognized by that court. Matters stand otherwise with the *Amtsgericht* or City or Borough Court, where a man is not compelled to engage a lawyer to represent him.

In this Court, however, no sum higher than six hundred marks or one hundred and fifty dollars can be sued for.

Further, the claimant is required to appear continually in person, which involves a considerable loss of time and infinite trouble. Thus this permission is hardly ever taken advantage of, and the lawyer is also generally engaged to represent his client in these cases.

The *Rechtsanwalt* is attorney and counsellor-at-law all in one (in England solicitor and barrister). The *Rechtsanwalt* can never be a business man as is the case in the United States.

The exercise of the law is not to be considered a calling or profession, but is to be looked on more as a public office. According to the lawyers' code of the 1st of July, 1878, lawyers are charged

publicly with certain duties. Thus, he is obliged to have his residence in the town or district where he is appointed (so called Residence Duty). Further, he must conduct himself in and out of office in a way befitting his professional and social standing (*i. e.*, duty due to his rank).

Thus a lawyer is forbidden to advertise in newspapers, by canvassing, etc., or to buy or take over a practice already made, as being unworthy of his calling.

His position in society is between officials and scholars and through custom and law he is compelled to keep this position to the last degree. This compulsion to keep one's rank has given rise to the existence of committees called *Anwaltskammern* whose duty it is to keep a strict watch that no lawyer dishonors his calling. These committees have a strict code of punishment ranging to complete expulsion from office.

In this way the lawyers in Germany have a good and honored position; in fact there is scarcely a country in which the lawyer enjoys more respect and confidence.

The Red Robe

By Charles E. Grinnell

WHILE our respect for the legal and natural rights of individuals and our jealousy of official power have unintentionally given opportunities for excessive delays in punishing persons convicted of grave crimes, the English people have recently imitated that respect and that jealousy by their new law for Criminal Appeal. That is an attempt to protect even a convict from too speedy punishment for fear of making mistakes by doing injustice when justice is intended and is more needed even by society than speedy execution. And while prosecuting officers in the United States have been complaining of the extraordinary facilities afforded by our system for the unjust defense of the most brazen enemies of law and order, the French people have not only recently checked the license heretofore practised of bullying accused persons to obtain admissions, but in a characteristic way their sentiments have been dramatically expressed by the revival upon the stage of the *Théâtre Français* of a remarkable play "*La Robe Rouge*," by Brieut, which was played for the first time about ten years ago in the *Théâtre du Vaudeville*.

This play represents the loss of justice caused by official ambition to succeed through convicting persons who are accused whether really proved to be guilty or not. One of the leading characters of this piece, in which then are many strong types, is a prosecuting officer of middle age longing for promotion, but too honest and independent to strive for it in the usual political channels. He regards success as the crown of merit and wishes to earn the reward which he idealizes by legitimate professional usefulness. He has a wife who loves and respects him, but thinks him too unworldly for a father of a daughter who needs a dowry and of two sons who require education and a start in business. He keeps his own promises and trusts the promises of politicians who temporize with him. Meanwhile other lawyers, his inferiors in attainments and character, gain positions which should have been shared with him. The district of the jurisdiction within which he is the responsible prosecutor has fallen behind other districts, for its statistics do not show a vigorous administration of criminal law by a record of many arrests and a large proportion

of convictions. Therefore his official superiors are indifferent to his modest advances, and his colleagues treat him as an impracticable dreamer. He is forever waiting for the chance which almost every one of them is trying to make for himself.

At last his chance seems to have arrived. A capital crime has been committed in his district. A rich old man has been murdered in his bed by some person unknown and the neighborhood and all official aspirants for glory are eager for a brilliant investigation, a sensational trial, and a result which shall show that in this district the government governs and deserves recognition.

But it happens that the desired excitement is dampened somewhat at the start by the scruples of a local judge before whom the case is first brought. One of the witnesses is an honest countryman who lived near the murdered man and who saw some strangers—vagabonds—coming from the house of the murder in the early morning just before it was discovered. Naturally the judge supposes the crime to have been committed by that party. But the search for them or any of them has been unsuccessful.

The community and the profession demand at least a scapegoat. The old judge grows nervous and restless under the publicity of methods to which he is not accustomed. He even takes the trouble to call upon the prosecuting officer to complain of the distasteful prospect of a vulgar display of advocacy when the case shall be opened against whomsoever it may be. Then he says that he does not feel well and finally refuses to go on with the case. Thus the prosecuting officer is thrown upon his own resources to find the criminal and success.

The old judge's refusal comes on the day when the prosecuting officer is giving a dinner party for politic reasons to his professional brethren at the close of the term's work. In making the house ready for the company the maid of all work finds a box which has to be moved and which contains a red robe that was bought two years before by the prosecuting officer's wife when she expected him to be promoted to an office permitting that dress. It is "*la robe rouge*," which gives its name to the play.

While waiting for the guests to arrive the prosecuting officer, happening to see the box opened, puts on the red robe and expatiates before his wife and daughter upon the superior impressiveness which he might have before judge and jury if dressed in such a costume. While he is posing and making a trial speech to an imaginary jury the guests arrive and the red robe has to be suddenly taken off and put away.

The guests are a scheming judge who was a peasant's son, and his wife who is well matched, also another very skillful judge who is besides a man of pleasure and is quite expert in the arts of a double life, also an old outspoken judge who is retiring from office after a long and unambitious service and says that now he finds he has nothing to hope for but has the right to judge according to his conscience in an inferior court, and a young assistant of the prosecuting officer who studied law because his family wished it and does not relish the fashion of treating one's magistracy as a career for the display of talents instead of the practice of the most difficult virtues.

After a conversation which brings out their characters they talk about the recent murder case and the failure to find any one against whom the crime can be proved. The scheming judge suggests that being a peasant's son he cannot help being blunt, and takes his host to task for not bringing more grist to the judicial mill to swell the importance of the district in the trial records. The host replies that he has "given orders" for zealous service even against smugglers. who are common there. The retiring judge draws out the young assistant to confess that he dreads his career because he would prefer to devote himself really to justice and mercy. At which the old retiring judge says that the young man has mistaken his role and should have been a priest. Soon the sporting judge exclaims that the fact is that the scrupulous judge who had had charge of the murder case was not the man for the job, and claims that his own more varied experience in criminal cases would dictate a more successful search for the real criminal.

He is urged by the company to speak freely, and after a little coquetting about his reluctance to seem to set his opinion against that of a colleague he lets himself go and asserts flatly that thus far the investigation has been fundamentally mistaken because it has assumed a vagabond was the criminal. He argues that the facts require a different explanation. He recites them as follows: "In a lonely house there is found one morning an old man of eighty-seven years of age murdered

in his bed. His servants who slept in an adjoining building heard nothing. Nor did the dogs bark. It is true some money or securities were stolen, but also certain family papers were taken. Remember that. It had rained the night before and footprints in the garden showed that some one had passed there whose right toe was out of his worn-out shoe. The judge who had charge of the case relied upon this evidence and declares that the murderer was a vagabond. I say this theory is false. The murderer was not a vagabond. The house was isolated and it is well known that within a radius of three or four leagues no tramp had been begging for anything to eat during the hours before the crime. Here the imaginary tramp, if there was one, would have eaten and drunk at the house of the murdered man either before or after the murder. But there is no trace which permits such a supposition that this was done. Imagine then, a man arriving exhausted by fatigue. He asks alms. He is refused. He conceals himself, and when night comes he robs and murders. There is wine, bread, other food; but he departs without touching it. Is it probable? No. If one says he was disturbed and fled, it is false, because your witness declares that he saw the vagabond in the morning some distance from the house and that the crime was committed before midnight. If my respected colleague, in addition to his rare qualities, had experience in such cases, he would know that empty bottles, glasses, the remnants of food left on the table, constitute, so to speak, the signature which murdering tramps leave at the place of their trespasses."

The peasant judge says, "True. I know that detail to be so."

The old retiring judge whispers to the young assistant. "That would lead to condemning anybody who happened to know anything."

"Go on, go on," says the prosecuting attorney.

"Then," continues the sporting judge, "my respected colleague should have known this: after food a vagabond needs shoes. This is so well known that tramps in prison beg shoes of the government to go to court with. According to the footprints the presumed criminal's foot was about the size of that of his victim. Yet he did not take his shoes. Once more, if the assassin was a tramp, an expert in begging, tell me why he chose a lonely road when there was a road near there where it is traditional never to refuse alms to such travelers. One word more. Why did a tramp steal family papers which would identify him as the murderer as soon as he met the next gendarme? No, gentlemen, the guilty man was not a vagabond. If you want to find him, don't hunt for him on the highways, seek him in the neighborhood of his victim; look for him among those who whether relations, friends or debtors, had an interest in the disappearance of the victim."

"Very just," says the prosecutor.

"Admirable in logic and clearness," says the peasant judge.

The sporting judge adds with confidence, "Believe me. It is a simple matter. If I had charge of the investigation I guarantee that before three days were over I would have the murderer behind the bars."

"Good!" says the prosecutor.

Then the host announces to the company that the scrupulous judge has just retired from the case, and formally offers the charge of the case to the sporting judge, who promptly accepts and promises to find the criminal in three days. Whereupon the enthusiastic company go out joyfully to dinner and the host orders some of his best wine to celebrate his crescent hope of a conviction and—a red robe.

Then the play begins in earnest in the second act, which opens in the office of the sporting judge. His assistants are watching there for him and express some curiosity as to why he is always tired when he returns from Bordeaux, where he was yesterday. His confidential assistant says that a magistrate of this district is always tired when he returns from Bordeaux. Then the sporting judge arrives, bustling but looking rather seedy and complaining of a headache. His confidential assistant soothes him by giving him some rare postage stamps which have turned up among official papers. And the judge's keen delight in this fad is brought out much to the amusement of the audience.

Then the judge examines his morning's mail, lays aside the chief papers and reads with a knowing smile a scented note. The audience gladly responds to this point. At last he begins to consider the business of the day, when a visitor is announced. He is irritated at the interruption, but when he learns that the visitor is a deputy of influence he sends his assistants out of the room and admits the deputy.

The deputy is a politician with the "fatal gift" of familiarity. He lets it be understood that he has just dropped in to say "how do you do" and to learn any news that there is. He asks casually about a new prisoner who has been arrested for the murder since the sporting judge took hold of the case. The judge is flattered by the reference and in turn flatters the deputy by permitting him to be present during the personal report of a military officer, a lieutenant who had charge of the arrest of the new prisoner. The lieutenant says that he is sure that they have caught the right man. The judge asks him why. The lieutenant answers that the prisoner has already been convicted several times for assaults; that fifteen years before he bought a vineyard of the murdered man; that he complained afterwards of the bargain; that he sold the vineyard himself after keeping it ten years; but that he had to continue certain payments to the murdered man nevertheless; that after his arrest the neighbors' tongues were loosed and one said the prisoner had said it was stupid to have to pay money to such an old fellow; and another said the prisoner had declared that it looked as if God had forgotten to take away the old follow. The lieutenant had also found that the prisoner owed money to the murdered man which would fall due about a week after the date when the murder was committed. The judge impresses the deputy by saying to him, "Singular coincidence," and asks whether the prisoner was in need of money. He learns that he had been borrowing lately. The lieutenant quotes the neighbors as saying that the prisoner was a surly fellow and they were not surprised by his arrest on such a suspicion, for he was the kind that could have struck such a blow. And on the other hand, all the neighbors were favorable to the prisoner's wife, praising her as a model housekeeper and good mother. They had two children. The mother's morals were reputed to be irreproachable. The lieutenant then recalled the fact that at the moment of the arrest the prisoner said to his wife, "I am caught." The judge wrote these things down. The deputy warms to the chase. The lieutenant adds that one of his soldiers can testify that he overheard the prisoner say to his wife, "Let nothing tempt you to admit that I went outside of our house last night."

The lieutenant then proceeds to tell about what he learned from a witness for the defense, the countryman who saw the vagabonds coming from the murdered man's house—but the judge chides him before he can tell this story before the deputy, and says, "Oh, yes, I have read that person's deposition. It is of no importance. Thanks. Prease write out your report and summon your witnesses." The lieutenant takes his leave.

The deputy compliments the judge upon his power of divination, and asks how he ever came to suspect that prisoner.

The judge says that finding out a guilty person is an art; that a good investigator is guided not so much by facts as by a kind of inspiration. But the deputy would like to know about the story of the witness for the defense. The judge tosses that off by saying he is a false witness because he had some business with the prisoner, and accused the vagabonds, and besides he is a Basque and would like to cheat the court by a false oath. The deputy is still puzzled by the judge's unwillingness to entertain the theory of his predecessor. Then the judge counters by saying:—

"Why suspect the poor vagabonds? I am like you, Mr. Deputy, I know your love for the poor and lowly, and I do not direct my suspicions exclusively against the miserable creatures who have neither friends to help them nor bread to eat." The deputy expresses delight at finding not only an able judge but one who shares his own profoundness of opinion, and says that now the newspapers should cease attacks which they had begun against such a judge. The judge disclaims any such hope, for he says that he is willing to suffer as a magistrate any unpopularity that may come from openly supporting as a citizen the candidacy of the deputy himself. The deputy is profuse in thanks, but warns the other to be prudent—to do things quietly—according to the advice of the keeper of the seals, to whom he refers by his Christian name. The judge asks, "Then you are intimate with Monsieur the keeper of the seals?" The deputy asserts with a significant gesture, adding, "We had to do with the Commune together."

The deputy takes up his hat to go and says, "By the way, what kind of a man is that prosecuting officer?" The judge replies, "Very attentive to his duties—even scrupulously so." "But I mean politically," says the deputy. "We cannot blame him for belonging to a camp diametrically opposed to ours,"

says the judge. "He is narrow-minded," responds the deputy as he glances at a paper on the judge's desk, and adds, "I have just caught sight of the name of a case against so and so, a friend of mine—one of my best election agents, and I assure you that there is nothing in it. I know that my friend is incapable of the things he is accused of. I told that prosecuting officer so, but now I see that he persists in pushing the case against him."

The judge shrugs his shoulders and replies, "All that I can say is that I will study these charges with especial care."

Says the deputy patronizingly, "I think too much of you to ask more than that. And now do not let me waste any more of your valuable time. Keep up your courage." He goes out with the same festive air with which he entered. The judge bows until he is out of sight, and as he returns to his desk says to himself. "I don't think our deputy will have a very bad opinion of me, and the fact is I did, indeed, have a pretty good scent when I suspected that prisoner. Now I must make him confess everything as soon as possible."

At that moment a telegram is brought in, directed to the judge. When the messenger departs the judge reads the telegram as follows:—

"Diana is in jail. The papers in the case were sent yesterday to the attorney-general." He is much disturbed, exclaiming, "This means me, then. Damn those women." He controls himself, settles himself at his desk, and calls his assistant to go to work.

The first order he gives is to set at liberty the deputy's friend and to dismiss the case against him. Then he orders in the witness for the defense in the murder case, the countryman above mentioned. He bullies this witness with arrogant criticism of his way of telling his story until the man, who respects the judge as an oracle of truth and justice, is made embarrassed. Yet the witness does get so far as to tell the substance of what he saw—a band of vagabonds coming from the house of the murder. The judge twists his testimony up as to the precise date and the exact number of vagabonds and the question as to whether the witness saw them shut the door or not, and sends the witness away with a warning not to mix in such matters as playing at suppositions before a court of justice. The witness is glad to escape and assures his honor that he will not undertake anything of the sort again.

Then the prisoner himself is brought in by two gendarmes in the presence of the judge and his assistant. He looks like a sturdy working man puzzled and distressed beyond measure.

The judge begins by dictating a formal statement of the case, by which it appears to the surprise of the prisoner that his counsel did not attend at every step of the proceedings up to the present, also that the prisoner has before this refused to answer and was remanded to jail. The judge asks him if he will talk now. He consents and the judge then repeats all that the lieutenant told him and urges him to confess the murder.

The prisoner stoutly denies it. The judge goes to him and describes what may have happened—a dispute about money, a sudden quarrel, a blow. The prisoner denies. The judge asks whether he hired some one else to do it. The prisoner denies. The judge reminds him that he is a Catholic and threatens him with the fear of hell. The prisoner does not fear hell because he denies the act. Then the judge leans over and whispers in his ear that his disgrace will fall upon his children. "You love them, don't you? Tell me. They are asking about you. They love you—because they don't know yet."

Then the poor prisoner sobs terribly, "My poor little ones." And the judge takes heart. "Come now. There is some good left in you. The jury will appreciate any confession which you make now. You may escape the supreme punishment. You are still young. You have long years before you to expiate your crime. You could deserve grace, and perhaps see again your children who will have pardoned you. Trust me. Confess in your own interest." He puts his hand on the prisoner's shoulder and continues in a soft voice, "It is true, then? If you cannot speak—only make some sign. Then I shall know it to be true. What? I don't understand what you say. It was you—was it not? It was you?"

"It was not me," sobs the prisoner.

Then the judge tells him that if he can establish an *alibi* he may get off. The prisoner declares that he was at home during all the night of the murder. But after a struggle he admits that he went out on the mountain to search for a horse that he had lost when smuggling him across the border.

But he did not find the horse and he has

told different stories as to whether he was at home or abroad that night. He says that he was afraid of being arrested for smuggling, and fixed his stories in the way he thought they would suit the police, since they are so particular about testimony. The judge sneers at his forms of invention, and the prisoner insists that the chief thing is now that he did not commit the murder.

After he is led out of the office, the judge and his assistant discuss the value of the reference to one's children for making a man wish to confess whether guilty or innocent, if only to save them from something. "If I had not had a headache!" says the judge. And he regrets having disclosed to the prisoner the improbability of his story about his *alibi*. "Never mind," he says, "I can coax his wife and get the truth out of her all right. The devil will be in it if I can't do that." He sends for the prisoner's wife.

The wife is a strong, energetic young woman of great spirit. She comes in with an openly defiant air. The judge warns her that if she does not tell the truth he will have her arrested as an accomplice of her husband. She replies that she is not afraid; that she cannot be an accomplice since her husband is not guilty. The judge charges her with knowing more than she will tell. She complains that it is disgraceful to treat her so. The judge asks her if she still persists in saying that her husband was at home during the night of the murder. She persists. The judge tells her that she lies. She persists in denying. Then the judge says, "Let us examine the value of your testimony." He opens the report made by his detectives and says, "Since your marriage—ten years ago—your conduct has left nothing to be desired. You are economical, faithful, industrious, honest—" "Well?" she says, "what of that?" The judge continues, "Wait. You have two children whom you adore. You are an excellent mother. They even say that when your son was ill your devotion was heroic—" "But what has all that got to do with the accusation against my husband?" she says. The judge says, "Have patience—you will see." "Then let me see," she replies. The judge goes on. "You are entitled all the more to credit because your husband does not practice the same virtue. Sometimes he gets drunk." "No," she says. "Come, now," says the judge. "That is notorious. He is brutal." "He is not brutal," she says. "It is well known that he has been convicted three or four times for striking and wounding people."

"Possibly—on holiday evenings there are disputes. But that was long ago. Now he is better and I am very happy with him."

"That astonishes me," says the judge.

"At all events," she asks, "does that prove that he killed the old man?"

The judge says, "He is avaricious."

She says, "The poor have to be so or die of hunger."

The judge says, "You defend him well."

"Did you think I would accuse him?" she exclaims, with a fine burst of indignation.

Then the judge puts the test question as follows: "Have you ever been convicted of any crime?"

"Me?" she asks, with a troubled voice.

"Yes—you."

"No," she says, losing all her former force, "I never was convicted."

"That is queer," says the judge. "There was a girl with the same name as yours, who served a month in prison for receiving stolen goods."

"Receiving stolen goods," she repeats, feebly.

"Now, then, you have not so much assurance," says the judge, and he banters her until she almost faints and the judge orders his assistant to give her a chair. As she sits down she says half aloud:—

"My God! You know that!"

The judge says, "Here is my information," and reads, "This girl went to Paris at the age of sixteen as a companion or domestic in the family of Mr. So and So."

"Is that correct?"

"Yes."

"I will continue. 'She soon became intimate with the son of this family, who was twenty-three years old. Two years later these lovers ran away, taking with them eight thousand francs which the young man had stolen from his father. On the father's complaint, the girl was arrested and sentenced to a month's imprisonment for receiving stolen goods. After serving her sentence out she disappeared. It was supposed that she returned to her own district.' Were you that girl?"

"Yes. Oh, God! But I thought that was so long ago—forgotten. It is all true, sir, but remember that for ten years I have consecrated every minute of my life to expiate that, to try to reform. A moment ago I

answered you rudely. I beg your pardon. You now have in your power not only my life, but that of my husband, and the honor of my children."

"Then your husband is ignorant of this?"

"Yes, sir! Oh, don't tell him. I beg of you on my knees. That would be a crime, yes—a crime. Listen—listen. I returned to my own district, I concealed myself, I would have rather been dead. I did not wish to stay in Paris—you understand why.—And then soon afterwards my mother died. This man loved me, urged me to marry him. I refused. I had the courage to refuse for three years. Then I was so lonesome, so sad, and he was so unhappy that I finished by consenting to marry him. I ought to have told him everything. I wanted to do so, but I could not. He would have suffered too much. For he is good, sir, I assure you" (the judge makes a gesture of some impatience), "Yes, yes, sometimes, it is true when he has drunk too much, he is brutal. I will not lie to you about that. But that happened less and less as time went on" (she weeps). "Oh, he must not know it, sir, he must not know it. He would go off, he would leave me, he would take my children away from me" (she cries out). "Oh, he would take away my children. I cannot tell you how much harm it would do. Tell me. Yes, I was guilty, but did I understand what I was doing? I was only seventeen, sir, when I went to Paris. My employers had a son. He almost took me by force, and besides, I loved him—and then he wanted to take me away because his relations intended to send him off. I did what he wanted. I did not know that he stole that money. I swear, sir, that I did not know it."

"Very well. Keep cool."

"Let us return to your husband's case," says the judge.

"Yes, sir."

"Summon up all your courage, my poor woman. Your husband is guilty."

"It is not possible. It is not possible—"

The judge says with great apparent sincerity, "To be sure he has not confessed—but I know that he was not at home on that night. There are witnesses who have told me so."

"No, sir. My God—witnesses—what witnesses? It is false."

"Now, don't lose your head," says the judge. "If you do, you will lose your husband. If you stick to your story that he was at home that night, you will go against the evidence and lose your husband. But if you tell me the truth—then if your husband was not the murderer he can tell what happened—he can tell who his companions were."

"He had no companions," she says.

"Did he go out alone?"

"Yes."

"At ten o'clock?"

"At ten o'clock."

"Did he return at five o'clock the next morning?"

"Yes, all alone."

"But are you sure it was that evening of the Ascension?"

Yes."

The judge says to his assistant, "Have you written that down?"

"Yes, your honor."

The judge then questions her as to her husband's indebtedness, and she says that he never told her about it. Perceiving his point, she exclaims:—

"No, sir, my husband did not kill a man for money. It is false—false—false."

"False, is it?" says the judge, "Your husband began by blindly denying everything and then presented me successively with two systems of defense. Now you begin with falsehood, also. All this, I tell you, does him no good."

"All I know is that my husband never murdered a man for money."

"Well," says the judge, on a new tack, "perhaps he is not as guilty as I supposed at first. Perhaps he acted without premeditation. Here is what may have taken place. Your husband may have been a little drunk and have gone to ask the old man for more time to pay the debt in. A dispute arose, the old man was still vigorous, and there may have been a struggle with the tragic end that we know. In this case, the situation of your husband is entirely changed. He is not the criminal with malice aforethought, and the punishment for what he did do may be the very lightest. You see, then, Madam, the interest you have in obtaining a complete confession from him. Otherwise, the jury will go to the limit of severity. Do you understand me?"

"Yes, sir."

"Do you wish to speak to him in the sense which I have indicated?"

"Yes, sir."

Immediately the judge sends for the husband, who is brought in again by the two gendarmes.

She begs him to tell the truth to his honor, the judge. He says it is of no use trying, that the judge wishes to find him guilty. She urges him for their children's sake to try to defend himself, and she goes so far as to suggested in a broken-hearted way the very story which the judge invented as a trap for them both. But she breaks down while trying this invention, and cries out, "I don't know anything about it, you know, but his honor, the judge, promised me just now that in that case you would not be punished, or only a very little. My God, what must you say? What ought you to do?"

"Then you, too, believe me guilty?" asks the prisoner of his wife. "You, too?"

"I don't know anything more about it," she says.

Then the prisoner turns on the judge savagely and tells him that this torture is his invention. And he turns to his wife with a sudden inspiration and says, "You know that with all my faults, I believe in God. Now, I pray God to kill my beloved children if I am a criminal."

His wife with the greatest fervor cries out, "He is innocent!"

"If is he innocent," says the judge, "why has he lied all this time?"

"It is you who have lied," says the prisoner. "You told me that you had witnesses who saw me go out of our house and you have not."

"Even if I had none, then, I have one now," says the judge. "That is your own wife. She says you did go out."

"You?" says the prisoner to his wife. The judge looks in his papers for her statement. She gazes first at her husband, then at the judge. She seems to be considering what to say, and at last looks firmly resolved.

"There," says the judge. "Your wife has told us that you went out at ten o'clock and did not return until five o'clock in the morning."

"It is not true. I did not say that," says the wife, very sharply.

"But it is written here," says the judge.

"You can write what you like," she says.

"You will have to pay me for this," says the judge angrily, and he orders his assistant to prepare a certificate for her immediate arrest as an accomplice. He sends for the gendarmes and tells them to take away the husband and to come back for the wife.

Then the wife startles the judge and his assistant by a grand burst of virtuous indignation.

"So you are furious, are you," she cries, "to miss your aim. . . . You pretend to be good. You speak softly. You want to make me send my husband to the scaffold. It is your trade to furnish heads to cut off. You must have men guilty at any price."

The gendarmes return.

"Take her away," says the judge.

The gendarmes seize her. She breaks away from them by a powerful wrench, rushes up to the judge's desk, and says, "You take a savage pleasure in all this, and call it justice. You are a brute."

"Take her away. What? Can't you two men relieve me of this lunatic?" says the judge.

The gendarmes wrestle with her, she exclaiming, "Coward! Judas! No pity, and the poorer the people you deal with the falser and more cruel you are." The gendarmes drag her along the floor out of the room.

The third act opens in the office of the prosecuting officers. The assistant of the sporting judge is there awaiting the result of the trial of the husband, which has reached the arguments. The old retiring judge comes in and wishes to shake hands. The assistant assures him that this is doing him too much honor. "Oh," says the old judge, "since this morning I am a judge no more. My dignity no longer requires me to be impolite to my inferiors." Then he asks who the old woman is who is waiting in the ante-room, and learns that she is the mother of the prisoner on trial. She has no anxiety about that case because she is sure that her son is innocent, and that the jury will be convinced of it. But she wishes to get her son to come out as soon as he is acquitted because his business has been ruined.

A rich neighbor has turned poisonous stuff from his factory into the stream where their cattle drank, and the laborers would not work because he was not on hand to pay them. She wants legal aid. The judge tells her some of the details that delay the progress of justice and of the expense. The old woman says she thought that justice was gratuitous in France. "Ah," says the judge, "yes, but the means of reaching it are not." It appears by the conversation that the case

against the friend of the deputy which the sporting judge dismissed was one of her many troubles.

Meanwhile the arguments have been made, and the room is filled with spectators and officials who are enthusiastic over the brilliant speech in which the modest prosecuting officer met the dangerous appeal to the jury of a distinguished advocate for the defense retained from the city for the purpose. The only fly in the ointment for the presiding judge is the fact just learned that a reporter of a Paris newspaper was present at the trial and had to stand up for want of a seat in the crowd of country people.

In the midst of this excitement the arrival of the attorney-general in town is announced, and the officials are agitated by the guess that he has come to offer promotion to the sporting judge.

The attorney-general arrives, and after mutual salutations he asks the sporting judge to remain as the others retire. Instead of offering him promotion the attorney-general calls his attention to the case of "Diana," in which it appears that the sporting judge was on a spree in Bordeaux and not only maltreated the police when he was drunk but ventured to claim immunity from prosecution by invoking his authority as a judge although he was masquerading in the character of a military officer.

The judge suggests that probably the attorney-general himself was young once. "Not to that extent," says the attorney-general. The judge refuses to resign on request and is threatened with prosecution and a scandal. He replies, "Prosecute, but the scandal will not fall so heavily on me as on the court. I am almost a stranger here. I am a bachelor of independent property and the set that I amuse myself with in Bordeaux will not think any the less of me because of this."

He takes leave very politely, and just afterwards the servant announces the deputy, who has come to see the attorney-general. After a little preliminary talk the deputy introduces the support of the political necessity which his intimate friend, the keeper of the seals, thinks requires much quiet prudence at this time, and says his friend relies upon the attorney-general to do his part. "Certainly, if one could tell me what it is," says the attorney-general.

"That is just what one wishes to assist," says the deputy, who then discloses to the reluctant attorney-general his knowledge that the attorney-general's own ambitious plans are familiar to him, and that taking all things together, a perfect quiet, indeed an absolutely dead calm is what is needed to preserve the equilibrium of all their political friends. The attorney-general replies that there is no occasion for anxiety, that the only thing of importance pending is the new case against the sporting judge.

"But he is one of my best friends," says the deputy, "A fair man, an excellent judge, full of energy and sense. Indeed I have recommended him to my friend"—naming a superior by his Christian name—"for the post of counsellor which is now vacant." The attorney-general then shows him the charges against the sporting judge.

The deputy glances at them and after taking a turn up and down the room, says, "Yes, but after all, if you only keep quiet, no one will know it. No scandal. The judiciary is attacked enough now without our furnishing arms to its enemies."

The attorney-general replies that unfortunately the editor of a local paper threatens to publish the facts unless that judge is turned out of that district. The deputy laughs and says there is a comic side to the situation if the attorney-general will only look at all sides. The attorney-general asks his meaning. The deputy suggests, just as a joke, that instead of prosecuting the judge the attorney-general might propose him to the authorities as counsellor for the vacant post and thereby please the recalcitrant editor, by removing him from this district, besides pleasing the deputy himself, the judge of course, and the deputy's friend who has the power to make the appointment, and there would be no scandal. The attorney-general is about to exclaim that such a course would be itself scandalous, when the deputy interrupts him. "You are mistaken. In politics there is only scandal when there is publicity." And he urges the expediency of not risking the reputation of the magistrates in general merely for the momentary punishment of one of them.

"You do not mean to ask me seriously?" says the attorney-general.

"I'll tell you what we should do," says the deputy. "Let us talk with Senator So and So. You can at the same time say a word to him in your own favor for that place you

yourself want. You won't risk anything, and you will succeed. I assure you my solution is the best. I'll go with you now. You will get there."

"Never—never," says the attorney-general feebly, as he lets the deputy hand him his hat and lead him out.

As they go the assistant in the office tells the attorney-general that the prosecuting officer has asked for a suspension of the trial.

The presiding judge and other officials and spectators enter and express amazement at the request for suspension, after such a powerful speech with a sure prospect of conviction. The judge even asks whether the prosecuting attorney is ill.

Then the prosecuting attorney comes in sadly and receives their compliments listlessly, says he is very tired, and requests an interview with the presiding judge, who fears that it may be because of some mistake of his own in the technical conduct of the trial. The other officials surmise that the self-distrustful prosecuting attorney is about to do something foolish.

Then there is a striking scene between the prosecuting attorney, the presiding judge and the attorney-general. The prosecuting attorney tells them that he doubts the guilt of the prisoner because of certain points. The attorney-general asks him why he should worry about the defense, since the other side had studied that.

"But if this man is not guilty?" says the prosecuting attorney.

"The jury will decide that. All that we have to do now is to bow to their verdict," replies the attorney-general. The prosecuting officer offers to follow their advice. Each of them indignantly refuses to give him advice and tells him that he must act on his own responsibility and not get under cover. They wash their hands of his duties, and leave him to his own resources.

His wife comes in and affectionately inquires why he is so gloomy just as he is on the eve of a success which will complete his career. He replies, "It is the success which frightens me." Then he opens his heart to her and explains that he took up the case in a partisan spirit, prepared it as a mere advocate of one side, made light in his own mind of points in favor of the prisoner which in the bottom of his soul he believes to be weighty. "Indeed," he says, "I reported everything in the prisoner's favor, with an incredible *naïveté* of bad faith. To practice our profession in that way is unjust and cruel."

His wife tries to console him by saying, "Perhaps the jury will bring in a verdict of acquittal."

"No," he says, "it will convict."

"Why," asks his wife, "did you urge conviction with such passion?"

"Why, why!" he sighs. "At first I was moderate, but after I had seen that distinguished advocate for the defense weep before the jury, I lost my self-control. And contrary to my habit, I replied. When I rose the second time I was like a soldier who sees defeat before him and fights with despair. From that moment the prisoner did not exist for me. I did not care anything about protecting society or maintaining the accusation. I fought against the advocate on the other side. It was an oratorical tournament, a comedy of actors. I was bound to win at any cost. I was bent on convincing the jury, on bringing it back to me, on snatching from it the verdict. I did not even think of the prisoner. I tell you, I thought of myself, of my vanity, of my reputation, of my honor, of my future. . . . It is shameful. I repeat, it is shameful. At all costs I was determined to prevent the acquittal which I felt was certainly coming. I was so afraid of not succeeding that I used every argument, good and bad, even those which pictured to these startled jurors their own dwellings in flames, and their families murdered. I called on the vengeance of God for judges who would not judge severely. And all this I did in good faith—or rather, without any conscience—in one storm of passion, in one blast of anger against that advocate whom I then hated with all my soul. My success was greater than I wished; the jury now is ready to obey me, and I, my dear, I permit myself to be congratulated, and shaken hands with—. See what it is to be an official prosecutor."

"Don't take it so hard," says his wife. "There are probably not ten men in France who would have done otherwise."

"Yes," he says, "and that's the worst of it."

At this moment the assistant enters, saying that the presiding judge is waiting to learn when the hearing can be resumed.

"At once," he says.

His wife asks, "What shall you do?"

He turns towards her as he goes out into the court room and with much feeling of

apparent relief answers, "My duty as an honest man."

His communication of his doubts to the jury causes the acquittal of the prisoner.

The fourth act opens with an amusing scene in the robing room of the court house when the business of the term has closed and the presiding judge is changing his clothes, while the peasant judge is toadying him. Then the prosecuting officer enters and they ask him if he feels better now that the man whom he prosecuted is acquitted. He says that he is very happy over it and that it is better that ten guilty persons should escape than that one innocent should suffer.

The peasant judge goes out and the prosecuting attorney accuses the presiding judge of having done unnecessary harm to the prisoner and his family by disclosing in court the fact that the prisoner's wife had had a criminal record before her marriage. The presiding judge sneers at the notion that such people have tender susceptibilities.

"If you don't like the law, you can try to change it," says the presiding officer.

"Alas," says the melancholy prosecutor, "if I were in power I should probably do as others do, and think chiefly of how to keep the ministry in office."

Then the presiding judge hurries off to catch a train to the country, where he is engaged to meet a hunting party.

The assistant comes in and arranges with the prosecutor the release of the prisoner's wife, who was detained after her arrest on the complaint of the sporting judge; and gets permission to allow the acquitted prisoner to wait in this room to avoid curious spectators while certain necessary formalities are being concluded. The prosecutor goes home, and the acquitted prisoner enters.

The assistant receives him kindly, and says that at last it is all over. The acquitted man replies, "It is finished in court, but it is not finished in my life. I am acquitted, but my life is ruined."

The mother of the acquitted man arrives, and he breaks down and weeps like a child at her knees, complaining bitterly of his wife's past, which he knew nothing of until the presiding judge mentioned it in court. His mother tells him his business is ruined, that his home is seized by creditors, and that she had to take his children away from school because they were treated as the children of a murderer. He says, "We must go to America."

"And," she says, "when they ask after their mother?"

"Tell them that she is dead," he says.

As his mother retires to prepare the children for the journey his wife enters the room where he and she are now alone. He does not look at her. She says in a voice thick with emotion.

"Pardon!"

"Never."

"No. Do not say never!"

"Did the judge lie?"

"No."

"Then you are a wretch."

"Yes, but forgive me."

"I should rather kill you."

"Yes, but forgive me."

"You are nothing—nothing but a Parisian wench without honor, without shame, without honesty."

"Yes, insult me. Beat me."

"You have lied to me for ten years."

"Ah, I wanted to tell you. How often have I begun to tell the frightful story. But I had not the courage. I was afraid of your anger, and of the harm you might do—I saw you so happy."

"You came out of your prison, from your vicious life and picked me out as your dupe."

"Oh! To think that he believes that of me! My God!"

"You are the cause of all our misfortunes. You have brought us all under the curse of heaven. Don't speak to me."

"Have you no pity? Don't you believe that I suffer?"

"If you suffer, you deserve it. You don't suffer enough. But why should I be your victim? My only hope is to forget you."

"Pardon."

"Never."

"Don't speak that word. God alone has the right to say that. I will go home. I will be your servant, the humblest—if you wish."

"We have no home. We have nothing left. All is lost. And it is your fault."

"Our children need me."

"You shall not see them again, nor speak to them ever."

"Oh, no, no. My children, my children are myself! You can cut me to pieces, but you cannot prevent my children being my children."

"You are unworthy to take care of them."

"Unworthy! There is no unworthiness that lasts. Have I been wanting in anything to

them? If I have not been a bad mother, my right to my children is entire and absolute. Unworthy! I could be a thousand times more guilty. More 'unworthy' as you say, but neither you nor the priests, nor God have the right to take my children from me. As a woman I may have been guilty, but as a mother no one can reproach me. No one can steal my children from me. And you who propose to do it are a wretch. Yes, because you wish to revenge yourself upon me by separating me from them. You are nothing but a coward You—and when you say I am unworthy to bring them up, you lie. Think of it! It is impossible!"

"You are right. I do revenge myself. My mother has already taken my children away."

"I will find them."

"America is large."

"I will find them."

"Then I will tell them why I have separated them from you."

"Never! That—never! I will obey you. But swear—"

At this moment the assistant enters and tells the acquitted man that he is free. His wife says to the assistant, "Wait a moment, sir," and to her husband, "I accept the separation, since it must be. I will disappear. You shall never hear of me again. But in exchange for this atrocious sacrifice, swear to me solemnly that you will never tell—"

"I swear it."

"Swear that you will never say anything which could lessen their love for me."

"I swear it."

"Promise, also, I beg of you, in the name of our happiness and of my suffering, promise not to let them forget me. You will let them pray for me, will you not?"

" I swear it."

"Then go. My life is over."

"Adieu!" he says quickly, and rushes out without touching her or looking at her.

As he disappears the sporting judge enters, and the assistant says, "Here is the wife of the man who was acquitted."

The sporting judge replies, "Oh, she is there, is she? The prosecutor spoke to me about her. Very well, I withdraw my complaints. Now that I am counsellor, I have no wish to come back here for an investigation. Proceed with the necessary formalities to let her go." Then the judge turns to the wife and says, "Since you have been imprisoned awhile, I am willing to let you out on probation, perhaps even to withdraw my complaints if you express regret for having insulted me."

"I do not regret insulting you."

"Do you want to go back to prison?"

"Ah, poor man, if you only knew how indifferent I am now as to going to prison."

"Why—"

"Because I have nothing left — neither house, nor home, nor husband nor children, and I believe—"

"What?"

"I believe that you are the cause of all this evil."

"You have both been acquitted. What more do you want?"

"It is true we have been acquitted, but all the same I am no longer an honest woman to my husband, my children, or the world."

He tells her that the law and not the magistrate is responsible.

She says, "Then you can ruin people and not be responsible?"

Suddenly she catches sight of a sharp knife on his desk which he uses as a paper cutter. She secretly grasps it, and waits for an opportunity.

He says, "Now I order you to go."

She speaks deliberately as follows:—

"Listen. For the last time I demand of you what you will do to restore what you have taken from me, to give me back my children?"

"I have nothing to say to you. I owe you nothing."

"You owe me nothing! You owe me more than my life. My children! I shall never see them again. What you have taken is the happiness of every minute, their kisses in the evening, the pride I had in seeing them grow up. Never—never more shall I hear them say, 'Mamma.' It is as if they were dead. It is as if you had killed them before me. (She prepares to strike). Yes, that is your work. You wicked judges! You take an innocent man and make him a fraud, and you turn an honest woman, a mother, into a criminal."

She stabs him, and as he falls he clutches her dress and dies holding her fast.

The feelings and conduct of the prosecuting attorney who is afraid to get a verdict of guilty because of his own doubts are rather the imaginary phases of morals which a French author not a lawyer would wish a

professional advocate to experience. An English or an American lawyer who had made such a speech to a jury as the prosecutor describes would hardly suffer doubts that he had discussed before to check him then. As usual in stories written to point a moral, the character intended by the author to enforce the lesson is the least natural. But in this instance it furnishes a fine opportunity for an actor of delicate perception.

The sporting judge is the most thoroughly developed character in the play. He is entirely natural in his artificial ways.

The brilliant and inspiring nature of the prisoner's wife lends deep pathos to her tragic struggle against the fate imposed upon her by the heartless routine of legal proceedings.

The only person in the play who remains contented at the end is the old retired judge, whose success counts in being as just as the law allows and kinder.

The piece is a fine illustration of the genius, character and aspiration of the French stage. It really holds the mirror up to nature.

Boston, Massachusetts.

The Next Great Step in Jurisprudence

WE have at present in American law no such unifying influence as that contributed by Blackstone's Commentaries at an earlier period, and Mr. James DeWitt Andrews, writing in the *Yale Law Journal*, vigorously urges the need of a logically co-ordinated system of law, uniform throughout the United States so far as conditions and needs are identical, such as Blackstone's Commentaries tended to promote.

"With such a system," he adds, "conflict could not long exist, because two conflicting rules, even though legally operative in different jurisdictions, would not long survive direct contrast in immediate juxtaposition."

Some people think that the time is not ripe for such an undertaking, for "externally the laws of the various states seem to present a medley of contradictions, a chaotic assortment of incongruous ideas, and all our comprehensive books designed to cover the whole field are thrown together in utter disregard of all scientific principles of arrangement and expression." But Dr. Andrews declares convincingly that while there is still some controversy on minor points, "upon the whole, the fundamental questions of our law are so well settled and so generally understood as to be ready to yield to the sifting of science for the purpose of logical organization and exposition. Mr. Waite states a truth which any one who will take the pains to examine our whole body of law will corroborate: '*There is a remarkably harmony in the general principles of American law.* There are discrepancies and contradictions in some instances, but notwithstanding these, it may be regarded as settled that *there is a great uniform, settled system of American law.*' (Actions and Defences, Preface.)"

Dr. Andrews then defines the scientific spirit in jurisprudence, contrasting it with that spirit which inertly opposes all change, "warning those who would venture beyond known regions that further progress is impossible." "The function of practical jurisprudence," he says, "is to sift out and make available by visible expression in logical relation what is valuable in the accumulated mass of ancient principles, novel doctrines and modern rules, eliminating those which have become wholly obsolete and innocuous; in other words, to keep the actual law knowable and to guide and guard the expression of law in its formation." This spirit is opposed by inertia in intellectual matters. And the conflict is really one between the empiricists and the institutionists. "The empiricists insist that there is no system; that every phenomenon is an isolated event, or, at best, that

the one branch is a system by itself and every topic complete in itself. In this manner the empiricist reaches the pinnacle of his aspirations when he achieves the proud designation of '*specialist*.' The institutionists, on the other hand, maintain that jurisprudence exists; that it is a science, and that its practical application will reduce any body of municipal law to a plain, simple system, unembarrassed by the breadth of domain, elaborateness and minuteness of legislation or the number of rules and precedents. *The talisman, the touchstone, the guiding principle in this science, as in every other, is analysis and classification.*"

Moreover, as Mr. Waite said (see *supra*), there is a uniform, settled system of American law, or, as Dr. Andrews asserts, "American law is an integral system." The belief of those who think that because there are fifty different jurisdictions there are fifty systems of American law is clearly wrong. As Dr. Andrews well says:—

"The body of our law is not so vast as many are led to suppose by reason of the seeming vastness of the written records in which it is enveloped. The vast and widely scattered material embraces a comparatively small body of rules and principles capable of being brought into clear light and stated in a reasonable compass. Many persons suppose that we have a variety of law, corresponding with the number of jurisdictions applying it. That is, that we have fifty systems of law. But all those are equivalent systems, in outline identical and in the main substantively alike. Truly, we have some divergence of construction, interpretation and application, but, on a given point, proposition or rule, there is, in most cases, uniformity, and it is very seldom that there exist more than two conflicting rules upon an identical proposition."

We have, therefore, a proper starting point for a systematic statement of American law in the integrity of the system as it exists, and once we state the law in the form of a rational and uniform system, "the uniformity of the statute law will follow as a consesequence." There should be no mistake, however, with regard to the course of procedure contemplated. "The main object of codification, or of any exposition desirable at the present day, *is not the invention of new law*, but better expression of that which exists." The main reason why Mr. David Dudley Field failed in his efforts to impose codification upon American jurisprudence, says Mr. Andrews, is because of his "lack of attention to the essential principles which must be observed in planning a code or any elaborate system by means of which to express the law." What is wanted is a statement of the common law, not a summary which leaves the common law unexpressed and inaccessible though wrongly presumed to inhere in the language used. Mr. Andrews quotes Sheldon Amos, himself an advocate of codification, as saying the New York Civil Code failed because—

"The conception of the code entertained by the commissioners was not a scientific system, compelling all the heterogeneous elements of existing law to enter into compartments judicially mapped out, but a republication of the statute and common law on such principles of classification as might do as little violence as possible to the methods and language adopted in the common text-books."

The fact that Field, as well as Austin and Bentham, failed, does not prove that an orderly system of law cannot be formulated. We may learn much from Austin. "The one essential principle of codification and of Austin's philosophy is classification." And Dr. Andrews lays great emphasis on the importance of logical classification.

"The practical working out of this great enterprise requires that system shall govern every process involved.

"There are conceived to be the following different processes, every one of which must be governed by a logical system, carefully worked out:—

"*First*—The system of classification above spoken of, giving order, showing the relative connection of subjects, avoiding repetitions, assuring completeness, clearness and conciseness.

"*Second*—A system of research, aiding in collecting the materials, ensuring the possession of the actual law, avoiding the insertion of obsolete rules.

"*Third*—A system of examining cases, ensuring the citation of cases in point and materially reducing the bulk of ordinary citation.

"*Fourth*—A system of citation, facilitating historical research, ensuring exhaustive citation of cases which now rule the courts, and enabling the persons using the books to refer to all the cases, from the earliest times.

"*Fifth*—A system of constructing the text,

focussing all the law upon every proposition."

By strict adherence to these logical systems, Dr. Andrews considers that it will be possible to give a more complete treatment of the law in twenty volumes than is now given in forty, "provided, the *text* is devoted entirely to law; no *text* space is wasted by padding it with obsolete rules; the citation is not padded with a mass of cases, supporting elementary rules; repetition is carefully avoided by the plan; the citation is of cases in point where the question was actually involved and really decided."

Dr. Andrews in concluding emphasizes the necessity of financial support for the proposed statement of the American *corpus juris*. He says that "constructive genius and the efficient plan must have the support of *dynamic energy* and national feeling," meaning by "dynamic energy" financial support. He adds:

"While a foundation is, no doubt, the ideal method of support, other practical methods are obvious. The work is clearly one of national importance and is deserving of the active co-operation of the legal profession in its creation and the hearty support of all with energy and natural feeling."

Vagueness of the Definition of Criminal Conspiracy in Restraint of Trade

THE common law in this country, as it applies to criminal conspiracies in restraint of trade, is carefully investigated by Arthur M. Allen of Providence, R. I., in a valuable article in the *Harvard Law Review*. By reviewing a large number of cases decided at different times in the United States on common law rather than on statutory grounds, he shows that the courts have not given as broad scope to the doctrine of conspiracy in restraint of trade as the American public is disposed to think. His conclusions are as follows:—

"(1) That the courts will not hold a conspiracy criminal *merely* on the ground that it has a tendency to prejudice the public; the purpose or means must be shown to be civilly or criminally illegal.

"(2) There is not, under the decisions up to this time, any well-recognized crime known as a criminal conspiracy in restraint of trade, that is, *sui generis*, which will be held to be criminal when it does not come within the ordinary definitions.

"(3) So far as combinations in restraint of trade are criminal at all, they divide themselves into not more than four classes: (*a*) combinations made criminal by certain old English statutes, and these are not generally regarded as being now in force in the United States; (*b*) combinations which are criminal by reason of illegality of purpose or means; (*c*) possibly combinations coming within the definitions of forestalling, regrating, or engrossing, but it is doubtful if these are now in force in this country, and they certainly are not to their full extent; (*d*) according to *dicta*, rather than decisions, combinations to create *monopolies* of necessities of life. Clearly the most usual forms of agreements among dealers in commodities to fix and regulate prices, when the prices are not unreasonable, the means used are not illegal, and the parties to the agreement do not comprise all the dealers in the community, do not come within any of the above classes."

Mr. Allen thinks that if monopolies of necessities of life are to be held criminal at common law many difficulties will arise. How are necessities to be defined? he asks. Again:—

"What constitutes a monopoly, and how wide in extent must it be? For example, an agreement among all the dealers of a single city is held not to amount to a monopoly. *Kellogg* v. *Larkin*, 3 Pinn. (Wis.) 123. Nor does an agreement by twenty salt dealers, although a large proportion of all the dealers in a province, constitute a monopoly. *Ontario Salt Co.* v. *Merchants Salt Co.*, 18 Grant's Ch. (Can.) 540. On the other hand it has

been said, in civil cases, that it is not necessary that all the dealers in a certain community should be in a combination in order to constitute a monopoly. See *Nester* v. *Brewing Co.*, 161 Pa. St. 473, 481, where the court said: 'The application of the rules does not depend upon the number of those who may be implicated, or to the extent of space, included in the combination.' In *Richardson* v. *Buhl*, 77 Mich. 632, 658, the court said: 'All combinations among persons or corporations for the purpose of regulating or controlling the price of merchandise, or any of the necessaries of life, are monopolies and intolerable.' *Cf.* definition of monopoly in Black's Law Dictionary, quoted in 29 R. I. 260."

It is not easy, he continues, to define the nature of a monopoly, or to formulate a fair rule regarding the reasonableness or unreasonableness of rates. Accordingly, he thinks the best solution of the problem, is to say, with Judge Taft in the *Addyston Pipe* case:—

"That trade agreements are not punishable under the rules of the common law, and then to look to the legislature to pass adequate and definite measures to protect the public. Clearly some combinations, both of labor and capital, should be restrained or punished. It is intolerable that dealers in the necessaries of life should have the power to extort exorbitant profits from the consumer by any means whatever. The demands of labor are often unreasonable and impose hardship, not only on the employer and the purchaser of the products of labor, but upon the laboring men themselves. A remedy is necessary, but an adequate one cannot be found in the common law as it has, up to this time, developed. The criminal law, in particular, should be definite and exact, and not be made to depend upon the shifting economic opinions of the courts. For these reasons legislation, not the common law, should, in cases relating to business agreements, define the crime as well as impose the penalty."

The Needed Reform of Patent Procedure

WHILE our patent system is the best in the world, the enormous increase in the number of applications, and the increasing complexity and refinement of invention, have rendered it impossible for the government to maintain a proper standard of efficiency with the limited facilities at its disposal," says Mr. William Macomber, author of "The Fixed Law of Patents," in the *North American Review* for June. The Patent Office plant and force should be increased, and this may be done without cost to the government, because the net earnings every year show a needlessly large profit. Moreover, patent procedure should be made certain, speedy, and inexpensive. For "the practice and procedure in patent causes is so cumbersome and slow and so expensive as to render the judicial establishment of a patent a luxury wholly beyond all but the few. This is creating a monopoly founded not upon inventive genius but upon financial power to dominate the field." To illustrate, this is the prevailing method of determining the validity of a patent in the courts:—

"When the cause is at issue the taking of testimony begins—not in court, but here and there, all over the country, before notaries. The testimony is laboriously written out on the typewriter. We go wherever a witness happens to reside. Everything goes into the record; there is no one to rule on the evidence. As an illustration of the tramping that is done, I cite a case within my own experience. Testimony was taken in Detroit, Buffalo, Detroit, Los Angeles, Chicago, Detroit, Troy, Buffalo, Chicago, Schenectady and Detroit, in the order given. This is common.

"From one to three years may complete a record seldom containing less than five hundred pages and sometimes assuming the proportions of the automobile cases, recently decided, which made a record of *thirty-six large octavo volumes*. Years may elapse before argument and decision. Then comes the appeal, reprinting the record and briefs, and

in time an opinion is handed down. The cost now may be $5,000 or $50,000. Is this final? Oh, no; this merely gives the patentee, if he succeeds, the right to enjoin the infringement that may have continued all these years and to prove damages *if he can*. But can he? The equity docket in New York, as a fair average, discloses only four cases of substantial recovery out of fifty-four cases where accordings were decreed. The case of *Eastman* v. *Mayor, etc.* (134 Fed. Rep. 844), was begun in 1877; decree for an accounting was ordered in 1891; accounting was completed and judgment for $818,074.32 was ordered in 1897. In 1904—twenty-seven years after he began his suit and seven years after he had been awarded an enormous fortune—the patentee was finally defeated and mulcted with costs. Nor is it the patentee alone who suffers. Six patents were the foundation of a successful hay-press industry (127 Fed. Rep. 363). After much hard fighting, the company had four of its patents held valid and infringed at the hands of an appellate court. Within a year, on rehearing, this court reversed itself and held all of the patents void but one. It took seven years to complete that accounting, and, owing to the fact that five-sixths of the patents had been held void, the company was unable to segregate the damages attributable to the single patent still good, and the result was six cents damages and half the costs. The case of *Tuttle* v. *Claflin* (76 Fed. Rep. 227) was in the courts eighteen years, survived two masters, was nine years in the accounting and finally ended in a lump-sum award by the appellate court. . . .

"Bad as this is, it is far from the worst. In 1891 the United States Circuit Courts of Appeals were established—one in each of the nine circuits—and these courts were given final appellate jurisdiction of patent causes. A decision of any one of these nine Circuit Courts of Appeals is final in a patent cause for that particular patent on the particular facts presented in that particular circuit, but it is *not a final adjudication upon that patent as to any other circuit*. While there is supposed to be comity between appellate courts, as a matter of fact there is none. The rubber-tire case (*Consolidated* v. *Diamond*, 157 Fed. Rep. 677) and the bottle-stopper case settle that question."

The remedy which the author proposes for these abuses in patent procedure is to be found, first, in the establishment of a Patent Court for hearing patent causes in the first instance. "It should consist of nine judges, one in each of the nine circuits, whose duty it should be to *hear, try and determine such causes, having the evidence adduced before them subject to ruling and exception*, after the manner of state courts of equity. The present system of taking testimony hither and yon before notaries should be abolished. In cases where witnesses are remote, commission should issue to the patent judge of the circuit wherein the witness resides; but such commission should issue only upon proof of the materiality of the evidence sought and in no case for the taking of expert testimony. Moreover, the present practice of adducing endless expert evidence should be stopped. Ordinarily one expert on each side is enough.

"Interference cases should be sent to the patent judge of the circuit most centrally located with reference to the evidence to be adduced and then and there decided in the same manner as a patent cause, but with additional safeguard that such trial shall be held behind closed doors to prevent disclosure of unpatented inventions.

"The next step is the establishment at Washington of a Court of Patent Appeals. To this one central court every appeal from every patent judge should be taken and that court should be given final appellate jurisdiction. It should be composed of five judges, all of them trained in the patent law. The method of appeal should be by case and exceptions; the record made by counsel and settled before the patent judge who heard the case, to the end that the present enormous cost of printing may be reduced and that the appellate court may not be burdened with a padded and cumbersome record.

"Such a change in no wise disturbs the great body of case law relating to patents. It is a *change of jurisdiction, but not of system*. The great body of rules, both in law and in equity, would remain in force, *with the exception that the present conflict and chaos of law and rule would be eliminated entirely*."

Reviews of Books

TIFFANY'S PERSONS AND DOMESTIC RELATIONS

Tiffany's Persons and Domestic Relations. 2d ed., revised by Roger W. Cooley, author of "Briefs on the Law of Insurance," and special lecturer in Legal Bibliography. Hornbook series. West Publishing Co., St. Paul, Minn. Pp. 551+table of cases and index 105. ($3.75.)

THE first edition of this standard treatise was published in 1896, and its popularity was due to the satisfactory manner in which it met the demand for a comprehensive treatise on the common law of persons as modified by statute in the United States. The arrangement was a decided merit, the rule of law being conspicuously stated in black type, followed in each case by explanatory text. The plan of treatment followed did not, to be sure, enable the reader to ascertain the statute law of his own state. The common law rule was first set forth, being followed by the substance of such statutes as have been generally adopted, and their interpretation by the courts, leaving the reader to ascertain the law of his own state for himself. But as a practitioner is assumed either to be pretty familiar with the statute law of his state or to be able to turn to it readily, this method cannot be criticised; moreover, the wisdom of concentrating the law student's attention upon local rules to the neglect of those generally prevailing is open to doubt. So that Tiffany's Persons and Domestic Relations was well designed to prove serviceable, and but few inaccuracies were noticed in the first edition.

During the past fourteen years the statute law has undergone much change, particularly with reference to the property and contract rights of married women, consequently Mr. Cooley found it necessary to make some additions to the text, the material additions being in that portion of the work dealing with the separate property of married women and in the chapter on Separation and Divorce, a section relating to the extraterritorial effect of divorce having been added. The principal work of the revisor has been the incorporation of the later decisions into the notes. Even in the case of the law of Master and Servant, where it might have been expected that there would have been important changes, and where changes are certainly impending, the editor has seen fit to retain the original text substantially unaltered. A book so largely concerned, however, with fundamental doctrines does not require that frequent re-vamping necessary in the case of treatises which cover a subject with greater minuteness. In the law of divorce, for example, there has been some activity of recent years on the part of legislatures, yet it has scarcely resulted in noteworthy innovations nor radically modified the principles set forth in this volume on its first appearance.

The second edition of the work enables it to keep pace with recent developments in the law, its citations being sufficiently complete, and on the whole it well fulfills its purpose.

WILCOX'S MUNICIPAL FRANCHISES

Municipal Franchises: A Description of the Terms and Conditions upon which Private Corporations enjoy Special Privileges in the Streets of American Cities. By Delos F. Wilcox, Ph.D., Chief of the Bureau of Franchises of the Public Service Commission for the First District of New York. (In two volumes.) V. I, Introductory, Pipe and Wire Franchises. Gervaise Press, Rochester; Engineering News Book Department, New York, sales agents. Pp. xix, 662+bibliography and index 48. ($5.)

IN "Municipal Franchises" Dr. Delos F. Wilcox essays a new field in bookmaking. For while there have been numberless magazine articles and many special reports as well as a few books written on the question of municipal as against private ownership of public utilities, and also books have been issued on the law of franchises, this volume is thought to be the first one ever published having for its subject the analysis and description of municipal franchises as they exist in actual operation in the cities of America.

Dr. Wilcox states that it is his purpose, in this book, "to simplify, as far as possible, fundamental conceptions as to the nature and purpose of franchise grants; to state as clearly as possible the necessary conditions to be imposed in connection with various classes of franchises; to describe the best types of franchises actually in force in different cities of the country; and, finally, to discuss

in a general way the principles involved in the regulation of public service utilities by means of taxation, rate regulation, public service commissions, the referendum, and municipal ownership."

The work is to be issued in two volumes of which the one under consideration is the first. It includes the preliminary discussion of fundamental principles and illustrative chapters on electric light, telephone, telegraph, signal, electrical conduit, water, sewer, heating, refrigerating, pneumatic tube, pipe-line and gas franchises, all treated in a highly technical and exhaustive but at the same time interesting manner.

Dr. Wilcox aims primarily to present an analysis of facts and conditions in such a form as to be available for the use of officials having the responsibility of granting franchises or enforcing franchise contracts, of special students of public affairs, and of citizens who, individually or through semi-public organizations, are endeavoring to bring intelligence to bear in a practical way on the governmental problems of their home cities; but he insists that his efforts can be of use only to such persons, whether in official or private life, as are, in good faith, seeking light upon this most complex problem, and will approach it not from the standpoint of personal or private interests, but from that of the public good.

CORPORATION MANUAL FOR 1910

The Corporation Manual: Statutory Provisions Relating to the Organization, Management, Regulation and Taxation of Domestic Business Corporations, and to the Admission, Regulation and Taxation of Foreign Corporations in the several States and Territories of the United States, arranged under a uniform classification; Corporation Laws of Alaska, Philippine Islands and Porto Rico, Federal Statutes affecting Business Corporations, and Digest of Business Corporation Laws of Mexico; and Cyclopedia of Corporation Forms and Precedents. Edited by John S. Parker, of the New York bar. 16th edition. Corporation Manual Company, New York. Pp. xvi, 1904. ($6.50 *net*.)

IN issuing the sixteenth edition of this valuable compilation, it is the purpose to include the amendments in the corporation laws relating to business corporations that have been enacted at the sessions of the legislatures of the various states and territories since the fifteenth edition, and, at the same time the editors have taken the opportunity to revise and rewrite the entire subject-matter for several of the states. The enlargement occasioned by these changes has made it necessary to omit from this edition the corporation laws of the Dominion of Canada and the several Canadian provinces which have heretofore been included; but to make up for this omission, the federal statutes affecting business corporations have been inserted, including the anti-trust law, interstate commerce law, and the corporation tax law and regulations.

As in previous editions the matter for each of the states is grouped under a uniform classification, and wherever practicable the full text of the statute provision is given under the appropriate heading of the classification. Thus the volume contains the statutory corporation laws of all the states in available form, a feature which will be greatly appreciated by the busy practising lawyer, who wishes to segregate the homogeneous statutory provisions of all the jurisdictions in the country in order to examine the authorities in those having cases directly in point.

The editor-in-chief is Mr. John S. Parker, of the New York bar, and his assistants on the editorial board are Messrs. Franklin A. Wagner, George Tumpson and Frederick W. Keasbey, and there is an associate editor for each state.

While primarily intended for the practical use of lawyers, this compilation will also be found a valuable reference aid by all who are interested in the study of modern industrial conditions.

A somewhat full discussion of the license tax system of Louisiana is embodied in the paper of W. O. Hart, Esq., of the New Orleans bar, a member of the Louisiana Tax Commission, now issued in a pamphlet of about ninety pages. Mr. Hart read this paper at the Third International Conference on State and Local Taxation at Louisville last September. He traces historically the license tax system as set forth in constitutional provisions, in statutes, and in the decisions of the state Supreme Court.

BOOKS RECEIVED

RECEIPT of the following books, is acknowledged:—

State Bar Association of Connecticut; Annual Report, 1910. Edited by James E. Wheeler, New Haven, secretary. Pp. 126.

New York State Bar Association; Proceedings of the Thirty-Third Annual Meeting, held at Rochester January 18, 20, 21, 1910. The Argus Company, Albany. Pp. vi, 910.

Report of Atlantic City Conference on Workmen's Compensation Acts, held at Atlantic City, N. J., July 29–31, 1909. H. V. Mercer, secretary, Minneapolis, Minn. Pp. 319+index 14. (Paper, 50 cts.)

A Treatise on Secret Liens and Reputed Ownership. By Abram I. Elkus and Garrard Glenn, of the New York bar. Baker, Voorhis & Co., New York. Pp. xxx, 183+index 11. ($3.50.)

Laws and Contracts and Legal Ethics; an address in the Hubbard course on Legal Ethics at the Commencement exercises of the Albany Law School, June 9, 1910. By Hon. Pliny T. Sexton, LL.B., LL.D. Pp. 28. (Pamphlet.)

A Treatise on International Law. By William Edward Hall, M.A. 6th edition, edited by J. B. Atlay, M.A., of Lincoln's Inn, Barrister-at-Law. Oxford University Press, New York, Toronto, and London; Stevens & Sons, Ltd., London. Pp. xxiv, 743+ table of cases and index 25. (£ 1, 1s. *net*.)

An Index-Digest of Decisions under the Federal Safety Appliance Acts, together with relevant excerpts from other cases in which the acts have been construed. Prepared by Otis Beall Kent, by direction of the Interstate Commerce Commission. Government Printing Office, Washington. Pp. xvi, 294. (70 cts. cloth, 40 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.)

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.)

Notes of Periodicals

That racial prejudice is most violent in those sections of the United States where illiteracy is greatest is the opinion of Prof. Du Bois of Atlantic University, writing in the *Editorial Review* for May. He earnestly argues the revival and enactment of the Blair bill, favored by Dr. Felix Adler and others, by which federal aid would be given to free common school education in all states where, and so long as, illiteracy exceeds a certain minimum percentage.

That employers would not have to pay so much to injured employees if the Wainwright workmen's compensation bill were passed by the New York legislature, as they are paying now in civil damages recovered in litigation, was shown by a table prepared by C. L. Chute, copied in the *Survey* of May 14. The aggregate payments in twenty-two cases amounted to $15,215, of which lawyers obtained $7,965 in fees. Under the Wainwright award the estimated amount due the same employees would be $12,362.68.

The most interesting discussion, probably, that has yet appeared, of the cost of living was published in the form of a symposium in the June *Cosmopolitan* on "The Problem of Subsistence," to which the contributors were: Charles Edward Russell, Frank Greene, managing editor of *Bradstreet's*, S. F. Taylor, Prof. E. R. A. Seligman of Columbia, Prof. J. Pease Norton of Yale, Secretary of Agriculture James Wilson, John Mitchell, Nahum J. Bachelder, Marcus M. Marks, John Wanamaker, Joseph French Johnson, John Spargo, S. R. Guggenheim, Lorton Horton, John A. Green, James J. Hill, Louis F. Swift of Swift & Company, Prof. Thomas Nixon Carver of Harvard, and Senator Henry Cabot Lodge.

A. Maurice Low writes in the *National Review* for May of the miscarriages in the administration of justice in the United States. "Perhaps one of the most ridiculous decisions rendered," he says, "which is a direct invitation to dishonest men to be dishonest without risk of punishment, was that of a tribunal hitherto as highly respected as the Supreme Court of Massachusetts, a state whose judiciary has always been held in high regard by the country." He refers to the decision that an automobile is not a "carriage," within the meaning of the statute providing owners of public vehicles with a remedy for the non-payment of fare (see 22 *Green Bag* 307). The defect thus revealed in the law has since been cured by new legislation.

Edward W. Harden, writing in the *Outlook*, says: "Leading economists are all but agreed that the world's increasing production of gold is the principal cause of the increasing cost of all living, of all industrial activity. However that may be, the railways alone of all the country's various forms of invested capital have been caught between the rigidity of the price at which they are compelled to dispose of their service and the uncontrollable cost of producing it." The writer gives a table showing "how small a proportion of the individual's living expenses is assessed by the railways. . . . The point is, simply,

that to grant the railways some increase in freight rates in partial compensation of the shrunken commodity value of their earnings would not mean oppression of the consumer, or even savor of it."

William Bayard Hale writes in the *World's Work* for June of President Taft's interest in the filling of judicial offices. "He was wrestling, during my week in Washington, with the appointment of four or five federal judges. Delegations and candidates from Texas, northern Ohio, Maryland, come and go. The President impresses it upon all that he desires and seeks but one thing, namely, the best man who can be found and persuaded to take the place. He asks many direct and searching questions. Does the suggested candidate stand at the head of his profession in his neighborhood? Is he in active practice? What are the facts as to his health? What was the real truth about this or another episode of his career? Is he a college graduate? (This is always an early question.) A man of general culture, breadth of view?"

That the influence of the Southern Pacific Railroad in California politics has been sinister is the theme of Charles Edward Russell's article in the June *Hampton's* on "Scientific Corruption of Politics." We are told that it is this influence which "stopped the graft prosecution in San Francisco; that enabled Ruef, Calhoun, and Schmitz to escape; that defeated Francis J. Heney at the polls; and morally this is the influence responsible for the hand that tried to assassinate him."

Index to Periodicals

Articles on Topics of Legal Science and Related Subjects

"Act of State." "The 'Act of State' Doctrine." By Howard Thayer Kingsbury. 4 *American Journal of International Law* 359 (Apr.).

Adjudication. "Common Law and the Common Man." By Herbert Pope. 5 *Illinois Law Review* 22 (May).

An earnest plea that judges shall look beyond the actual issues arising from the special circumstances of the controversies brought before them, and lay down general rules which will enable the common man more readily to ascertain the state of the law.

Admiralty. "How the Great Lakes Became 'High Seas,' and Their Statutes Viewed from the Standpoint of International Law." By Harry E. Hunt. 4 *American Journal of International Law* 285 (Apr.).

Treats of admiralty jurisdiction over the Great Lakes, their ownership, and rights of navigation, wrecking, fishing, criminal jurisdiction, etc.

"American Corpus Juris." "The Next Great Step in Jurisprudence." By J. DeWitt Andrews. 19 *Yale Law Journal* 485 (May).

Dr. Andrews, with Mr. Lucien Hugh Alexander of Philadelphia and Dean George W. Kirchwey of Columbia Law School, is one of the authors of the plan for the proposed statement of the American *corpus juris*, presented in the *Green Bag* for February, 1910. For an abstract of this article see p. 405 *supra*.

British Constitution. See Government.

Carriers. "Contract Limitations of the Common Carrier's Liability." By Edwin C. Goddard. 8 *Michigan Law Review* 531 (May).

Codification. "Codification in the Philippines." By Charles S. Lobingier, Judge of the Court of First Instance. 10 *Journal of Comparative Legislation*, pt. 2, p. 239 (Apr.).

Treating of the situation as regards the proposed unification of the Civil and Commercial Codes, and showing to what extent the work of the Commissioners of Uniform State Laws has been utilized in the Philippines.

See "American *Corpus Juris*."

Comparative Jurisprudence. "The Unification of Law." By the Rt. Hon. Lord Justice Kennedy. 10 *Journal of Comparative Legislation*, pt. 2, p. 212 (Apr.).

The author discusses the prospects of the unification of law throughout the civilized world, and incidentally pleads for the study of Roman law as part of the intellectual training desirable for entrance into the profession.

"French Law Within the British Empire; III, Points of Departure." By Mr. Justice Wood Renton. 10 *Journal of Comparative Legislation*, pt. 2, p. 250 (Apr.).

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

Conspiracy. See Monopolies.

Contracts. See Carriers.

Corporations. "The Conclusiveness of Judgments Against Corporations on Their Members in Assessment Proceedings." By Albert S. B olles. 19 *Yale Law Journal* 533 (May).

"Executed *Ultra Vires* Transactions." By Edward H. Warren. 23 *Harvard Law Review* 495 (May).

"Corporation Liens on Stock." By Edson R. Sunderland. 8 *Michigan Law Review* 555 (May).

Criminology. "The Death of Lombroso." By Professor Courtney Kenny. 10 *Journal of Comparative Legislation*, pt. 2,p. 220 (Apr.).

A readable characterization of the Italian criminologist, including a statement of his opinions.

"The Lighter Side of My Official Life; VIII, Sharps and Flats." By Sir Robert Anderson, K.C.B. *Blackwood's*, v. 18., p. 678 (May).

Reminiscences of thieves and swindlers.

"Criminal Statistics, 1908." 35 *Law Magazine and Review* 312 (May).

Cross-Examination. "The Art of Cross-Examination." By E. F. B. Johnston, K. C. 30 *Canadian Law Times* 395 (May).

Defamation. "Legal Presumptions." By Julius Hirschfeld. 35 *Law Magazine and Review* 265 (May).

Considering the general subject of unintentional libel.

Employer's Liability. See Labor Laws.

Elections. "The Fight for a Clean Ballot." By Edward Ridley Finch. *Independent*, v. 68 p. 1020 (May 12).

Equitable Conversion. "Equitable Conversion in Pennsylvania." By Roland R. Foulke. 58 *Univ. of Pa. Law Review* 455 (May).

Equity Jurisdiction. See Insanity.

Espionage. "Espionage and Scientific Invention." By Norman Bentwich. 10 *Journal of Comparative Legislation*, pt. 2, p. 243 (Apr.).

Discussing the war crime of esponiage, particularly as affected by wireless telegraphy and aviation.

Evidence. See Cross-Examination.

Fifteenth Amendment. "The Fifteenth Amendment." By William C. Coleman. 10 *Columbia Law Review* 416 (May).

An able, learned, and in fact unanswerable refutation of the arguments of the late Judge Morris, Mr. Arthur W. Machen, Jr., and others that the Fifteenth Amendment is not valid.

Full Faith and Credit Clause. "Equity Jurisdiction Under the Full Faith and Credit Clause: *Fall* v. *Eastin*, I." By Prof. Henry Schofield. 5 *Illinois Law Review* 1 (May).

Government. "The History of the Department of State, V." By Gaillard Hunt. 4 *American Journal of International Law* 384 (Apr.).

Treating of "Occasional Duties of the Department."

"Recent and Pending Constitutional Changes in England." By Edward Porritt. *American Political Science Review*, v. 4, p. 196 (May).

A review of the fourth edition of Sir William Anson's Law and Custom of the Constitution, into which is introduced much shrewd analysis and comment on present conditions of British politics.

"The Canadian Constitution." By W. Kent Power. *Law Notes*, v. 14, p. 27 (May).

A good description of the government of Canada, with emphasis on the features which distinguish it from other colonies.

See Fifteenth Amendment.

History. See Government, Legal History.

Insanity. "Equity Jurisdiction Over the Persons and Property of Incompetent Persons; I, II." By Sidney J. Dudley. 16 *Virginia Law Register* 1 (May), 81 (June).

The subject is considered not solely from the point of view of Virginia law, the treatment being of broad scope.

International Law. See "Act of State," Admiralty, Espionage, International Relations, Liability of the Sovereign, Nationality, Naturalization, Neutrality, Newfoundland Fisheries Case, Title by Discovery.

International Relations. "The Cretan Question." By Theodore P. Ion. 4 *American Journal of International Law* 276 (Apr.).

Dealing with the political status of Crete.

Interstate Commerce. See Railways, Street Railways.

Labor Laws. "A Review of Labor Legislation in the United States for the Year 1909." By Irene Osgood. *American Political Science Review*, v. 4, p. 163 (May).

Remarking that labor legislation in this country is in a chaotic condition, and calls for the establishment of scientific standards, this writer proceeds to summarize, under a dozen or more headings and subheadings, the important legislation of the year.

Legal History. See Marriage and Divorce, Roman-Dutch Law.

Legislation. "Review of Legislation, 1908." With introduction by Sir Courtenay Ilbert. 10 *Journal of Comparative Legislation*, pt. 2, p. 27 (Apr.).

A summary of the legislation of Egypt, France, Germany, Italy, Switzerland, the United States, and the British Empire, for the year 1908. Special attention may be given to the following:—

"United States of America—State Legislation." By R. Newton Crane. Pp. 284–289.

"The United States Tariff." By Wallwyn B. Shepheard. Pp. 289–293. See Tariff.

Liability of the Sovereign. "Sovereigns as Defendants." By Nathan Wolfman. 4 *American Journal of International Law* 373 (Apr.).

A paper suggested by the decision of the Supreme Judicial Court of Massachusetts in *Mason* v. *Intercolonial Railway of Canada*, 197 Mass. 349 (1908).

Literature. "Cowper and the Law." By His Honor Judge William Willis, K. C. *Law Journal*, v. 45, p. 343 (May 21).

Treating particularly of the poet's connection with the Inner Temple.

"Law from Lay Classics; I, The Magistracy of Sancho Panza." 5 *Illinois Law Review* 39 (May).

The first of a series of extracts compiled to illustrate the treatment of the law in satiric or philosophic strain.

Marriage and Divorce. "The History and Present Condition of the German Divorce Law." By Dr. Ernest J. Schuster. 10 *Journal of Comparative Legislation*, pt. 2, p. 229 (Apr.).

Succinctly epitomizes the history of the German law of divorce, the law as it now stands, and some of the results of its operation.

Monopolies. "Criminal Conspiracies in Restraint of Trade at Common Law." By Arthur M. Allen. 23 *Harvard Law Review* 531 (May).

A timely discussion of one of the most important subjects of American law. See p. 407 *supra*.

Nationality. "The Chinese Nationality Law, 1909." By Tsai Chutung. 4 *American Journal of International Law* 404 (Apr.).

Naturalization. "Citizenship for the Porto Ricans." By Roland P. Falkner. *American Political Science Review*, v. 4, p. 180 (May.).

A former Commissioner of Education of Porto Rico carefully analyzes political conditions in that country and considers his special subject in all its bearings.

Neutrality. "The Real Status of the Panama Canal as Regards Neutralization." By H. S. Knapp. 4 *American Journal of International Law* 314 (Apr.).

The author considers that the Canal is not neutralized in any sense of the word.

Newfoundland Fisheries Case. "The Atlantic Fisheries Dispute." By P. T. McGrath *American Review of Reviews*, v. 41, p. 718 (June).

A full presentation of the circumstances of the controversy before the Hague Court, by a Newfoundland journalist of experience.

Patents. "Patents and Industrial Progress." By William Macomber. *North American Review*, v. 191, p. 805 (June).

A vigorous plea, by a leading authority on patent laws, for urgently needed reforms in patent procedure. See p. 408 *supra*.

"The Patents and Designs Act, 1907." By J. W. Gordon. 35 *Law Magazine and Review* 289 (May).

Police Administration. "The Third Degree." By Henry C. Spurr. 16 *Case and Comment* 370 (May).

Written from the standpoint of a former public prosecutor, who considers that the innocent have little to fear from the ordeal of the third degree.

"A Golden Rule Chief of Police." By Frederic C. Howe. *Everybody's*, v. 22, p. 814 (June).

A first-hand account of Chief Kohler's methods and their results.

"Policemen Around the World." By Nevin O. Winter. *World's Work*, v. 20, p. 13056 (June).

Describing the police of many different countries, in all parts of the world.

Procedure. "Judgment on the Pleadings on Motion." By E. Mortimer Boyle. 21 *Bench and Bar* 53 (May).

Treating of how section 547 of the New York Code of Civil Procedure (1908) has been construed by the courts.

Professional Ethics. "The Ethical Basis of Jurisprudence." By Dean William S. Pattee. 10 *Yale Law Journal* 564 (May).

Public Lands. "The Land System of New Zealand." By "Agricola." 35 *Law Magazine and Review* 279 (May).

Public Service Corporations. See Railways.

Railways. "Control of Railroad Accounts in Leading European Countries." By A. M. Sakolski. *Quarterly Journal of Economics*, v. 24, p. 471 (May).

The systems of regulation of railway accounting and finance considered are those of Germany, Great Britain and France.

"The Shifting Railroad Control." By C. M. Keys. *World's Work*, v. 20, p. 13045 (June).

Gives many interesting facts regarding the eight great railroad systems of the United States.

See Carriers, Rate Regulation.

Rate Regulation. "The Effect of Increased Freight Rates." By Edward W. Harden. *Outlook*, v. 95, p. 31 (May 7).

An argument for higher rates, based on the grounds that they are both deserved by the railways and harmless to the public.

See Railways.

Restraint of Trade. See Monopolies.

Roman-Dutch Law. "The History of the Roman-Dutch Law." By Professor R. W. Lee. 10 *Journal of Comparative Legislation*, pt. 2, p. 261 (Apr.).

Street Railways. "Street Railways and the Interstate Commerce Act." By Borden D. Whiting. 10 *Columbia Law Review* 451 (May)

Considering the question of the federal regulation and control of interstate street railways.

Tariff. "The United States Tariff." By Wallwyn B. Shepheard. 10 *Journal of Comparative Legislation*, pt. 2, p. 289 (Apr.).

A short digest of the tariff act of 1909, with observations.

Taxation (General). "The Separation of State and Local Revenues." By Prof. Charles J. Bullock. *Quarterly Journal of Economics*, v. 24, p. 437 (May).

The author argues clearly and convincingly in opposition to the proposed separation of state and local taxation.

Taxation (Proposed Income Tax Amendment). "Inherent Improprieties in the Income Tax Amendment to the Federal Constitution." By Arthur C. Graves. 19 *Yale Law Journal* 505 (May).

The author considers this amendment improper "under the limitations which ought to guard the concessions of authority to our federal government."

"The Income-Tax Amendment." By Senator William E. Borah. *North American Review*, v. 191, p. 755 (June).

A short argument in support of the proposed amendment.

"The Income Tax Amendment." By Professor Frederick M. Davenport. *Independent*, v. 68, p. 969 (May 5).

The argument of a professor of political science in favor of the amendment.

Title by Discovery. "The Arctic and Antarctic Regions and the Law of Nations." By Thomas Willing Balch. 4 *American Journal of Law* 265 (Apr.).

Treating of the rights of nations in the soil of the polar regions.

Water Power. "The Illinois Water-Power Scheme." By H. G. Moulton. *Journal of Political Economy*, v. 18, p. 381 (May).

Workmen's Compensation. See Labor Laws.

Miscellaneous Articles of Interest to the Legal Profession

Biography. *Campbell.* "Lord Chancellor Campbell." By J. A. Lovat Fraser. 35 *Law Magazine and Review* 257 (May).

Lurton. "Horace Harmon Lurton." By John J. Vertrees. 58 *Univ. of Pa. Law Review* 495 (May.)

Roosevelt. "Theodore Roosevelt." By Archibald R. Colquhoun. *Fortnightly Review*, v. 86, p. 832 (May).

A sympathetic appreciation of the American statesman.

Cost of Living. "The Problem of Subsistence." A Symposium. *Cosmopolitan*, v. 49, p. 21 (June).

A collection of the opinions of many college professors and leaders of various industries on the causes of the high cost of living.

European Politics. "European Intervention in Morocco." By Norman Dwight Harris. 19 *Yale Law Journal* 549 (May).

Legal Miscellany. "The Trial of William Blake for High Treason." By Herbert Ives. *Nineteenth Century and After*, v. 67, p. 849 (May).

An interesting review of the forgotten dragoon episode in the life of the poet-painter.

Negro Problem. "The Economic Aspects of Race Prejudice." By W. E. Burghardt Du Bois. *Editorial Review*, v. 2, p. 488 (May).

A plea for the education of the Negro.

Political Corruption. "Scientific Corruption of Politics." By Charles Edward Russell. *Hampton's*, v. 24, p. 843 (June).

Dealing with the machinations of the Southern Pacific Railway in California politics.

Russia. "The Reaction in Russia: A Review of Events Since the 'Bloody Sunday' of January, 1905; I." By George Kennan. *Century*, v. 80, p. 163 (June).

Dramatically reviews the thrilling events of the year 1905 and the subsequent months of "pacification," when the counter-revolution triumphed.

Taft's Administration. "The President at Work." By William Bayard Hale. *World's Work*, v. 20, p. 13005 (June).

Latest Important Cases

Carriers. See Public Service Corporations.

Contracts. See Employer's Liability.

Employer's Liability. *Employer not Exempted from Civil Liability by Contract whereby Employee Accepts Voluntary Relief in Full Compensation—Public Policy.* D. C.

That voluntary relief granted under a contract releasing the employer from liability, to an employee injured while he was acting within the scope of his employment, does not bar an action for civil damages brought under the Employer's Liability Act of 1906, was held by the Court of Appeals of the District of Columbia in *McNamara* v. *Washington Terminal Co.*, decided May 10 (Washington Law Rep. June 3). The Court (Robb, J.) decided that a contract of employment entered into by a railroad company and an employee whereby the employee agreed that, in the event of the acceptance by him of the relief benefits to which the contract referred, the company would be relieved of all liability on account of his injury, was within the terms of section 3 of the Employer's Liability Act of 1906, whereby it is provided that "no contract of employment, . . . relief benefit, . . . nor the acceptance of any such insurance, relief benefit, . . . shall constitute any bar or defense to an action brought to recover damages for personal injuries to or death of such employee," etc., but giving the carrier the right to set off in such action any sum it may have contributed toward such insurance, relief benefit, etc.

The Court upheld the foregoing provisions of the statute as not an unjustifiable encroachment by the law-making power upon the right of free contract guaranteed in general terms by the Fifth Amendment:—

"We must have in mind that the object of this law, and of laws of similar character, is not alone to protect and benefit employees of common carriers, but to promote the public welfare. *Johnson* v. *Southern Pacific Co.*, 196 U. S. 17, 25 Sup. Ct. Rep. 158; Mr. Justice Moody in the *Employer's Liability* cases, 207 U. S. 533, 28 Sup. Ct. Rep. 141. The safety of the traveling public is dependent, to a large extent, upon the safety of employees engaged in the operation of railroads. The interests of employees and passengers, in so far as the safety of either is involved, are, of necessity, mutual. In section 1 of the act the carrier is declared to be responsible to employees for injuries sustained through its negligence or the negligence of fellow-servants. If the imposition of such responsibility upon the carrier inured to the benefit of the public as well as to the employee, and we think it did, Congress had the right to take that into consideration in enacting section 3."

Extradition. See Interstate Rendition.

Interstate Commerce. See Railway Rates.

Interstate Rendition. *Petition for* Habeas Corpus *Dismissed—Circumstantial Evidence of Physical Presence within Demanding State.* N. Y.

Frank N. Hoffstot, residing and doing business in New York City, and in the habit of going to Pittsburgh on business once a month, was detained under a warrant issued by the Governor of New York directing his surrender to the Pennsylvania authorities as a fugitive from justice. He petitioned for a writ of *habeas corpus*, which was denied by the United States Circuit Court. (*Matter of Hoffstot*, N. Y. Law Jour. May 24.)

The Court (Holt, J.) reviewing all the evidence, held that there was circumstantial evidence which brought the case within the following rule: "Under the constitutional provision, and the statute passed in conformity with it, providing for the extradition of fugitives from justice from one state to another, it is necessary that the defendant should have been physically present in the state in which it is alleged that the crime was committed, at the time when it was committed, in order to make him, on his subsequent departure from the state, a fugitive from justice (*Hyatt* v. *Corkran*, 188 U. S. 691, 23 Sup. Ct. Rep. 456)."

Application for Extradition Denied—Physical Presence under Conditions Pointing to Non-Participation in Criminal Act. N. J.

Similar points were considered in *Matter of J. Ogden Armour*, which grew out of the application of the Prosecutor of Hudson County, New Jersey, to the Governor of that state for the rendition of Mr. Armour as a fugitive from justice. Armour & Co. had

been indicted for conspiracy in restraint of trade, but the Governor refused to grant the papers on the ground that "all that occurred was that Armour, in going from Chicago, where he resided, to Europe, took passage on the steamer at Hoboken, and on returning from Europe to Chicago, landed at Hoboken." We quote from the learned opinion of Governor Fort (N. Y. Law Jour. May 25):—

"The affidavits submitted as to the presence of J. Ogden Armour within this state during the period alleged as the continuance of the criminal act, do not establish his presence within this state under conditions which refute the impossibility of his non-participation in the furtherance of the criminal agreement. . . . In all the cases which I have considered in which it was attempted to show that the presence of a certain person within a state has reference to participation in a criminal act, where on one side it was attempted to impute participation in a criminal act, and on the other, to show that such presence was merely casual or in the course of business in no way connected with the criminal act, the facts appearing of record have been much more complete, sufficient, at any rate, to raise a question argumentatively as to whether such presence was or was not in fact under such circumstances that participation in a criminal act was at least a reasonable inference."

Monopolies. *Mississippi Anti-Trust Law Constitutional—Police Power.* U. S.

In the case of *Grenada Lumber Co.* v. *State of Mississippi*, 30 Sup. Ct. Rep. 535, the Supreme Court of the United States, in an opinion filed on May 2, sustained the Anti-Trust law of Mississippi, passed in 1900, and reaffirmed the principle that an arrangement by which, under penalties, an apparently existing competition among all the dealers in a community in one of the necessaries of life is substantially destroyed, without any merging of interests through partnership or incorporation, is one to which the police power of the state extends.

The opinion of the Court was written by Mr. Justice Lurton, who said:—

"The argument that the situation is one which justified the defensive measures taken by the plaintiffs in error is one which we need neither refute nor concede. Neither are we required to consider any mere question of the expediency of such a law. It is a regulation of commerce purely intrastate, a subject as entirely under the control of the state as is the delegated control over interstate commerce exercised by the United States. The power exercised is the police power reserved to the states."

Tennessee Statute Prohibiting Suppression of Competition Constitutional—Equal Protection of the Laws. U. S.

The decree of the Supreme Court of Tennessee ousting the Standard Oil Company of Kentucky from doing business in the state of Tennessee was affirmed by the Supreme Court of the United States in an opinion filed May 2, in *Standard Oil Co. of Kentucky* v. *Tennessee ex rel. Cates*, 30 Sup. Ct. Rep. 543. Mr. Justice Holmes delivered the opinion of the Court.

"The basis of the former contention [that the Tennessee statute violated the Fourteenth Amendment] is that by section 3 of the act any violation of it is made a crime, punishable by fine, imprisonment or both, and that this section has been construed as applicable only to natural persons: *Standard Oil Co.* v. *The State*, 117 Tenn. 618. Hence, it is said this statute denies to corporations the equal protection of the laws. . . .

"The foregoing argument is one of the many attempts to construe the Fourteenth Amendment as introducing a factitious equality without regard to practical differences that are best met by corresponding differences of treatment. The law of Tennessee sees fit to seek to prevent a certain kind of conduct. . . . We are of opinion that subjection to it, with its concomitant advantages and disadvantages, is not an inequality of which the plaintiff in error can complain, although natural persons are given the benefit of the rules to which we have referred before incurring the possible sentence to prison, which the plaintiff in error escapes." (Legal Intelligencer, May 6.)

Police Power. See Public Education.

Public Education. *Industrial School Law of Kentucky Unconstitutional—Class Legislation—Delegation of Police Power to Voters of the Precinct Unlawful.* Ky.

The legislature of Kentucky this year enacted, over the veto of Governor Willson, an industrial school act, familiarly known as the Holland law, making it unlawful to establish an industrial school owning or controlling more than seventy-five acres of land without the consent of a majority of the

legal voters of the voting district where the school is to be maintained. The Jefferson Circuit Court, Chancery Division, held this law void in a decision, May 21, by Judge Shackelford Miller. The Court declared, citing the authority of the *Berea College* case (29 Sup. Ct. Rep. 33, 21 *Green Bag* 31) and other important decisions:—

"Instead of being a police regulation, it is really class legislation of the most pronounced character. Under the practical operation of this act, it is doubtful if this school could be conducted in any desirable location in the state."

The Court also held that the act was unconstitutional as delegating the police power to the voters of the precinct, and as violative of section 60 of the constitution of Kentucky.

Public Policy. See Employer's Liability.

Public Service Corporations. *Penal Statute Prohibiting Overcrowding of Street Cars—Provision Unenforceable for Uncertainty.* D. C.

The Court of Appeals of the District of Columbia, in *U. S.* v. *Capitol Traction Co.*, decided April 5 (Washington Law Rep. May 20), held the act of Congress of May 23, 1908 (35 Stat. 246), requiring street railroads to operate a sufficient number of cars so as to give expeditious passage to all persons desiring to use the same without crowding said cars, to be so general, indefinite and uncertain in defining the offense of running crowded street cars as to be incapable of enforcement.

Mr. Justice Van Orsdel said:—

"A criminal statute cannot rest upon an uncertain foundation. The crime, and the elements constituting it, must be so clearly expressed that the ordinary person can intelligently choose, in advance, what course it is lawful for him to pursue. . . . If the Congress has power to declare it a crime for the street railway companies in the District of Columbia to operate cars in a crowded condition, it must, in order to impart validity to the law, declare, with certainty, what constitutes, under the statute, a crowded car. This it has totally failed to do."

Liability for Refusal to send Telegram to which Notice that it Must be Rushed was Affixed. Mass.

The Massachusetts Supreme Court handed down a decision May 19 to the effect that a man has the right to insert in a business message the warning that it is important and that failure to deliver it promptly and correctly will result in financial loss, and that the company must send the message as instructed. The decision was made in the suit of *William M. Vermilye* v. *Postal Telegraph Cable Co.*, 91 N. E. Rep. 904.

The Court, in allowing the plaintiff damages of $50, declared that the company had no right to refuse to receive for transmission a proper message, payment for which was tendered to it, and the notice affixed did not make the plaintiff's message improper.

It also decided that as the company's refusal to transmit was intentional it was willful within Revised Laws, chapter 122, sections 9 and 10, giving a suit for forfeitures against such companies.

See Railway Rates.

Race Distinctions. *"Jim Crow" Law of Kentucky Constitutional.* U. S.

In *Chiles* v. *Chesapeake & Ohio R. R. Co.*, decided May 31, the United States Supreme Court sustained the constitutionality of the statute of Kentucky requiring separate accommodations for white and colored passengers. The decision of the Circuit Court, declaring that a railroad company may, independently of a state law, adopt and enforce rules requiring colored persons, although they are interstate passengers, to occupy separate coaches, was affirmed.

See Public Education.

Railway Rates. *"Missouri River Rate" Cases—"Zones of Trade"—Powers of Interstate Commerce Commission.* U. S.

By a decision of 4 to 3, the Supreme Court of the United States decided May 31, just before adjournment, that the Interstate Commerce Commission had not exceeded its power in ordering the reduction of freight rates in the so-called *Missouri River Rate* cases and the *Denver Rate* cases. These orders were held to be valid.

The decision of Judges Grosscup and Kohlsaat, of the United States Circuit Court, rendered at Chicago August 24, 1909 (see 21 *Green Bag* 533) was reversed, Mr. Justice McKenna holding that the Commission had not exceeded its powers in the *Missouri River Rate* case, in fixing zones of trade. The decision in the *Denver Rate* cases was reversed on similar grounds.

The Editor's Bag

PROFESSOR WIGMORE AND THE "AMERICAN *CORPUS JURIS*"

DEAN WIGMORE of the Northwestern University School of Law, in a communication which elsewhere appears in this issue, records his emphatic dissent from the plan proposing an "American *Corpus Juris*." The judgment of one of America's ablest legal scholars possesses very great weight and his opinions are deserving of the most thoughtful consideration. His criticisms must be treated in the same candid, dispassionate spirit in which they are offered.

His first objection is that the proposal is untimely, because the law is undergoing continuous change, and a generation must elapse before it can become a body of fixed and coherent principles. Of course if the proposed statement of the law were to be confined purely to an exposition of principles established in all jurisdictions, so small a portion of the field of American jurisprudence would be covered that such a work would have no utility. The most difficult problem to be solved in the execution of this enterprise, a problem far greater than that of establishing the foundation on a satisfactory basis and organizing the talent necessary to the success of the undertaking, must of necessity be that of determining what policy shall be pursued in the treatment of unsettled and conflicting legal doctrines. The task of stating the reasonable rule where the settled rule is not to be found will call for an order of constructive legal ability which is exceedingly rare. We do not share Dean Wigmore's impression, however, that if such ability can be set to the task, the unsettled law cannot be so logically and far-sightedly dealt with as to insure permanent utility for the undertaking. Undoubtedly most of the changes are only on the surface. The underlying fundamental doctrines do not change. Even when we take into account the relatively slow changes in the law induced by altered social and economic conditions, there must be a basic system of rules out of which is evolved the reason of the law, which in a single generation can undergo only inconsequential variations. No doubt it will be far easier to state the law as an orderly system twenty-five or fifty years hence than it is now. That the time is unripe, however, for an effort to bring order out of chaos and to forestall changes which are merely the fortuitous outgrowth of the blundering quest of the right rule, is hard to believe. We agree with Judge Grosscup that

> "We have come to a time when, for the sake of civilization as well as the practical administration of the law, the body of the law should be put into scientific form." (See 22 *Green Bag* 103.)

Dean Wigmore's second objection is that the plan is unsound because of the countless differences in the law as laid down in fifty distinct jurisdictions.

To lay too much stress on these differences, however, is to slight the underlying unity. Do we Americans really live under a heterogeneous system of laws? Are there fifty distinct versions of each legal doctrine, one for each of the fifty jurisdictions? As a matter of fact, the fifty jurisdictions are in accord as to most matters of principle, and rarely break up into more than two groups in the application of the principles. In these groups there is unity. Take, for example, the doctrine as to what law governs the validity of a contract, on which Professor Beale has written so luminously (see 23 *Harvard Law Review* 194, reviewed in 22 *Green Bag* (Feb. 1910) p. 119). He finds three forms of the doctrine, prevailing in three groups of states. There are, therefore, in this case, instead of "countless differences," only three divergent principles, and considering the fact that there are fifty jurisdictions, the situation is relatively one of unity rather than of diversity. So in the case of the entire body of legal doctrine; examined in its ***minutiæ*** it is relatively homogeneous rather than heterogeneous, and to foster this homogeneity by every possible device and make it more perfect is a legitimate undertaking. But it will perhaps be contended that these ***minutiæ*** are susceptible of countless combinations, and that while individual doctrines will not split up into more than three or four forms, the entire body of the law is in fact to be found existing in fifty distinct systems. This is a false position, because it ignores the relative homogeneity of our *corpus juris* and conceives of a diversity which a little analysis will show to be wholly imaginary. The concept of a fundamental heterogeneity baffling every attempt to overcome is, in fact, unscientific and absurd.

We will not admit, then, that there are "countless differences," but there are of course differences, and they cannot, in so far as they are radical and social, be removed merely by the use of printer's ink. But in so far as they are merely superficial and casual they may be, in time. To recur to our illustration, it is hard to see anything radical or social in the doctrine that the validity of a contract is determined by the law of the place of making or by the law of the place of performance. The rule that it is determined by the law intended by the parties, which is the rule toward which we are tending according to Professor Beale, may reasonably be hoped to prevail some time throughout the United States, already prevailing in a greater number of states than the other rules, and in an expository code it would properly be given a leading place as the preferred rule. We cannot conceive of any sound objection to such a procedure.

Moreover, the differences which Professor Wigmore has in mind arise largely from the bewilderment of judges on account of their inability to turn immediately to an orderly system of legal doctrine for the rules applicable to cases before them. To quote Professor Pound:—

> "There are suggestions here and there, and a powerful judge now and then draws a principle from the mass of rules. In general, however, the courts are too often forced to reach a conclusion on the large equities of the cause and forage in the books for cases to support it. This makes our written opinions a mere ritual. Sooner or later a system of our law must come." (See 22 *Green Bag* 105.)

Under present conditions there is a besetting danger for the judiciary to regard as intricate what is actually simple. As Hon. Frederick W. Lehmann of St. Louis has said:—

"If an American wishes to know the laws of his country he must turn to several hundred volumes of statutes, several thousand volumes of reports of adjudicated cases and almost as many more volumes of text-books, commenting upon and expounding the statutes and the cases . . . but the rule by which he is to be governed in any transaction is somewhere in that confused mass of legal lore, and it is so plain and so simple that it is his own fault if he does not find it or does not understand when he has found it." (See 22 *Green Bag* 66.)

What is needed is to extract the unity which underlies the conflict of doctrine, and to supplement it with a symmetrical outline of standard rules conveniently accessible and likely to win their way gradually into the favor of judges. If that object cannot be realized, it would seem as if that could be only on account of the difficulty of finding draftsmen equal to the task, and the question of the scarcity of the requisite legal talent is the next point to be considered.

The third objection, that there are not in this country scholars enough equal to the demands of the enterprise, deserves serious attention. If American legal scholarship leaves much to be desired we may as well candidly admit the fact, but the wisest thing to do under those circumstances would perhaps be to set before our jurists a goal of scientific achievement toward which they could struggle. One should not, however, allow oneself to be persuaded that the country is deficient in scholarship without strong proofs of the allegation. The point has already received some notice. Sir Frederick Pollock intimates that it is a question for the American lawyer to decide for himself, for he has said:—

"Having settled the outlines of your body of law, can you get them filled in by men whose standing in the profession is such that their exposition will command general confidence? . . . I know no particular reason against a satisfactory solution, but obviously it is a question to be solved in the United States and not elsewhere." (See 22 *Green Bag* 96.)

It is by no means certain that the majority of Americans competent to judge would share Dean Wigmore's opinion regarding the shortcomings of legal scholarship in this country. Hon. John G. Milburn evidently sees no drawback of this nature:—

"I have never entertained a doubt as to the necessity and vast influence for good in many directions of such a statement, but the difficulties and obstacles in the way of it always seemed to me to be insuperable. But the study of your Memorandum has convinced me that it is perfectly feasible with the aid of an adequate foundation." (See 22 *Green Bag* 92.)

Professor Watrous thinks the difficulty of finding the right sort of draftsmen by no means insuperable:—

"The difficulties in the way of achievement are tremendous, but I am sure they can be overcome by the triumvirate, in so far as in the nature of things they can be overcome." (See 22 *Green Bag* 105.)

And former Chief Justice Baldwin is also hopeful that ability of the kind required can be obtained:—

"I am in entire sympathy with those who believe that a full and well arranged statement of the rules of common law and equity, as they are or should be generally recognized in the United States, can be prepared by competent men and put in the compass of a few volumes." (See 22 *Green Bag* 101.)

The natural first impression of many, moved only by the din of great reputations, might be that we had very few legal scholars of first rank and marked analytical acumen in the United States, but scarcely a month passes that does not witness two or three noteworthy contributions to the higher forms of legal science, and a second impression, based on fuller information, must be

that the supply of high grade juristic material for the successful organization of such an undertaking as that now proposed is much greater than it appears to be only at a casual glance. Sound juristic analysis and method, to be sure, may be of comparatively recent origin in this country, and no doubt during the next generation enormous progress may be looked for both in legal science and in all the related social sciences, but that is not saying that the country lacks a respectable supply of scientific ability or that the best way to stimulate legal scholarship is to postpone measures well suited to bring about its advancement. If the world had deferred every great scientific discovery to posterity on the ground that the time was not ripe for it, all scientific achievement and all appetite for it would have been completely annihilated. Learning is best advanced by being put to practical use.

Is there any real danger of the authors of the proposed work fixing permanently upon our law an untested and unscientific juristic analysis and method? Mr. Charles A. Boston's view is undoubtedly entitled to much respect. He has written:—

"I have said the time is ripe. Those who are familiar with the instruction given in the greater law schools know how conscientiously and efficiently the greater minds among the teachers have pondered and expressed the philosophy of their subjects, so as to imbue their students with the philosphic conception of the law as an art, based on scientific principles, if not, as it is frequently called, a science. The improved methods of general education have invaded the law schools, necessitating a scientific kind of work on the part of the instructors, who have thus become leaders, occupying an enviable and useful position, which they have created, and fill with ability. Thus far their services have in the main been useful to the community only through the law students they have trained. But there is every reason why their abilities should be made directly useful to the entire community." (See 22 *Green Bag* 114.)

At one or two places Dean Wigmore's criticisms suggest the possible construction that he has conceived the statement of the American *Corpus Juris* as a work which, once executed, is to stand untouched for years to come, requiring in the opinion of its projectors no modification to readjust it to constantly altering conditions. If this were to be the case, some of Professor Wigmore's objections would be fatal for the usefulness of such a codification would be outlived within a short time after its appearance, and if there were no prospect of periodical revision there would indeed be grave danger of fixing harmful methods permanently upon legal science. If, however, the large editorial staff which is to stamp American jurisprudence with the impress of the best juristic thought of our own generation is to be succeeded by a permanent board to have charge of subsequent revisions, as is earnestly to be hoped, the objections noted would fall to the ground of their own weight. The results would be, then: (1) a tremendous impetus applied to legal science by the co-ordination of the best effort of the best legal intellects in the greatest undertaking yet set before them; (2) a more useful law treatise than has ever been given to the profession in America; and (3) steadily increasing timeliness and utility with each periodical revision, and growing simplicity as the "contrarieties" noted in the original edition would tend to become engulfed in the swelling stream of uniformity. The benefits to arise from the execution of so "untimely, unsound and futile" an undertaking cannot possibly be overestimated.

HOW TO DISCHARGE AN OBLIGATION

TO the amusing definition of manslaughter we add a second gem, from another examination paper, sent us by the dean of the Suffolk School of Law, Boston. It was a young Hebrew who defined manslaughter as "murder committed without malice aforethought." Another young man of the same race wrote in his examination book:—

"Any tampering with a written instrument except crossing the 't's' and dotting 'i's' will discharge the obligation if it in any way puts a different meaning into the instrument, *e. g.*, cutting off from the bottom of an instrument certain words is a *good* alteration and will discharge the obligation upon which it is based."

A QUESTION OF COLOR

OUR readers may be interested in the novel question raised by a Tennessee correspondent:—

Green Bag Publishing Co.—

Dear Sirs: Please give me full information on this question. If a Colored purson is on trial for any thing and their is not a Colored man on the grand or petty juror, and the lawy. motion for a Colored man to be put on the juror, if this is not don can the Colored man be tryed a convicted by law, in any state. Pleas give me full information on this.

It all depends on the presiding judge; if he can be persuaded to take a colored view of the law, the colored man will have the right to demand a colored juror.

A PERSIKUTE-ING ATTORNEY IN DEMAND

REMARKING that some readers of the *Green Bag* may be interested in learning "how a negro who is up in the air offers ten dollars to the 'persikute'-ing attorney to put him on the ground," United States Attorney Armbrecht sends us the following letter recently sent to A. T. Howard, Esq., an Assistant United States Attorney in Albama:—

April 6, 1910.

Mr. Elick Howard:—

Dear Lawyer: Can't you fend [?] in my case like you persikute in the govment court. My case is before Judge Alford. I has 10 dollars which I can give you if you put me on the ground. Pleas come thursday to see me bout this at 11 o'clock.

Respectively,

JOE JOHNSON.

LORD COKE AND LITERATURE

IN his address delivered at the last annual meeting of the North Carolina Bar Association, T. T. Hicks, Esq., took the interesting career of Sir Edward Coke as his subject. We quote one of many good passages of a readable paper:—

"Lord Coke had no taste for the poetry of life, was seldom enthusiastic and never too full of feeling. Bacon said of him: 'He hath not in his nature one part of those things which are popular in men, being neither civil nor affable.' His writings contain no reference to or quotations from Shakspere, who was born when Coke was twelve years of age and died seventeen years before Coke; nor Ben Johnson or Edmund Spenser, all of whom were his contemporaries. He was never known to be in a theatre and had a great contempt for players and poets, except Chaucer, whom he quoted occasionally. He was aware that his productions were dry and 'in the lawyer's dialect,' though 'plainly delivered.' He wrote that he 'did in some sort envy the state of the honest ploughman and other mechanics; for at their work they merrily sing or whistle some self-pleasing tune, and yet their work proceeded and succeeded; but he that takes upon himself to write (the law) doth captivate all the faculties and powers both of his mind and body, and must be only attentive to that which he collecteth, without any expression of joy or cheerfulness while he is at his work.' He took no pleasure in festivities, studied unceasingly, went to bed with the sun and rose at three in the morning. It seems the Court in his day sat from eight to eleven a. m. On one occasion a messenger from the King on urgent business arrived at Lord Coke's house at one a. m. and requested an immediate audience. Sir Ed-

ward's son told him: 'If you come from ten kings you shall not; for I know my father's disposition to be such that if he be disturbed in his sleep he will not be fit for any business,' so the messenger waited. Promptly at three a. m. Sir Edward rung a little bell to call his servant, and at once arose and saw the messenger and transacted the King's business."

A HABIT ACQUIRED IN THE SICK ROOM

THE late Justice Brewer was presiding, years ago, over a civil case in which one of the important witnesses was a horse-doctor named Williams. The doctor was a small man with a weak little voice, and the counsel on both sides, as well as the Court and jury, had great difficulty in hearing his testimony.

During cross-examination the counsel for the plaintiff became exasperated and began to prod and harry the little man.

"Dr. Williams," he shouted, "if we are ever going to get anywhere with this case you must speak up so the Court will hear you. Speak up loud and strong, sir!"

The small-sized veterinary tried, but it was evidently no use. Whether from embarrassment or inability the sound would not come.

"Well, your Honor—" began the counsel, indignantly, when Judge Brewer stopped him with a gesture. Leaning over the bench, he said, in his kindly tone:—

"Mr. Attorney, you must be patient with the doctor. He cannot help it. Years spent in the sick-room have apparently made speaking low a second nature with him."

NOT FIT FOR A DECENT PERSON

A YOUNG assistant prosecuting attorney was conducting a case where one woman had caused the arrest of another for assaulting and calling her a lot of unmentionable names. He put the woman on the stand and directed her to tell the Judge just what the other woman had called her.

"But I can't do that," she said, with surprise.

"Oh, yes, you can," replied the young prosecutor. "As a matter of fact, you'll have to."

"But I just can't," insisted the woman. "Why, it's not fit for any decent person to hear!"

"Oh, well then," he said cheerfully, "just step up and whisper it to his Honor."

NOT DURING SESSION

THEY have the reputation, down in Florida, of not respecting the law as wholesomely as it deserves. But a certain preacher of the "revivalist" type testified to me the other day that these Southerners do most assuredly respect the findings of the Grand Jury.

He was conducting a series of religious meetings, lately, in one of the peninsula's little county towns, during the very week of the jury's session. It was a wicked little town, with several notorious sinners among its prominent citizens.

One of these, a hoary-headed reprobate, kept coming up to the "mourners' bench," groaning more heavily each night, and apparently wrestling in prayer, yet making no further progress towards the desired end, of "getting religion."

"Confess your sins, brother, confess your sins, and be saved," the minister continued to adjure him.

But the week drew towards its close, and still confession and conversion seemed far off from the hoary penitent.

On the last night of the meeting, the preacher made his most stirring appeal, and closed with the direct exhortation to his particular sinner:—

"Stand up, man, stand up and confess your sins before the Lord and the brethren!"

Groaning yet more deeply, the reprobate still shook his gray head. "I can't, O, I can't, Pahson!"

"But why not?" pursued the servant of the Cross. "There is no other way to find the true religion but by confession of sin. Arise, then, brother, and acknowledge your errors. The Lord is merciful and will forgive."

"Yes, Pahson, yes—I understand that. But, Pahson, the Lord ain't foreman of the Grand Jury!"

AN ADROIT STROKE

SIR JAMES SCARLETT, the famous English lawyer, held that verdicts could be won without eloquence, and he proved it many a time in his own career. His skill in turning a failure into a success was wonderful. In a breach of promise case the defendant,

Scarlett's client, was alleged to have been cajoled into an engagement by the plaintiff's mother. She as a witness in behalf of her daughter completely baffled Scarlett, who cross-examined her. But in his argument he exhibited his tact by this happy stroke of advocacy: "You saw, gentlemen of the jury, that I was but a child in her hands. What must my client have been?"

"A LAWYER'S TEN COMMANDMENTS"

JAMES M. OGDEN, Esq., of Indianapolis, in an address at the seventh annual banquet of the Alumni Association of the Indiana Law School, which was given May 24, defined the duties of a lawyer, setting them off in separate divisions. Mr. Ogden is the lecturer in that school on Negotiable Instruments, and the author of Ogden's Negotiable Instruments, recently published. Mr. Ogden's "Lawyer's Ten Commandments" are as follows:—

Duties to Client

1. Be loyal to the interests of the client whose cause you have championed and in his cause be guided by high moral principle. Do not let the amount of your fee determine the amount of your industry.

2. Neither underestimate nor overrate the value of your advice and services in your client's behalf.

Duties to Court

3. Be honest with, and respectful to, the court.

4. Do not depend on bluff or trick or pull to win a case but depend on thorough preparation.

Duties to Public

5. Give a measure of your best legal service to such public affairs as may best serve your community. Remember also to protect the defenseless and oppressed.

6. Never seek an unjustifiable delay. Neither render any service nor give any advice involving disloyalty to the law.

Duties to Fellow Attorneys

7. Be friendly with and keep faith with the fellow members of the bar; publish their good characteristics rather than their shortcomings. Especially be on friendly terms with the young man starting in the legal profession and if necessary inconvenience yourself in order to encourage him.

8. Do not discuss your cases with the court in the absence of opposing counsel.

Duties to Self

9. Avoid the "easy-come, easy-go" method with your finances. Bank on no fee until paid.

10. Keep up regular habits of systematic study of the law, Acquire special knowledge in some one of its branches. Remember the law is a jealous master.

THE GENEALOGY OF A LEGAL JOKE

A WRITER in the Utica (N. Y.) *Globe* has interested himself in the pedigree of certain jokes of ancient lineage. Here, for example, are three generations of a jest which does not seem at all likely to die out:—

FIRST GENERATION

(A. D. 1880)

The Judge Kept His Word

Judge Q—, who once presided over a criminal court down East, was famous as one of the most compassionate men who ever sat upon the bench. His softness of heart, however, did not prevent him from doing his duty as a judge.

A man who had been convicted of stealing a small amount was brought into court for sentence. He looked very sad and hopeless, and the court was much moved by his contrite appearance.

"Have you ever been sentenced to imprisonment?" the judge asked.

"Never—never!" exclaimed the prisoner, bursting into tears.

"Don't cry—don't cry," said Judge Q— consolingly. 'You're going to be now!"

—*Youth's Companion* (1880).

SECOND GENERATION

(A. D. 1895)

Tears That Failed

Sir Arthur Jelf was a formidable opponent at the bar, and on the bench has proved no less a success. He has a pretty wit, too. Once at Quarter Sessions, as recorder of Shrewsbury, he was sentencing a hypocritical prisoner, who, hopeful of soften the judge's heart, shed copious tears and in reply to his lordship's inquiry, "Have you ever been in prison before?" sobbed tearfully.

"Never, my Lord, never!"

"Well, don't cry," was the recorder's reply, "I'm going to send you there now."

—London *Golden Penny* (1895).

THIRD GENERATION

(A. D. 1910)

No Disappointment Here

A man who had been convicted of stealing was brought before a certain "down East" judge, well known for his tender-heartedness, to be sentenced.

"Have you ever been sentenced to imprisonment before?" asked the judge, not unkindly.

"Never!" exclaimed the prisoner, suddenly bursting into tears.

"Well, well, don't cry, my man," said his honor consolingly, "You're going to be now."

—*Everybody's Magazine* (1910).

USELESS BUT ENTERTAINING

PROCEDURE AT SEA

James M. Beck, Esq., attorney for the American Sugar Refining Co., was crossing the Atlantic in company with a distinguished member of the bench. Mr. Beck is rather susceptible to seasickness, and on the second day out traveling was somewhat rough. As he leaned over the steamship rail disconsolately, his friend the judge approached and asked in a superior tone:—

"Feeling bad, eh, Jimmy? Can I do anything for you?"

Mr. Beck drew himself up to the top of his stature and said in formal tones:—

"Yes, your honor. I would like you to overrule this motion!"

ONE LAWYER AND TWO HONEST MEN

In one of the interior counties a case was called that had long been in litigation. The justice thought it impracticable to keep the suit longer in court, and advised the parties to refer the matter. After due deliberation they assented, agreeing to refer the case to three honest men. With a grave smile, in perfect keeping with judicial dignity, the Judge said that the case involved certain legal points which would require one of the referees, at least, to have some knowledge of the law; therefore, he would suggest the propriety of selecting one lawyer and two honest men.

The following conversation was heard at Rochester County Court last month:—

His Honor Judge Shortt (to a plaintiff)—Where does the defendant live?

Plaintiff—Hoo, sir.

His Honor—The defendant.

Plaintiff—Hoo, sir.

His Honor—The defendant, I said, the defendant.

Plaintiff—Hoo, sir.

His Honor (to Registrar)—Is this witness deaf—eh? not deaf. Well, where does the defendant live?

Plaintiff—Hoo, sir.

His Honor—Where does he live, in what house?

Plaintiff—He lives at Hoo, sir.

Then the Registrar explained to the Judge that Hoo was an adjacent village.

—*London Law Notes.*

Two college chums happened to enter simultaneously upon their respective careers of physician and lawyer, and late one afternoon the newly-made medico dashed into the room of his legal friend, exclaiming:—

"Congratulate me, old man. I've got a patient at last. Just on my way to see him now!"

The legal light slapped his friend enthusiastically on the back.

"Delighted, old chap," he cried. Then, after a slight pause, he added with a sly grin: "I say, let me go with you. Perhaps he hasn't made his will yet."—*Saturday Journal.*

"Dad," said the youngest son of Mr. Briefer, K.C., "I want to ask you a question about law. Supposing a man had a peacock and the peacock went into another man's garden and laid an egg, who would the egg belong to?"

Briefer was relieved; this was an easier one than usual. "The egg, my son, would belong to the man who owned the peacock," he said, "but the man on whose garden it was laid would have good cause for an action for trespass."

"Thank you, dad." Silence for a brief space, and then:

"But, dad, can a peacock lay an egg?"

— *Canada Law Journal.*

A TENDER-HEARTED SCOUNDREL

Magistrate (to Prisoner). "If you were there for no dishonest purposes why were you in your stockinged feet?"

Prisoner. "I 'eard there was *sickness* in the family."

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

Correspondence

The "American Corpus Juris" Criticised

PROFESSOR WIGMORE ON THE "AMERICAN *CORPUS JURIS*"*

To the Editor of the Green Bag:—

Sir: I have read in your February number the Memorandum proposing an "American Corpus Juris,"—having already perused the Memorandum in manuscript, by the courtesy of my very good friends, Messrs. Alexander, Kirchwey and Andrews, its proposers. I regret to take any public position of dissent from their plans. But I am unwilling to see the proposal given such publicity without doing my small share to save the supposed benefactor from wasting (as I conceive) his money on it.

The proposal is untimely, unsound and futile.

It is untimely, because our law is passing through a period of radical changes, both in substance and in form, all along the line. A generation must elapse before it can be stated accurately as a body of fixed and coherent principles.

It is unsound, because there are today fifty distinct bodies of independent sovereign law within this nation, varying at countless points and in infinite details. Therefore, it is and will be scientifically false to attempt to state an "American" law, until the progress of Uniform Codification (just begun by the National Conference) shall have removed the larger part of this tangled mass of irreconcilable contrarieties. That period is yet far off. Its arrival will depend mainly upon the speed of assimilation in social conditions, and cannot be conjured into fancied existence by twenty volumes of printer's ink.

It is futile, because there are not yet in this country scholars enough to produce such a work equal to the ideals set forth. And there are not scholars enough, because we have yet, as a profession, been devoting too brief a period of years to the scientific study and analysis of law, and therefore do not yet possess an output numerous enough to insure the easy discovery and availability of men qualified for that particular task. There is reason to believe that the compilation of this particular "Corpus Juris" would necessarily involve embodying and fixing permanently upon our law an untested and premature juristic analysis and method. This would be, juristically, a calamity for our law. The opinion that it would be a calamity is shared by several well-known legal thinkers with whom I have discussed the matter before now. In making public this firm conviction, I am moved (as those who know me will well understand) only by a sense of respect for the scientific needs of our law, and not by any desire to show disrespect for the learned authors of the project.

I do not wish to enter upon any controversy, but merely to record my emphatic dissent, and to encourage those who share this dissent.

JOHN H. WIGMORE.

Chicago, Ill., May 10, 1910.

*See editorial, p. 420 *supra*.

REPLY

[Dean Wigmore himself mailed a copy of his letter to Mr. Alexander, whose reply accordingly appears herewith. The views of the *Green Bag* are expressed on page 420 *supra*.—ED.]

To the Editor of the Green Bag:—

Sir: My friend, the learned Professor Wigmore, so often an optimist and by nature an idealist, occupies a strange role in preaching the gospel of despair. What do Professor Wigmore and his faculty teach their students? If it is the law, then that which they teach should be capable of accurate and scientific statement, otherwise his law-school cannot justify its existence.

Again, were social conditions to remain stationary — *and if no other problems than now exist were to enter the equation* — the Bench, the Bar and the people of this nation, represented by the present and the next generations of men, could no doubt manage to continue the administration of justice in face of the present conditions, so

well described by Professor Wigmore as "this tangled mass of irreconcilable contrarieties," until that period "yet far off" (again to quote Professor Wigmore) when we shall have disentangled our present juridical knots and have developed from generations yet unborn those mighty intellectual giants of the law capable of stating an ideal *Corpus Juris*. But other problems *are* entering the equation. Our old world does not stand still, and it is a practical world. It is ever moving, and each generation breeds its new social problems and its new juristic difficulties, and with these each generation should to the best of its ability grapple. Otherwise, and if there is force in Professor Wigmore's argument, why not stop the administration of justice until perfect judges are evolved?

By the time our present juristic knots are untied—and Wigmore says it will take a generation, and we will be fortunate if the prophecy is fulfilled—new issues, new complications, new difficulties will beset the seeker after the eternal principles of justice, and the men of that period will no doubt be able to argue with equal and perhaps greater force that the problem of a *Corpus Juris* had better not be attempted until the complicated questions of that age are settled at some time in the still more hazy future, and so on and on from generation to generation *ad infinitum*—and "after that the deluge." This gospel of despair, had it held sway in 1787, would have blocked the formulation of the Constitution of the United States. It would have been so much easier to have drafted it had it been delayed until those halcyon days when the people of the United States shall have disentangled themselves from their governmental difficulties, and solved by "assimilation in social conditions" (to quote Professor Wigmore) the problem of a virile national government. But "the fathers" had faith in their ability to solve for their own time their own problems, and some of them had faith they could solve some of them for future ages and other peoples—and they did.

We of our generation in America are not disposing of our problems in the law as rapidly as the new ones are developing. The situation is constantly growing more complicated. This is not a credit to our profession and it is a disgrace to our civilization. It will not do to shove our tasks forward upon the next generation and offer as an excuse that our men are unequal to the problems of our day. We must grapple with them and solve them as best we may. Our issues are the present ones. The *idealistic* statement of our *Corpus Juris* may be left to be worked out in the future through the genius of unborn generations. We need now the best statement of the principles of our law which the men of our time are equal to preparing. It is all we deserve and it is all that we can get; but let us arouse ourselves and get it. Future generations will improve it according to their ability and their needs.

Human law is the creature of man. Man was not made for the law, but the law for man. If man were made for the purpose of working out eventually an ideal statement of the law, instead of law being made to aid man in his present needs and to a higher *status*, then we could afford to wait, as Professor Wigmore would have us do, until in the process of our evolution more analytical brain power had been developed by our race. But law is not the *desideratum*. It is a mere means to an end. It is only man's servant—his tool for present work.

There are other reasons, apart from the aiding of ourselves, why we as a profession (each member of it in his own way doing what he can) should now prepare a scientific and adequately co-ordinated statement of the entire body of American law. We have responsibilities as a nation to the world at large. America and the men of our day are not playing the part in the world-problems of the law they should. Have we helped China as we should in her struggle for the best system of law which her people can evolve from the experience of the Orient and the Occident? The answer must be "No!"—See views of Dr. Wu Ting-fang, *Green Bag* for February, 1910, p. 97. Is American law exercising the influence it should on the continent of Europe? Again, emphatically "No!"—Read statements of Judge von Lewinski of Berlin and M. Barbey of Paris, *Id.* p. 96–97. To the foreign jurist our American law is a closed book by reason of there being no statement of our *Corpus Juris*. The lawyers of continental Europe have been equal to the task of doing for the Civil Law of Rome what we should be equal to doing for the Common Law inherited from our Anglo-Saxon progenitors. The lawyers of Hammurabi's time did not flinch when confronted by their problems, nor did those of the days of Theodosius II, Justinian and Napoleon. Should we? The views received

only this morning of the eminent German jurist Brunner, are particularly in point. I refer to Dr. Heinrich Brunner, professor of law in the University of Berlin, whose services in clearing up many important and previously obscure points in Anglo-Saxon and Anglo-Norman law, evidenced by the works of Maitland, Thayer and Ames, were so gracefully adverted to in the *Green Bag* for April, 1910, p. 262. Professor Brunner writes (and in this translation the italics are mine):—

"The plan for an American *Corpus Juris* interests me exceedingly. The German jurist who has made no special study of American jurisprudence conceives the body of the law of the United States to be practically equivalent to that of English law. *He interprets the former as in a sense a dialect of the latter.* Except in the sphere of constitutional law, the differences are scarcely noticeable to him. The reason for this is to be found in the scope and extent of American judicial procedure, in the existence of a separate statutory law for the individual states, *and finally in the absence of a comprehensive and systematic presentation of the corpus of American law.*

"Only after such a presentation in intelligible form shall have been made accessible, will the world conceive of American law as something distinct from English law. *Only such a presentation will accelerate the independent growth and development of American law, and stamp upon it those distinctive and individual features that shall make it expressive of the complex life and civilization of a great people and a great body politic.*"

May I suggest that the chief value of Brunner's estimate of the condition here in America lies in the fact that he looks upon us from the world-view standpoint. His simile that the development of Anglo-Saxon law in America is analogous to a dialect of English law is striking. To carry the simile further, the truth is we are now developing in the United States a number of different dialects of American law by reason of the many independent tribunals which are supreme, and unless a co-ordinating influence such as the proposed *Corpus Juris* is put at work furnishing exact information in the matter of the fundamental principles of our law these dialects will as time goes on grow farther and farther apart, no doubt in some particulars finally attaining almost the *status* of foreign tongues, thereby further complicating the administration of justice in our land. *Vide* views of Judge Endlich, *Green Bag* for February, 1910, p. 110.

In striking contrast with Professor Wigmore's gospel of despair is the recent expression of opinion upon the proposed plan for a *Corpus Juris*, from one of the ablest American lawyers who has graced our bench, one who is also a great administrator of the law and an intensely practical man, President William H. Taft, who writes:—

"*A compendium thus made would be of the utmost use* not only to lawyers, but rather more, I think, to laymen. *It will tend to render the law more certain, and will be of much public service.*"

L. H. A.

Philadelphia, May 13, 1910.

The Salaries of Judges

To the Editor of the Green Bag:—

Sir: I have noticed from time to time, with much favor, your agitation for an increase of the salaries of the federal judges. That these men are underpaid, is notorious, if not a disgrace to our government. The fathers made the mistake of not having the proper conception of the great dignity and power of the office as well as a proper perspective of the tremendous growth of our country. Democracy was indeed then rampant. But doubtless, while they feel the inadequacy of their compensation, almost to the point of humiliation, just like other mortals in these days of oppressive charges, yet they enjoy the sublime satisfaction of feeling secure in their positions for life, and of knowing that, at the ripe and beautiful age of seventy, they can retire on full pay, unvexed by what the political status may be on the morrow. This is certainly worth a great deal, far more than an increase of salary. For what could be more satisfying and conducive to the best of effort than to *know* that tomorrow is provided for until the chrysalis of eternity gathers you to her arms! This is doubtless what the founders

had in mind when they wisely made the position one for life.

But, do you know that the hardest worked judges in this country are those who occupy the *nisi prius* and reviewing benches of the various states? The work which they are called upon to do is tremendous. In this judicial district, of which Cleveland is the centre, the reporters, when they are short of news, regale the public with the startling statement that the court is four thousand cases behind the docket, eleven judges working constantly. The same can be said proportionately of all our great centres of population. The questions presented are just as intricate, just as complicated and original, and require just as high an order of ability as those which go before the federal judiciary. I am prepared to say, as a rule, they are much more so; and every lawyer will concede that the time and labor involved are far greater.

These judges are *also* inadequately paid, to say nothing of being subjected to the latest political gust, when their foundations are liable to be swept from under them. Massachusetts, like the founders of the Republic, knows how to get a good judge—make him secure in his position, with proper reservations, and pay him a salary that will give him peace of mind. No state in the Union has a better, if so good, a judiciary as "The Grand Old Commonwealth." On a disputed point, every *nisi prius* and reviewing judge in the country takes notice when an opinion from her is cited. And it has always been so. The explanation is easy.

Why not start an agitation for the state judiciary, who are required to do a great and arduous work? I like the last sentence of your editorial in the June issue: "Salaries that impoverish work harm not only to the judges individually, but imperil the state by diminishing the popular respect for the efficient administration of the law." You might have added that an insecure judiciary is as great a menace.

HARVEY R. KEELER,
Judge, Court of Common Pleas,
June 8, 1910. *Cleveland, Ohio.*

[We believe that the foregoing considerations would apply with especial force to the proposition now being discussed to limit the terms of federal circuit judges to ten years by means of a constitutional amendment. Adequate salaries and tenure of office during good behavior, for state and federal judges alike, are both equally necessary to the highest efficiency of the judiciary.—Ed].

The Legal World

Important Litigation

The federal government has not abandoned its intention to dissolve the merger of the Union Pacific and Southern Pacific railroads, and the bill in equity filed some time ago is likely to be argued in the United States Circuit Court, for the eighth circuit, about October 1.

With two vacant seats in the United States Supreme Court, it has fallen slightly, though only slightly, into greater arrears, and adjourned with 108 more cases undisposed of than was the situation a year ago this time. However, that is not a large number compared with the congestion that obtained in the court before the Evarts act went into effect creating the Circuit Court of Appeals. This was in 1890. At that time there were 1800 cases on the docket; now there are 586. Since the Evarts act was passed there have been filed with the court 8166 cases and 8557 have been disposed of, in the number being cases previously filed. The yearly average of the number of cases filed is thus 408 and the number decided 422, showing that the court is overtaking the number of cases waiting decision. This year 391 cases were decided. With Mr. Justice Moody back and Governor Hughes in his new seat, the Court will doubtless quickly make up for lost time.

The trial of Charles R. Heike, secretary of the American Sugar Refining Company, on the charge of conspiracy to defraud the government in the sugar short-weighing frauds opened at New York City May 17, and he was convicted on June 10. The trial took place before Judge Martin in the United States Circuit Court, and five others, former employees, were tried at the same time. The

government was greatly aided by the sensational testimony of Oliver Spitzer, who was unexpectedly released from the federal penitentiary at Atlanta, having been pardoned in order that his evidence might be produced. Special deputy Attorney-General Henry L. Higginson, assisted by Winfred I. Denison, conducted the prosecution. Three of the defendants, Walker, Voelker and Halligan, decided to plead guilty early in the trial. Ernest W. Gerbracht was convicted on all six counts, and the jury brought in a verdict of seven to five for the acquittal of James F. Bandernagel, former cashier of the refinery.

The government was unsuccessful in its prosecution of Fritz Augustus Heinze, who after a trial lasting nearly three weeks was acquitted of the charge of misapplying the funds of the Mercantile National Bank in 1907, and of overcertifying the checks of his brother's firm, Otto Heinze & Co. The trial took place before Judge Hough in the United States Circuit Court at New York City, United States Attorney Henry A. Wise having charge of the prosecution, while John B. Stanchfield conducted the defense. Heinze afterward declared that the trial had cost him between $4,000,000 and $5,000,000, in damaged credit and legal expenses. The government has appealed to the United States Supreme Court. The appeal avers that Judge Hough was in error when he quashed the seven numbered counts in the Heinze indictment which alleged the misapplication of funds of the Mercantile National Bank, in cashing checks of Otto Heinze & Co. The appeal is allowable because there was no trial on these counts.

The next term of the United States Supreme Court will open on October 10. The three great suits assigned for reargument, namely the *Standard Oil* case, the *American Tobacco Co.* case and the *Corporation Tax* cases, will doubtless be heard soon after the Court opens, though in what order cannot now be foretold. The Court puzzled many people in April by setting two of the fifteen tax cases for reargument at the beginning of the October term. The decision announced on May 31, that all the cases would be reargued, together with the explanation that the decision to reassign was delayed by the hope that a satisfactory determination obviating a rehearing might be reached before the summer recess, shows that no particular significance was to be attributed to the earlier announcement. The later announcement that all cases would have to be reargued does not lend much support to the earlier rumor that the Court had found the constitutionality of the tax doubtful only as applied to the circumstances of two of the fifteen cases.

On complaint of a committee of Western shippers that twenty-five railways had joined to increase freight rates, Attorney-General Wickersham on May 31 filed a petition for a temporary injunction at St. Louis against the Western Trunk Line Association, restraining the enforcement of most of the higher rates, on the ground that the agreement under which the rates were advanced was in violation of the Sherman law. The companies had allowed one person to file at Washington notice of the advances contemplated. The action was a complete surprise to the railways, which had been kept in ignorance of the plans of the government. They were consequently unable to prevent the immediate issuing of the injunction without notice, by Judge D. P. Dyer of the United States District Court. On June 6, President Taft held a conference with Western railroad presidents, in consequence of which the railroads agreed to withdraw the schedules enjoined, and not to increase their rates until after the rate bill pending in Congress should become a law.

In the so-called "white slave" investigation by District Attorney Whitman of New York, the government succeeded in convicting one of the three defendants, Belle Moore, of the charge of selling two girls for immoral purposes and she was sentenced to state prison. The evidence produced was that she, with Harry Levinson and Alec Anderson, had sold four girls to special agent G. A. Miller of the District Attorney's office, two college women having aided the office in working up the case. The grand jury of which John D. Rockefeller, Jr., was foreman, had brought in six indictments, and the three prisoners were arraigned before Judge Crain May 2. One of them, Levinson, pleaded guilty and promised a full disclosure, but the statement which he gave to the District Attorney did not afford the evidence of organized traffic which was looked for. The sensational statements made early in the history of the case were in some respects unsupported, the newspaper report that one of the four girls sold was a child of fifteen who cried at being taken away from her Teddy bear being shown to be false, as she was a woman of mature years. On June 10 the third defendant, Anderson, was released, and the case against him was abandoned.

Personal—The Bench

Hon. Claudius B. Grant, late of the Michigan Supreme Court, is now to practise law with the legal firm of Shaw, Warren, Cady & Oakes, of Detroit.

Judge Willard M. McEwen of Chicago has retired from the state circuit court to become head of the law firm heretofore known as Weissenbach, Shrimski & Meloan.

Hon. Lucilius A. Emery, Chief Justice of the Supreme Court of Maine, delivered a series of lectures on probate law and practice

before the students of the University of Maine School of Law in May.

Francello G. Jillson of Providence, R. I., has been chosen Judge of the Municipal Court at Providence to fill the place made vacant by the death of Judge Joseph E. Spink. He was for three years speaker of the lower house of the legislature.

A dinner was given in honor of Justice Arno King of Ellsworth, Me., by the members of the Androscoggin County Bar, at Auburn, Me., May 18, at the close of the April term of the Supreme Court over which Justice King presided. This was Justice King's first term in Androscoggin County since his appointment to the Supreme bench.

Mr. Justice Harlan of the Supreme Court of the United States reached his seventy-seventh birthday on June 2. He has been a Justice for nearly thirty-three years, and if he lives two years more he will have served longer than any man who ever sat upon the bench of the Supreme Court. He has lately said that he has no thought of retiring.

The Vermont State Bar Association gave a banquet at Montpelier on May 24 in honor of the seventy-fifth birthday of Chief Justice John W. Rowell of the Supreme Court, Hon. James M. Tyler of Brattleboro and Hon. H. H. Powers of Morrisville, who were formerly associated with Justice Rowell on the Supreme Bench. Among the guests present was Justice Wendell P. Stafford of Washington, D. C., a former Vermont judge.

Mr. Chief Justice Fuller has decided to retire from the United States Supreme Court soon after the October term opens, according to a despatch in the Portland (Me.) *Argus*, which says that he has yielded to the repeated urgings of his friends that he ought to enjoy for the remainder of his life the leisure which he has so well earned. He wishes, however, to see both the *Standard Oil* and the *American Tobacco Co.* cases decided before his retirement. His honor will be seventy-eight years old next February.

Personal—The Bar

The death of King Edward VII. occurred on May 7, and George V. was proclaimed King two days later. It may not be generally known that King Edward was actually a barrister, having been called to the bar as Prince of Wales in 1861 at the Middle Temple, long holding the office of a bencher of the Inn. George V. is also a member of the English bar, being a bencher of Lincoln's Inn. The new King is said long to have been a serious student of the Constitution.

Former Congressman Charles E. Littlefield delivered a lecture May 12 in Carnegie Hall, New York, on "The Law in Relation to Labor Unions," under the auspices of the Fordham University School of Law. Mr. Littlefield said that of the injunctions granted by the federal courts in recent years, 94 per cent did not concern labor controversies. Only one state in the union, California, he said, had pronounced the boycott right and proper as a weapon in labor controversies. He praised President Taft for making, as a federal judge, "some of the ablest decisions on unions and industrial combinations now found in the books."

Bar Associations

The fourteenth annual meeting of the Indiana Bar Association will be held at Indianapolis, July 6 and 7.

The annual meeting of the North Dakota Bar Association has been postponed from September 1 and 2 to September 8 and 9, 1910, in order to enable members to attend the meeting of the American Bar Association.

The Oregon Bar Association, at an adjourned session held May 17, approved the resolutions in favor of a nonpartisan judiciary previously adopted by the Multnomah Bar Association. These resolutions were advocated before both bodies by Judge Martin L. Pipes.

The lawyers of Adams, North Adams and Williamstown, Mass., met on June 3 and organized the North Berkshire Bar Association on June 3, with these officers: president, John E. Magenis of North Adams; vice-president, Edward K. McPeck of Adams; secretary and treasurer, James O'Hallaran of North Adams.

The Mississippi Bar Association held its annual meeting at Natchez, Miss., May 3–5. The president's address was delivered by Dr. T. H. Somerville of Oxford, and Judge Wilson E. Hemingway of Little Rock gave the annual address, his subject being "Reminiscences of the Practice of Law in Mississippi." The following papers were read: "Uniformity of Legislation," by Hon. W. O. Hart of New Orleans; "The Unequal Application of Our Criminal Laws," by Gerard Brandon of Natchez.

The annual meeting of the Louisiana Bar Association was held at Baton Rouge, La., May 20–21. Resolutions were adopted asking the legislature to increase the salaries of the judges and district attorneys, directing a raising of the standard of qualifications of applicants for admission to the bar, and appointing a committee of seven to examine the work of the civil and criminal codes commission. In his annual address, President Randolph gave an illuminating resumé of the work of Congress, and advocated the adop-

tion of the American Bar Association canons of legal ethics. This recommendation was followed. A report was read, prepared by W. O. Hart of New Orleans on the efforts made in this and other states to procure the enactment of uniform legislation, and proposing a resolution indorsing the Stafford uniform bill of lading and transfer of shares of private corporations bills. This resolution was adopted. Archibald R. Watson, Corporation Counsel of New York City, and former editor of *Bench and Bar*, spoke on "Some of the Duties and Responsibilities of Municipal Government," and expressed some enthusiastic praise of Mayor Gaynor of New York City, which has since been construed in some quarters as a Presidential boom. These officers were elected: E. H. Randolph of Shreveport, president; Joseph Carroll of New Orleans, first vice-president; E. T. Weeks, second vice-president; Judge P. S. Pugh of Shreveport, third vice-president; Frank P. Stubbs of Alexandria, fourth vice-president; Charles A. Duchamp of New Orleans, secretary-treasurer.

Crime and Criminal Law

A committee of the United States Senate has been appointed to investigate the "third degree" method of police examination of prisoners. It consists of Senators Curtis, Brown, Borah, Overman and Stone.

In the death of Prof. Franklyn C. Robinson of Bowdoin College, Brunswick, Me., at Portland, Me., May 25, Maine loses her best known expert on toxicology. For many years, practically every case in the state, where there was a suspicion of poisoning, was referred to him, and he was called as the state's expert in numerous murder trials.

International Law and Politics

The New England Arbitration and Peace Congress met at Hartford, Conn., May 9–11. Much enthusiasm was aroused by the reading of letters from President Taft, Ambassador Bryce, Secretary Knox, and other distinguished statesmen and leaders, Dean Henry Wade Rogers of the Yale Law School discussed "The Present Problem," Rabbi Stephen S. Wise of New York spoke on "The Life of Elihu Burritt, and former Governor George H. Utter of Rhode Island considered "The Signs of the Times in the Light of Peace." Other addresses given were those of ex-Secretary of State John W. Foster, Hon. James Brown Scott, and ex-Chief Justice Simeon E. Baldwin. At the close of the conference the American Peace Society met and elected these officers: president, Robert Treat Paine, Boston; treasurer, F. B. Sears, Boston; secretary, Rev. B. F. Trueblood, Boston, and auditor, Dr. William F. Jarvis, Waltham, Mass.

The sixteenth annual International Arbitration Conference was held at Mohonk Lake, N. Y., May 18–20. The most important happening was the official announcement to the conference by Secretary Knox, through Solicitor of the State Department James Brown Scott, of the probability of the early establishment of the proposed Court of Arbitral Justice. Simeon E. Baldwin, ex-Chief Justice of the Supreme Court of Connecticut, pointed out some of the faults of the present court of nations established at the first Hague Conference, and expressed the hope that Secretary Knox's proposition to make the Judges of the International Prize Court *ex officio* Judges of the Court of Arbitral Justice, would receive general indorsement. England, Sweden, Switzerland, Ecuador, Columbia, and other countries were represented by delegates. Among those who made addresses were Dr. Nicholas Murray Butler, Professor John B. Clark of Columbia, President Emeritus Charles W. Eliot, William J. Bryan, Oscar F. Whitelaw and Benjamin F. Trueblood.

Miscellaneous

Clara Shortridge Fultz of Los Angeles, Cal., dean of women lawyers in Southern California, has been appointed assistant district attorney because it is deemed advisable to have a woman in the office to deal directly with women complainants.

Four oil paintings of former Chief Justices of the United States Supreme Court have been presented by United States Senator Frank B. Brandegee to the state of Connecticut, and hung in the State Library. The portraits are of Chief Justices Roger B. Taney, Salmon Portland Chase, Morrison R. Waite and John Marshall.

Professor Edward H. Warren of the Harvard Law School and Miss Elinor Foster, daughter of Mr. and Mrs. Douglas Foster, were married May 28 in the Northminster Presbyterian Church in Baltimore. They will spend the summer in Europe and upon their return will live at 224 Marlborough street, Boston.

Members of the joint committee on the reform of legal procedure appointed by the American Bar Association and the National Civic Federation held a conference in New York City at the Bar Association in West 44th street the first week in June. Everett P. Wheeler, Esq., of New York, is chairman of the former committee, and Ralph W. Breckenridge of Omaha of the latter.

The degree of Bachelor of Laws was conferred upon twelve graduates of the Temple University Law School of Philadelphia at the commencement exercises on June 4. Dr. Newell Dwight Hillis of the Plymouth Church, Brooklyn, delivered the address, his subject being "The New Demand upon the Scholar in the Republic." Two members of the class had already passed the Pennsylvania bar examinations, and one had passed the New

Jersey bar examinations, before completing the course. The school maintains a four years course, since it has been found impossible for most men to cover thoroughly in an evening school the different branches of the law in any less time.

One of the bills introduced by the New York State Commission on Employer's Liability, was enacted in May. This act amends the existing employer's liability law in several particulars, modifying the fellow servant rule by taking all those in positions of authority out of the class of fellow servants, abolishing the so-called assumption of risk rule by which an employee is held to assume the risk of defects amounting to negligence in his employer if he continues in employment after knowledge of them, and placing the burden of proof of contributory negligence upon the defendant. It then offers to employers and employees a chance to make a contract by which the employee gives up his uncertain right to sue for damages in cases where he can prove negligence, in return for a certainty of compensation for all accidents of employment according to certain uniform rates—roughly, half wages for disability, three years' wages for death.

Goldwin Smith, who died at Toronto, June 7, would deserve mention in these pages on account of his notable contributions to the discussion of political and social questions, but the legal profession can also claim him, as he was early called to the bar at Lincoln's Inn. He was the eldest son of Richard Smith, M. D., of Reading, Berks. He was born in 1823. His early education was obtained at Moncton, Farley and at Eton, and he was later graduated from University College, Oxford. He gained the Hertford Scholarship in 1842; Ireland, 1845; Chancellor's prize for Latin verse, 1845; Latin essay, 1846; English essay, 1847; and was appointed Fellow of University College in 1846. He was made Regius Professor of Modern History at Oxford in 1858, which position he retained until 1866. He was a prominent champion of the North during the American Civil War of 1864, and in 1868 came to the United States, when he became honorary Professor of English and Constitutional History in Cornell University, which he assisted in founding. He took up his residence in Toronto in 1871. He was the author of a work on the empire (a series of letters which appeared in the London Daily News in 1862–3); a group of studies of "Three English Statesmen" (Cromwell, Pym and Pitt); lives of "William Cowper" and "Jane Austen"; "Irish History and Irish Character"; "The Political Destiny of Canada"; "Canada and the Canadian Question"; "False Hopes, or Fallacies Socialistic and Semi-Socialistic"; "A Trip to England"; "The Moral Crusader, William Lloyd Garrison"; "Essays on Questions of the Day"; "Lectures and Essays"; "Guesses at the Riddle of Existence"; a compact "Political History of the United States"; a "History of the United Kingdom"; "The Founder of Christendom"; and a collection of verses entitled "Bay Leaves," and "Translations from the Latin Poets."

Necrology—The Bench

Alford, Jules E.—At Mobile, Ala., May 29. Judge of inferior criminal court at Mobile; recently nominated solicitor of Mobile county.

Benson, Charles F.—At Atlanta, Ga., May 12, aged 61. Formerly judge in Jacksonville, Fla.

Clary, Albert E.—At Boston, May 14, aged 62. Practised over thirty years in Boston; for several years a police magistrate highly esteemed for his ability.

Corrigan, J. R.—At Minneapolis, Minn., May 13, aged 50. Democratic political leader; friend of William J. Bryan; formerly Probate Judge of his county.

Crawford, Merriwether Lewis.—At Dallas, Tex., May 16, aged 69. Confederate major formerly active in Democratic politics.

Damron, Charles N.—At San Barnardina, Cal. Formerly of Johnson county, Ill.

Ehrgood, Allen W.—At Lebanon, Pa., May 20, aged 59. President Judge of Lebanon county.

Keyes, John Shepard.—At Concord, Mass., May 15, aged 88. For thirty-six years presiding justice of the District Court of Central Middlesex; oldest judge in Massachusetts.

Lane, William S. At Washington, Ga., May 8, aged 60. For fourteen years ordinary of Wilkes county; Confederate veteran.

Newton, C.—At Monroe, La., May 26, aged 62. Former member of Congress; Democratic leader.

Sankey, R. A.—At Wichita, Kas. Prominent member Sedgwick County Bar Association.

Sherman, E. B.—At Chicago, May 6, aged 78. For years master in chancery of the United States Circuit Court.

Wilkins, A. Milton.—At Amherst, N. H., May 28, aged 56. For twenty years trial justice; was sent to legislature.

Necrology—The Bar

Boarman, William W.—At Washington, D. C., May 2, aged 60. Prominent member of old Maryland family.

Burr, Charles L.—At New York City, May 26, aged 40. Of the law firm of Mackenzie & Burr.

Coe, Ernest L.—At Newark, N. J., May 26. Writer on historical subjects.

Curie, Charles.—At New York City, May 9, aged 68. Civil War veteran; mining company and bank director; member New York firm of Curie, Smith & Maxwell.

Denison, Arthur Elmer.—At Cambridge, Mass., May 18, aged 62. Formerly associated with Edward Everett in Boston.

Dickinson, Charles C.—At New York City, May 24, aged 40. Lawyer and banker; founder and later president of the Carnegie Trust Company; writer on financial subjects.

Fanning, Charles A.—At Kankakee, Ill., May 10, aged 55. Until recently had offices with M. R. Morris in Chicago.

Farrington, Willard.—At St. Albans, Vt., May 22, aged 75. Civil War veteran.

Goddard, Warren.—At Brockton, Mass., June 3, aged. 61

Gordon, Captain Robert H.—At Cumberland, Md., May 10, aged 58. One of the best chancery lawyers in Maryland; geologist, lecturer, and publicist.

Gross, William C.—At Philadelphia, May 2, aged 58. Formerly select councilman in Philadelphia.

Harris, Gilbert N.—At Melrose, Mass., May 28, aged 70. Civil War veteran.

Hill, Henry Evelyth.—At Worcester, Mass., May 11, aged 59. One of the best known lawyers of that city.

Ingraham, Richard.—At Hempstead, L. I., N. Y., May 17, aged 87. Formerly known as a breeder of trotting horses.

Ivers, Jesse A.—At Columbus, Ga., May 28, aged 60. Practised in McConnelsville, Ga., for thirty-three years.

Kasson, John A.—At Washington, D. C., May 18, aged 88. Formerly United States minister to Austria and Hungary; had long and successful career in diplomacy; a writer of history; at one time practised in New Bedford, Mass; wrote a history of the formation of the United States Constitution and the history of the Monroe doctrine.

Lee, A. Markley.—At Charleston, S. C., May 21. Of the firm of Smythe, Lee & Frost of Charleston.

Mann, Harry E.—At Hamilton, Md., May 2, aged 58. Prominent in Baltimore.

Mattocks, Gen. Charles P.—At Portland, Me., May 16, aged 70. Civil War veteran; county attorney at Portland, 1869–1872; representative to Maine legislature; Judge of Probate, 1900–1906; served in Spanish War.

Minot, Robert S.—At Dover, Mass., May 15, aged 53. Practised in Boston; prominent citizen of a prominent family.

Noonan, Thomas F.—At Bayonne, N. J., May 11, aged 51. Former clerk of the Assembly and Assemblyman; former District Court Judge of Bayonne; for several years City Attorney.

Patterson, John C.—At Marshall, Mich., May 24, Member of Michigan senate for five years.

Pearson, William W.—At Plainfield, N. J., May 22, aged 68. Civil War veteran; practised several years in New York City.

Peck, Myron H.—At Batavia, N. Y., May 14, aged 60.

Pitman, J. H.—At Atlanta, Ga., May 16. Former representative in state legislature.

Pulsifer, Augustus Moses.—At Auburn, Me., May 7. Formerly county attorney of Androscoggin county, Me.

Ritsher, Edward C.—At Chicago, Ill., June 2, aged 45. Member of the Chicago firm of Ritsher, Montgomery, Hart & Abbott.

Rooney, John.—At Brooklyn, May 20, aged 71. Lawyer and promoter; for years president of the Boston, Hartford & Erie Railroad.

Ross, Walter I.—At Stanhope, N. J., May 4, aged 70. Had practised in Stanhope for forty years.

Shaver, Llewellyn A.—At Washington, D. C., May 11, aged 76. Attorney for Interstate Commerce Commission for the past fourteen years; before entering government service practised in Montgomery, Ala.

Spalding, Thorndike.—At Cambridge, Mass., May 4, aged 39. Graduate of Harvard College and Harvard Law School; state senator from the second Middlesex district; had practised in Boston since 1897; prominent in Cambridge.

Stevens, John C.—At Galesburg, Ill. Prominent in Galesburg.

Stone, Charles Francis.—At Redlands, Cal., Apr. 27, aged 73. Member of the New York firm of Davies, Stone, Auerbach & Cornell; educated at Harvard and at French and German universities; widely known as one of the first legal scholars of New York State; appeared in the courts only at rare intervals, most of his work being confined to the library and to consultation; of noble character and unselfish life.

Sturtevant, Ralph O.—At Swanton, Vt., May 28, aged 71. Civil War veteran; prominent Mason.

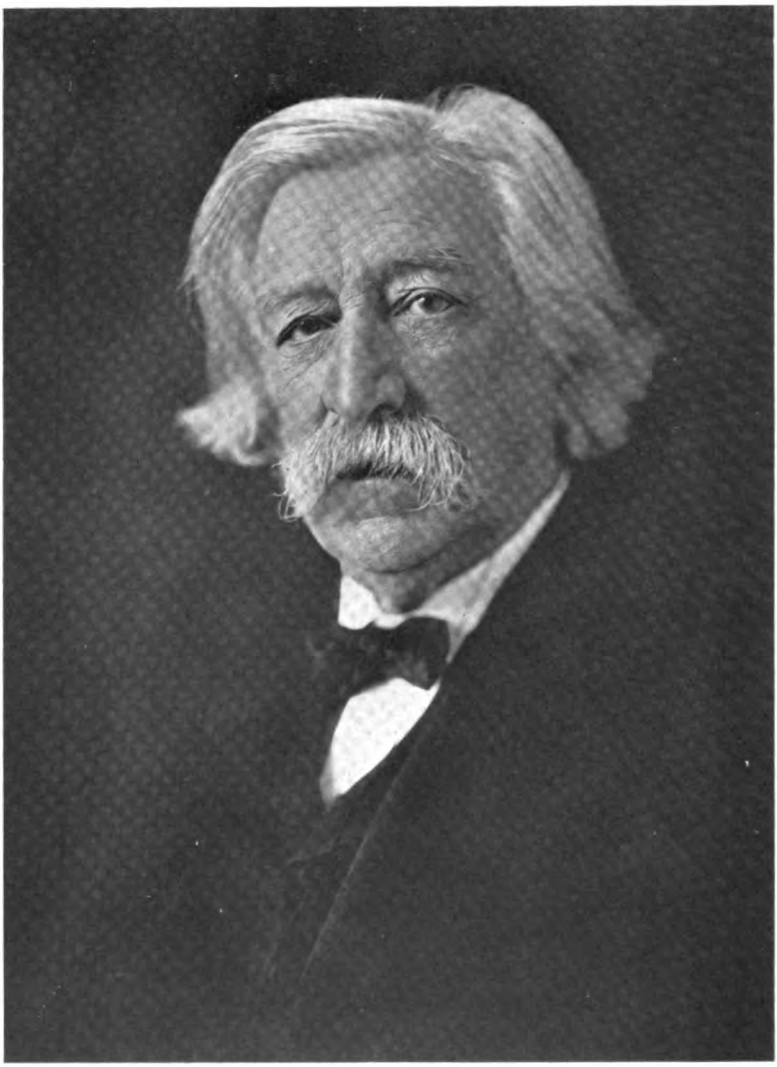
Thompson, J. B.—At Pittsburg, May 10, aged 37. Borough Solicitor of South Sharon, Pa., for the past six years.

Vaughan, Fielding.—At Mobile, Ala., May 14, aged 52. Had a large practice for many years in Mobile.

Watson, James W.—At Fond du Lac, Wis., May 21.

Webster, Sidney.—At Newport, R. I., May 30, aged 82. Secretary to President Franklin Pierce; graduate of Yale and Harvard Law Schools; practised in Boston and New York City; attorney for Samuel J. Tilden in the electoral commission case; for years legal representative of the Rothschilds in the United States; adviser of E. H. Harriman; authority on corporation and international law; author of "Two Treaties of Paris and the Supreme Court" (1901) and other works.

Wyman, Isaac Chauncey.—At Salem, Mass., May 18, aged 82. Practised twelve years in Boston, largely in shipping, mercantile and real estate law; later became a large real estate owner in Lynn and Marblehead; has left his large fortune to Princeton University.



THE LATE CHIEF JUSTICE MELVILLE W. FULLER

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The Green Bag

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The Late Chief Justice Fuller

IT may turn out that Chief Justice Fuller's tenure of office is to be followed by important developments in constitutional law. The epoch closed by his death may have been one of transition. The social and economic developments of late years certainly seem to be calling for a great constructive jurist like Marshall or Mansfield,—one who, as head of our most august tribunal, could work out, in a conservative spirit, that invulnerable doctrine of the scope of federal powers which the country seems to be anxiously awaiting. It is no longer conceivable that a judge of Fuller's or Taney's leanings towards state rights could come to dominate the Supreme Court. Herein may perhaps be found the explanation of Chief Justice Fuller having failed to impress his influence more effectively upon his colleagues.

But one thing he could do—at a time when the Court was unable to present a compact firing line to its adversaries in the battles around crucial points of constitutional interpretation, he could take up his stand boldly in defense of fundamental personal and property rights which amid the current zeal for growing centralization and regulation were in danger of being belittled, and his courage and conservatism in this respect were frequently exhibited. If he was unable to sweep the whole Court into the current of his own convictions, he could at least block what seemed objectionable tendencies. If he could not complete the edifice, he could supply foundations for his successor to build upon. For twenty-two years, longer than any other member of the court except Mr. Justice Harlan, he contributed this steadying influence, worthily maintaining the continuity of the Court and the stability of the Constitution.

When Chief Justice Fuller was called to the bench by Grover Cleveland he had built up a large and important practice in Illinois, being considered a special authority on commercial and real estate law; but others were accounted his superiors in the art of advocacy and in depth of learning. His powers of analysis and reasoning were respectable, but were not remarkable. Yet the modest Chief Justice proved himself fitted to direct the procedure of the Supreme Court with admirable skill and discretion, his administrative ability being conspicuous on all occasions and his labors well serving to maintain the dignified detachment and privacy of the Court and to promote efficiency and expedition in its disposal of business.

It is believed that not one of our Chief Justices was ever so loved by his associates and so honored by the American Bar as Melville W. Fuller.

A Practical Program of Procedural Reform*

By Roscoe Pound

ONE needs but look about him to see that procedural reform is in the air. The subject has progressed beyond the stage of discussion by jurists and teachers and controversy in periodicals, legal and lay, and has entered upon the practical stage. To say nothing of the elaborate measure pending in this state, bills for reform of federal procedure, including one for a commission to draft a complete federal practice act, are before Congress, and procedural reform has received the weighty approval of the President; a commission on delay in the administration of justice has reported recently in Massachusetts; a committee of the Association of the Bar of the City of New York has put forth a printed report on simplification of procedure; Kansas has adopted, at the instance of the State Bar Association, a revised code of procedure which embodies many notable reforms; the Bar Association of San Francisco recently has procured important reforms in the criminal procedure of California; and the American Bar Association now maintains what is practically a standing committee on delay and expense in legal procedure. Even more significant, there are notable signs of increasing liberality in judicial decisions on questions of practice.[1] Thus, after a period of rigidity in practice, in which substance has been sacrificed to form and end has been subordinated to means, we are evidently about to enter upon a period of liberality in which the substance shall prevail and the machinery of justice shall be restrained by and made strictly to serve the end for which it exists.

Such periods of rigidity and liberality in procedure have alternated throughout the history of our law. What Mr. Zane has called the Golden Age of the Common Law, in which the power to make new writs, liberally exercised, indeed assured that no wrong, or at least no type of wrong, should be without a remedy, was succeeded by a period of hard and fast actions in which a statutory attempt to restore the former flexibility could only give us the action on the case. A period of free amendment of the record was succeeded by one in which the final and unalterable nature of the record became a dogma and gave rise to a record-worship from which our procedure suffers still, so that, as Blackstone said long ago, suitors have "suffered as much by this scrupulous obstinacy and literal strictness of the courts as they could have done even by their iniquity."[2] The judicial liberality of the year books with respect to proceedings before the court, when pleadings were settled orally and not made part of the record until the legal phases of the case had been thrashed out, was arrested in the fifteenth and sixteenth centuries[3] and gave us in the seventeenth century the high-water mark of technicality in pleading. A new period of liberality set in at the end of the eighteenth century, when Lord Mansfield made of the count for money had and received a bill

* Presented at the annual meeting of the Illinois State Bar Association, June 23, 1910.

[1] *Cockerell* v. *Henderson* (Kan.), 105 Pac. Rep., 443; *Byeson* v. *Territory* (Okla.), 103 Pac. Rep., 532; *People* v. *Strollo*, 191 N. Y., 42, 61, 66–7.

[2] 3 Bl. Comm., 411.

[3] Cf. Co. Lit., 304*a*, 304*b*.

in equity at law,[4] when he made the equitable defense of non-performance by a promisee of the counter-promise on his part into breach of an implied condition, available at law,[5] when he took cognizance at law of purely equitable interests and rights where the trusts on an outstanding term were fully satisfied,[6] and when he went a long way toward breaking down the distinctions between actions at law,[7] and gave to trover many equitable incidents. This, again, was followed by a reaction which was almost unaffected by the legislation of the reform movement and endured until the drastic changes of the Judicature Act of 1873. In this country, the liberal ideas of the New York Code of 1848 and of the period in which that code swept over the country, was followed quickly by a judicial reaction which went a long way toward nullifying its most important provisions.[8] A swing of the pendulum toward liberality at this time is but part of a general movement in all departments of mental activity away from the purely formal, away from hard and fast notions, away from traditional categories which our fathers supposed were impressed upon the nature of things for all time. This movement is remaking the natural and physical sciences, is rewriting history, is recasting political theories, is making over economic theory, and, under the name of sociology, is changing our attitude toward all problems of social life. It is inevitable that jurisprudence, and ultimately the law itself, be affected profoundly. For whatever its validity in other fields, pragmatism must be the philosophy of the lawyer. "What are its results; how does it work, and what does it work," must be the questions he puts to every theory and distinction and dogma and category. Adjective law is but an instrument; its categories of actions and proceedings were not stamped upon legal science by the Creator. And whenever pragmatism supersedes the natural law of our historical school in juristic philosophy, so that we look upon action at law and suit in equity, the form of common law actions and the traditional types of proceedings, not as eternal categories, beyond the reach of legislation, but as instruments for the enforcement of the substantive law, to be judged as such, a liberal and flexible procedure is certain to ensue.

But we must not expect too much from procedural reform at present. In the first place it is not a panacea. There are at least three problems connected with the administration of justice in America which are of equal, if not, some of them, of greater importance. Moreover, these problems are connected intimately with that of procedural reform. The organization of courts, and thereby the organization of judicial business, the personnel, mode of choice and tenure of judges, and the organization, mode of training and traditions of the bar have each at least as much to do with the conditions of effective judicial administration as the course and rules of practice in the courts. It is not too much, indeed, to say that improvement in these three particulars is a necessary precursor of thoroughgoing reform of procedure. With a modern organization of the courts and

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[4] *Moses* v. *Macferlan*, 2 Burr., 1005.
[5] *Kingston* v. *Preston*, 2 Doug., 689.
[6] *Doe d. Bristow* v. *Pegge*, I. T. R., 758, note *a*.
[7] "It is merely a distinction whether the relief shall be in this form or that." *Hambly* v. *Trott*, Cowper, 271.
[8] *Allen* v. *Patterson*, 7 N. Y., 476; *Reubens* v. *Joel*, 13 N. Y., 488; *Voorhis* v. *Child*, 17 N. Y., 354; *Goulet* v. *Asseler*, 22 N. Y., 225; *De Graw* v. *Elmore*, 50 N. Y., 1; *Barnes* v. *Quigley*, 59 N. Y., 265; *Bonesteel* v. *Bonesteel*, 28 Wis., 245; *Anderson* v. *Coze*, 28 Wis., 505; *Supervisors* v. *Decker*, 30 Wis., 624; *Denner* v. *R. Co.*, 37 Wis., 268; *Maguire* v. *Vice*, 20 Mo., 419; *Richardson* v. *Means*, 20 Mo., 495; *Myers* v. *Field*, 37 Mo., 434.

an efficient, independent, experienced judiciary, almost any system of procedure may be made very tolerable. Without them, the best considered practice acts will prove disappointing in their actual administration. In the second place, experience has shown that reforms of procedure must not come too soon and must not go too fast for bench and bar, who are to administer them. Much of the difficulty which has attended the operation of the New York Code of Civil Procedure and the codes founded thereon has arisen from the circumstance that the reform was premature. The bench and the bar were not ready for it. For one thing, the old procedure was not yet so thoroughly tested under American conditions as to afford a sound basis for reform. We must remember that when, in 1847, the commissioners were appointed to draft the New York Code of Civil Procedure, there was scarcely half a century of useful experience in the administration of justice in America to draw upon. Written opinions began with the appointment of Kent as Justice of the Supreme Court of New York in 1798. There was a lay Chief Justice in Rhode Island as late as 1820, and one of the Justices of the Supreme Court of that state from 1814 to 1818 was a blacksmith. Two of the three Justices of the Superior Court of New Hampshire after independence were not lawyers. New Jersey and Kentucky at the end of the eighteenth century legislated against citation of English books in the courts. There was a rule of court to the same effect in New Hampshire. In the latter state, one of the Justices in the last decade of the eighteenth century used to boast that he had not read Coke or Blackstone and never would read them. Kent tells us that in New York, while he was upon the supreme bench of that state, "English authority did not stand very high."[9] Not only had the old practice been in effective operation too short a time, but it was unreasonable to expect that a generation which had just thoroughly learned the English practice, and learned to apply it under American conditions, should abandon it over night or give up its fundamental tenets without a struggle. The reform of 1848 too often fell far short of the needs of present-day administration of justice. But where it did go to the full extent, judicial jealousy of legislative derogation of the common law and professional tenacity of hard-learned conceptions of English procedure operated to restrict, if not to defeat it. Many common-law ideas in procedure have been worked out to their logical results for the first time in judicial applications of the codes.[10] To-day, after more than a century of American experience, after the country as a whole has been settled and developed and conditions have become stable, we are much better prepared for effective reform of procedure than in 1848. But we should be warned by the example. New York was a too precious and too ambitious pioneer, and over-ambition to achieve a complete and thoroughgoing reform at one stroke may very well have the same results today.[11] Thirdly, no amount of procedural reform can obviate entirely dissatisfaction with the legal administration of justice. Administration of law without forms is as impracticable and undesirable as

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[9] For the details with reference to this and the foregoing statement, see my paper "The Influence of French Law in America," 3 Ill. Law Rev., 354.

[10] See *Mescall* v. *Tully*, 91 Ind., 96; *Rust* v. *Brown*, 101 Mo., 586; *Lumber Co.* v. *Wadleigh*, 103 Wis., 318; *Anderson* v. *Chilson*, 8 S. D., 64; *Cozey* v. *Major*, 8 Okl., 665.

[11] *E. g.* it was a considerable time before the Judicature Act in England could be made to work well. See Judge Harris's book, "Farmer Bumpkin's Lawsuit," where many curious examples of the earlier workings of that statute are given.

administration of justice without law. But forms and rules will always operate more or less mechanically, and in consequence will always give rise to dissatisfaction with the justice administered thereby. Because of this inherent difficulty in all judicial administration, we must look for the chief benefits of procedural reform, not so much toward obviating popular discontent with the workings of the courts, although such discontent may be diminished to no small extent, as toward relieving our overworked courts of about twenty-five per cent. of the points now submitted to them—points which have no real connection with the substantive rights of the parties litigant,—and toward enabling lawyers to study and present their cases on the substantive law more thoroughly and intelligently, so as to assist the courts more effectively, and thus assure greater certainty and precision of application of the rules on which rights depend.[13]

Premising so much, I purpose to consider (1) the best means of achieving procedural reform in an American state today, (2) the leading principles upon which such a reform should proceed and the chief improvements which it should attempt to achieve.

There are three agencies through which reform of procedure may be brought about conceivably. These are (1) judicial decision, (2) rules of court, and (3) legislation. Perhaps at the present time the scope of the first agency is so restricted by legislation as to make it impracticable for the attainment of any large results. Where there are not codes, going into minute detail, there are usually practice acts expressly providing, or at least clearly assuming, things of which any effective reform must rid us. With respect to these matters, it is obvious that judicial decision is powerless. Yet we must not overlook the achievements of Judge Doe in New Hampshire. With only an ordinary statute of jeofails and amendments to work upon, perceiving what judges in code states, with the aid of better legislative provisions, had not perceived, that forms of action and distinction between legal and equitable proceedings were formal, not substantial, he did not hesitate to allow the form of action to be changed by amendment,[14] to allow amendment from law to equity or *vice versa*,[15] and to allow *mandamus*, or relief in the nature thereof, when the case made showed it proper, although a wholly different remedy had been applied for.[16] For these beneficent strokes of judicial audacity, he had the example of legislation in other jurisdictions. But he went beyond this and settled judicially, without waiting for legislation, that where error at a trial requires a reversal of a judgment, the prior proceedings shall be saved so far as and wherever possible, and a new trial had only of the matter affected directly by the error, if the latter is separable.[16] A Mansfield or a Doe, however, is not to be found on every bench, and in the hands of any less than they were, the power to make such decisions would be dangerous. For the great obstacle to judicial improvement of the law is that judicial changes operate retrospectively. It is not fair to litigants to turn the courts into experiment stations in which judicial reformers

[13] About 35 per cent. of the points decided by our highest courts each year are points of practice. If that burden may be lessened, the benefit to courts, lawyers, and the law needs not be argued. I submit that reduction from thirty-five per cent. to ten per cent. is perfectly feasible, and would be no small relief to our courts.

[14] See Henning's Life of Doe; in Lewis, Great American Lawyers, vol. viii, pp. 239, 254.

[15] *Metcalf* v. *Gilmore*, 59 N. H. 433.

[16] *Boody* v. *Watson*, 64 N. H., 172; *Atty.-General* v. *Taggart*, 66 N. H., 369.

[16] *Libson* v. *Lyman*, 49 N. H., 582.

may try on their ideas of legal improvement retroactively, nor is it fair to judges to ask them thus to sacrifice the interests of individual litigants in order to do what ought to be accomplished by rules laid down in advance of decision. Reform by exercise of the power of courts to make rules is free from the latter difficulty. But here again, in most jurisdictions and for most purposes, the detailed provisions of practice acts or codes stand in the way of effective improvement. Hence we may take it that legislation must be resorted to as the direct and immediate agency of reform.

Assuming that legislation is imperative if not as the sole means, at least as a precursor of procedural reform, three methods are open: (1) A succession of brief practice acts dealing with portions of the subject or with special details, (2) a complete general practice act, after the general model of the codes of procedure, covering, or attempting to cover, all details at one stroke, (3) a short, simple practice act laying out the broad lines only, and, so far as possible dealing only with those matters that require legislative change or legislative authority for change, leaving the details to be settled, developed and improved by general rules to be devised or adopted by the judges.

It cannot be denied that the first of these methods has been pursued thus far in this state with no little success. Three notable reforms were brought about in the last practice act, namely, the power of transfer from Appellate Court to Supreme Court and *vice versa*, the power of amendment from law to equity and *vice versa*, and the power of suit by an assignee in his own name. The limitation of double appeals in the *certiorari* act is another instance of what may be done in this way. But the objections to this course are serious. In the first place it makes progress one-sided. Advance takes place here and there, as it were by jerks, but the general system is left as it was. And it happens not infrequently that defects are really in the system as a whole more than in the details. In that event, the detailed improvements have to take their place in the system and are molded thereto by construction until they fail of effect. A more serious objection is that such a succession of acts, when the work is complete, will give us a mass of enactment with all the characteristics of a code. In other words, it will give us a complete scheme in all its details, laid down in advance by legislation, and to be altered only by more legislation. Hence, all the arguments that may be urged against a code of procedure or a general practice act going into minute detail, apply with equal force, in the end, to such a succession of acts. On the other hand, the advantage of this method,—and it must be conceded to be a real advantage,—namely, the gradual introduction of changes as bench and bar are ready for them, may be achieved equally by leaving details to be worked out by rules of court.

It would seem, therefore, that the choice must be between the second and the third of the three methods named. And herein is the first and most vital problem in devising a program of procedural reform. At the very outset, every jurisdiction must choose between a brief, scientific outline of, say, one hundred sections, to be developed by rules which may be enacted, revised, amended, or abrogated by the judges, in the light of experience of their actual operation, or a detailed code of some two thousand sections, at least, amendable only by means of further legislation, to be developed by judicial constructions

which will be unalterable except by legislation, and thus to furnish material for forensic strife and legislative tinkering indefinitely.

Hence, the first item in a practical program of procedural reform should be, I submit, the following principle:—

I. *A practice act should deal only with the general features of procedure and prescribe the general lines to be followed, leaving details to be fixed by rules of court, which the courts may change from time to time as actual experience of their application and operation dictates.*

Discussion of this question need not be theoretical only. We have abundant experience to draw upon. Undoubtedly more than one cause contributed to the untoward fate of procedural reform in New York. But the chiefest factor was that the reform proceeded upon a wrong principle. I have discussed this at no little length in another place, and beg to repeat what I then said:[17]

"No one can lay down details of procedure in advance with much assurance that they will not require modification. Even if they do not require modification, the rules may acquire meanings through judicial construction, which will demand a change. Such changes of detail ought to be easy to make. The original New York Code unhappily went into detail aad made no provision for change. Minute details could only be altered by legislation. When, as a result of judicial hostility in the earlier years of its history, narrow and illiberal constructions became fastened upon it, resort to legislative amendment was the sole resource. Thus legislative interference grew to be a fixed habit, and a revision supervened, swelling the code to some 3,000 sections, which has been characterized aptly as 'revision gone mad'. Compare with this the method employed in the English Judicature Act. That act contained but 100 sections, with a schedule of 58 rules of practice appended, leaving details to rules of court to be framed by the judges. In drawing up the first rules a mistake was made analogous to that made by the framers of the New York Code. The latter had their eyes chiefly on practice at law and in consequence made rules at many points which proved awkward of application to equity proceedings. Those who drew the Judicature Act and the first rules thereunder were equity lawyers, had their eyes too much on equity, and hence, at first, proceedings at law were made cumbersome and dilatory. . . . But legislation was not necessary to effect a change. The judges themselves were able to and did change the rules as experience of actual application dictated, until the present rules were developed. How unfortunate the results of hard and fast legislation as to the details of procedure may prove in practice is demonstrated by later English legislation with respect to workmen's compensation. Instead of leaving the details of procedure in such cases to general rules to be framed by those who were to administer them, Parliament enacted where appeals should go and in what manner, in such a way that in the reports styled 'Workmen's Compensation Cases,' we meet frequent examples of appeals dismissed because taken to a Divisional Court instead of to the Court of Appeal or *vice versa*—about the only vestige of appellate procedure left in England."

I have said that when the first rules under the Judicature Act in England, having been framed too much with a view to equity practice, proved unfortunate when applied to procedure at law, the judges gradually found the cure by improved rules. Compare with this what happened in New York. There the provisions as to joinder and as to cross-demands were framed with a view to practice at law only, and, in their application, threatened to abrogate the equitable doctrine of complete disposition of the cause and the equity of joining all persons interested in the subject of the suit and proper to complete relief.[18] But the judges were powerless. They were bound by hard

[17] Some Principles of Procedural Reform, 4 Ill. Law Rev. 388, 403-404.

[18] See the sarcastic remarks of Comstock, J., in *Railroad Co.* v. *Schuyler*, 17 N. Y., 592, 604.

and fast legislative rules. Only legislative amendment could effect a cure. But the amendment, when it came, was subject to the same difficulty. It was rigid and unalterable. Hence, as might have been expected, the cure was but partial, and the new section and provisions founded upon it have been prolific sources of litigation in New York and in the other code jurisdictions ever since.[19]

Rules of court, as a means of developing the details of procedure, are no experiment. Not only was this an ancient common-law power, both in courts of law and in the court of chancery, but it was given to the Supreme Court of the United States, with respect to equity practice and admiralty practice, by an act of 1842.[20] It was given to the same court by the Bankruptcy Act of 1898[21] and by the Copyright Act of 1909.[22] It has also been given, within fairly wide limits, to the Municipal Court of Chicago.[23] According to newspaper reports it is also to be given to the new federal Court of Commerce. And if, in some of these cases, as, for instance, the federal equity rules, no great things have resulted from this power, at least no harm has followed, and the power is at hand to be used whenever the demand for improvement becomes acute. Moreover, the orders in bankruptcy, which are much more modern than the equity rules, and have been improved by amendment since their adoption, show the possibilities of such a system.

This principle of development of the details of procedure through rules of court, rather than through minute legislation, is submitted and discussed at length in the report of the special committee of the American Bar Association to suggest remedies and formulate proposed laws to prevent delay and unnecessary cost in litigation presented to the Detroit meeting in 1909.[24] It has been approved as a principle of procedural reform by President Taft.[25] The advantages of the principle have been summarized, in the report already cited, as follows:—

"(1) No one can anticipate in advance the exact workings of a detailed rule of practice. Change and adaptation to the exigencies of judicial administration is inevitable. The judges are best qualified to determine what experience requires and how the rule is actually working. (2) The opinion of the bar as to the working of a rule may be made known to and made to affect the action of the judges in framing new rules or improving old ones much more easily and with better results than where the legislature must be applied to. (3) Small details do not interest the legislature, and it is almost impossible to correct them. (4) Too often details in which some one member of the legislature has a personal interest are dealt with by legislation, and not always in accord with the real advantages of procedure. (5) As experience shows that changes are needed and what they are, there ought to be a possibility of speedy adjustment of details of procedure. Only rules of court can meet this demand."[26]

The case against the principle for

[19] See Pomeroy, Code Remedies, §§ 464-478, for the details.
[20] Comp. Stat. U. S. (1901), § 917.
[21] National Bankruptcy Act, 1898, § 30.
[22] Chap. 320, 35 Stat. U. S.. 1075, § 25. See 214 U. S., 533.
[23] Municipal Court Act of 1907, § 20, Laws of 1907, p. 235
[24] Rep. Am. Bar. Ass'n, xxxiv, 578 595-600.
[25] "In the first place, the codes of procedure are generally much too elaborate. It is possible to have a code of procedure simple and effective. This is shown by the present procedure in the English courts, most of which is framed by rules of court." The Delays of the Law, 18 Yale Law Journal, 28. Again: "The English system, consisting of a few general principles laid down in the practice act and supplemented by rules of court to be adopted by the Supreme Court of Judicature, has worked with great benefit to the litigant, and has secured much expedition in the settlement of controversies, and has practically eliminated the discussion of points of practice and pleading in the appellate courts. My impression is that if the judges of the court of last resort were charged with the responsibility within general lines to be defined by the legislature for providing a system in which the hearings on appeal should be as far as possible with respect to the merits and not with respect to procedure, and which should make for expedition, they are about as well qualified to do this as anybody to whom the matter can be delegated." *Id.*, p. 31.
[26] Rep. Am. Bar Ass'n, xxxiv, 597.

which I am contending was argued fully and ably by Mr. Gilbert in his address before this association last year.[37] Stated summarily, his objections are four: (1) That the evils to be cured are chiefly the result of judicial legislation and that the agency which has produced the condition to be cured ought not to be entrusted with administration of the remedy; (2) that since in the past bench and bar have been hostile to new modes of procedure and have prevented their beneficial operation, it follows, to use his own language, that "to leave to them [the judges] too much discretion, would be likely to result in the adoption of many rules more suited to their own convenience than to the convenience of litigants and to the prompt and proper transaction of business"; (3) that to leave the details to be settled by rules of court would result in confusion and uncertainty; and (4) that even if the judges had the ability and the disposition to enact good rules, they have not the time. In addition to these objections, others have urged that the proposed system is unconstitutional, as involving a delegation of legislative power to the courts. The latter objection is obviously untenable. The power to make rules for practice in the courts has always belonged to the judiciary. Except so far as statutes have prescribed details, that power still exists and is still exercised. Mr. Justice Brown has argued that a great deal of our procedural legislation, intended to tie the judges hand and foot, and to regulate their every act from the time they enter the court room, is of doubtful validity as involving undue legislative encroachment upon the judicial department.[38]

Be this as it may, the example of the grant of this power to the federal Supreme Court which has stood unchallenged since 1842, should convince the most skeptical. With respect to Mr. Gilbert's objections, it may be said, first, that the present condition of American procedure is by no means to be laid solely or even chiefly to the bench nor to bench and bar. Not only has ill-advised legislation contributed its fair share in more than one jurisdiction, but the most active causes have been deep-seated. An extended discussion of these causes here would be out of place. But at least six may be traced, namely: (1) survival of conceptions and rules originating in the archaic administration of justice by the mechanical following of form; (2) the circumstance that the characteristic features of our legal procedure became fixed and its chief details were fully developed in the seventeenth and eighteenth centuries,—in what is for the modern world the period of formalism of over-refinement in every department of human activity—and so acquired a highly formal and artificial character; (3) the influence of Puritanism in the formative periods of our law, both in England and America, whereby the Puritan jealousy of the magistrate took an extreme form as jealousy of the judge, and hard and fast rules of procedure, absolute and unyielding rules of evidence, and strict review of the details of practice by a series of reviewing tribunals were deemed necessary to hold him in check; (4) the influence of the frontier and of the exaggerated importance of the advocate and the free rein accorded him in frontier communities; (5) the weakness of an elective judiciary before encroachments by the bar and the sharp line between courts of first instance and courts of review in America, whereby the

[37] The Administration of Justice in Illinois, Proc. Ill. Bar Ass'n, 1909, 328.

[38] Judicial Independence, Rep. Am. Bar Ass'n, xii, 265.

trial judge, without the commanding position which the common law contemplates, hard-pressed by advocates and held in check by reviewing tribunals, removed from his difficulties, has been driven to a cautious, timid, dilatory course that does not comport with the business-like administration of justice; and (6) modern conditions of professional employment in America.[29] If this view of the causes of our present situation is sound, the situation was for a time inevitable, and no blame attaches to those who sat upon the bench or pleaded at the bar. The present generation of judges did not create it,—they found it. So long as they are trusted to determine the constitutionality of statutes and to wield the common-law power of judicial law-making involved in our system of case law, it is idle to say we may not trust them to frame general rules of procedure in advance of action.

Mr. Gilbert's second objection, so far as it is not met by what has just been said, appears to involve the assumption that judges who are hostile to a practice act, while they may be expected to develop it by *rules* so as to render it nugatory, may be prevented by legislation from *construing* it so as to defeat its objects. Such has not been the experience with practice legislation elsewhere. No one, as yet, has succeeded in tying down unwilling courts, whether by express statutory provisions or by elaborate interpretation clauses, so as to preclude judicial molding of statutes to what the judges conceive is practicable and just. Indeed, Mr. Gilbert's objection is in reality an argument for the principle objected to. It is because the earlier constructions of a practice act are likely to express the ideas and breathe the spirit of the old practice, rather than of the new, that we ought to be cautious about enacting much detail in a form making it difficult of change. In case rules of court develop a practice act in a conservative or reactionary spirit, we have but a continuance of the existing situation till a new generation of judges comes along to supersede the old rules by a new body of rules conceived in more liberal fashion. On the other hand, if a detailed code is construed narrowly or in a reactionary spirit, we have a substitution of one illiberal system by another, which has the disadvantage of being unknown, and further legislation is the sole escape. Moreover, it is no small advantage to have the rules of practice construed by the same agency that drafts them.

With respect to the third objection, it may be remarked that the first rule in a judge-made body of rules would undoubtedly be a provision retaining the existing practice unless and until and except so far as changed by the rules.[30] In time, when the body of rules had become fully developed, this rule would disappear. This very thing happened in England.[31] Consequently, so far from there being danger of a period of confusion and uncertainty, development of the general principles of a practice act by rules of court is the most certain method of minimizing, for one may hardly hope to obviate entirely the difficulties involved in any change of procedure. Rules devised, added to and amended as the courts and the bar are ready for them, are less likely to cause confusion than rules laid down

[29] For detailed discussion of these points, see my paper, "Some Principles of Procedural Reform." 4 Ill. Law Rev., 388, 395-400.

[30] U. S. Equity Rule 90; General Orders in Bankruptcy, No. xxxvii; U. S. Copyright Rules, No. 1.

[31] Judicature Act of 1873, Rule 1, paragraph 2; Rules of the Supreme Court, 1874 (see Charley, Judicature Act, 3 Ed. 353); Judicature Act of 1875, Sec. 21. The provision has now disappeared.

in detail in advance, no matter how wise and learned the lawyer who frames them.

As to the fourth and last objection, namely, that our judges have not the time to make rules of practice, one might give Diogenes' answer. The Supreme Court of the United States is a hard-worked court, and yet it found time between March 4 and June 1, 1909, to promulgate the Copyright Rules, and between July 1, 1898, and November 21, 1898, to promulgate thirty-eight General Orders in Bankruptcy, accompanied by a schedule of sixty-three forms. Certainly the pressure of business before legislatures is quite as great as that before courts. Moreover, it is not necessary that the judges actually draw up the rules themselves, any more than that legislators themselves actually draw up every detail of a code or practice act. For example, bar-association committees may devise proposed rules for submission to the court as easily as proposed statutes for submission to the legislature.

It has been suggested, and Mr. Gilbert's Act in Relation to Courts now contains such a provision, that there should be a complete set of detailed rules in the first instance, in order that the new practice may start full-fledged, with power in the court to amend, abrogate or develop the several details by general rules. If we are to have an elaborate-made code, this is undoubtedly a wise feature. It would obviate much of the difficulty that has attended the administration of the New York Code. But if such a plan is adopted the scope of judicial power of abrogation and amendment should be made very plain, designating clearly those things which are to stand beyond the reach of the judicial rule-making power and those which are to be subject thereto. Probably the best device would be that adopted in the English Judicature Act of 1873,—to put the permanent and unalterable provisions in the form of sections and append a schedule of rules of practice to serve as rules of court until set aside, amended or added to by the Supreme Court. Such a course may well be entirely proper. But if the rules intended to serve such temporary purpose are inserted in the body of the act with nothing to distinguish them outwardly from those intended to be permanent, or if the whole act, and every section thereof, is to be made subject to the judicial power, one may well hesitate.

Whether practice legislation takes the form of a detailed code or of a legislative outline leaving details to be developed by rules of court, only second in importance is the question how such legislation shall be drafted. Here again three agencies are conceivable: (1) a single draftsman, (2) a public commission, (3) a private committee or commission. In Europe, a public commission would be a matter of course. Even in individualist England, a series of royal commissions framed the Judicature Act. But American experience with legislative commissions has not been satisfactory, and executive commissions appear to have no place in our polity. On the other hand, the Commissioners on Uniform State Laws, a purely private organization, originating in connection with the American Bar Association, have, on the whole, given us a model of conservative but thoroughgoing code-making. We have an example also in the revised Code of Civil Procedure of Kansas, drawn by a committee appointed by the State Bar Association, submitted to the bar and examined and approved by the Bar Association, and adopted by the legislature.[32] No public commission, in

[32] See Judge Allen's account, 21 Green Bag, 266.

recent times, has done such work as that of these purely private agencies. Indeed the rise and development of bar associations throughout the country has made such private commissions not merely feasible but highly desirable as means of careful study and scientific drafting of legislation of a non-political character. It would seem therefore, in view of the difficulties always involved in legislative provision for the expense of public commissions, that the bar associations, through committees or commissions appointed at their instance, are the agencies to which we must look in practice. On that theory, I propose the following as a second proposition in a practical program of procedural reform:—

II. *A practice act should be drawn in the first instance by a commission or committee appointed under the auspices of the State Bar Association, upon which judges, both of appellate and nisi-prius courts, practitioners, law-writers and law-teachers are all represented; the draft drawn by such a body ought to be published and submitted to the bench, the bar, the several local bar associations, and critical jurists generally, for examination and criticism; after a sufficient period of criticism, the results thereof should be compiled, and the draft should be re-examined, in the light of such criticism, section by section, by an enlarged commission or committee, and amended, added to, or redrawn whenever desirable changes or additions have been suggested. Only the final and perfected draft, so arrived at, upon approval by the State Bar Association, should be submitted to the legislature.*

In framing this program, I have tried to devise one which would be practicable in any of our jurisdictions. Hence I have assumed that the draft must be the work of more than one man. Probably no one in this country had a greater genius for code-making or labored more diligently or for a longer period in that work than David Dudley Field. It is not fair to charge to him the huge mass of detail now known as the New York Code of Civil Procedure. But in that code as he first drew it, for it was chiefly his work, there proved to be deficiencies of the most serious character; and his later codes have been pronounced by one of the ablest of modern juristic critics striking examples of misguided ambition.[38] In this state, however, we have a draft at hand, in Mr. Gilbert's proposed Act in Relation to Courts, which may well serve as a basis of work for a commission. No one can read that proposed act in its final form without respect and admiration for the industry, learning and practical sense of its author and above all for his great skill as a draftsman. But it is no reflection upon any one to insist that important legislation must represent the combined wisdom of many and must be subjected in advance to criticism from every point of view from which light may be shed upon it. Hence we ought to insist that a practice commission be completely representative. And the work of the late Dean Ames upon the proposed Uniform Partnership Act and of Professor Williston upon the Uniform Sales Act, at the instance of the Commissioners on Uniform State Laws, shows the utility of placing writers and teachers upon such committees along with men of action. But, more than anything else in this connection, we ought to insist upon thorough work in the first instance, at the risk of making slow progress, to the end that when done the work shall be done indeed.

The New York Code of 1848 was

[38] Pollock, Law of Fraud in British India, 122. See also pp. 20, 95, 99.

provided for by statute in April, 1847, the commission appointed thereunder was organized in its final form in September, 1847, it reported its draft to the legislature in March, 1848, the draft, with some amendments, was passed about the middle of April, and the new code took effect in July, 1848,—about fifteen months after the statute creating the commission.[34] From that time to the present the bane of procedural legislation has been hurry.[35] It is better to wait for the new act than to be forced to recur to the legislative *deus ex machina* after its enactment, to do what should have been done in the first instance. While no American state may be asked to imitate the snail's pace of procedural reform that culminated in the English Judicature Act, where, beginning with 1826 and ending with 1874, five commissions put forth nine reports,[36] nor the characteristic completeness of preparation and slow-going minuteness of execution that marked the framing of the new German Civil Code,[37] the example set by the Commissioners on Uniform State Laws[38] should be before the eyes of legislators and codifiers in the future rather than the precedent of 1848.

Turning now to the principles upon which a practice act should be drawn and the lines it should lay out to be developed by rules of court, I venture to think that the first principle which those who frame such an act should have in view should be to *make it unprofitable to raise questions of procedure for any purpose except to develop the merits of the cause to the full.* So long as any advantage may be derived from the raising of procedural points as such, diligent and zealous counsel will raise them and the time of courts will be wasted in passing upon them. We have the testimony of an American observer of the American and the British Consular Courts in China, who saw them working side by side, that whereas in the American court we have "the wearying, formal, perfunctory round of motions and demurrers," in the British court, points of practice "being unsuccessful in achieving any advantages, such objections tend to lapse into disuse."[39] The point, then, is to make the rules of procedure rules to help litigants, rules to assist them in getting through the courts, not, as Professor Wigmore has put it, "instruments of stratagem for the bar and of logical exercitation for the judiciary."[40] Although it will not do the whole work, a prime factor in achieving this result will be to distinguish between rules intended to secure the orderly dispatch of business, on the one hand, and rules intended to protect the substantial rights of the parties, on the other hand. The former, that is, rules intended to provide for orderly dispatch of business with consequent saving of public time and maintenance of the dignity of tribunals, ought to be no concern of the parties unless under exceptional circumstances. It should be for the tribunal, not the party, to object in such cases, and decisions with respect to such

[34] Hepburn, Historical Development of Code Pleading, 83-88.

[35] Indeed one may go further. Until the new German Civil Code, haste had marked the drawing up and enactment of all codes, and the total or partial failure of so many of them is chiefly attributable thereto. Cf. Austin, Notes on Codification, Jurisprudence (5 Ed.), ii, 1035.

[36] Lord Eldon's Commission, 1826; Royal Commission of 1829, 1830, 1832; Commission on Pleading and Practice in Courts of Common Law of 1851, 1853, 1860; Chancery Commissioners of 1852, 1854, 1856; Judicature Commissioners, 1869, 1874.

[37] See Mr. Smithers' historical introduction to the translation of the German Civil Code by Loewy (1909), and Mr. Schuster's paper, "The German Civil Code," 12 Law Quarterly Rev., 217.

[38] See, for instance, the report of the Committee on Commercial Law of the American Bar Ass'n, 1909, Rep. Am. Bar. Ass'n, xxxiv, 523, 524.

[39] 42 Am. Law Rev., 745, 749.

[40] Evidence, i, §21.

rules should be reviewable only for abuse of discretion. To quote from a discussion of this matter on another occasion:[41]

"This principle is recognized to some extent in practice, as it stands. The order in which testimony shall be adduced, whether a party who has rested shall be permitted to withdraw his rest and introduce further testimony, the order of argument, in most jurisdictions, the time to be devoted to argument, and many other matters of the sort are left to the discretion of the trial judge. The reason is that such rules as exist upon these points exist in the interest of the court and of public time and not in the interest of the parties. But there are other rules resting upon the same basis which, unhappily, are not dealt with in the same way. This is notably true in the law of evidence. Many rules of evidence are in the interest of expedition and saving of time, rather than of protecting any party; prejudice to the dispatch of judicial business is the objection rather than prejudice to a party. In such cases how far the rule should be enforced in any cause should be a matter for the discretion of the court in view of the circumstances of that cause. Some courts, indeed, recognize this. But for the most part it has been assumed that there must be an absolute rule or no rule in these cases also, as if substantive rights depended upon them. With respect to all other rules of procedure, we should make nothing depend upon them beyond securing to each party his substantive rights —a fair chance to meet his adversary's case and a full opportunity to present his own. No party should be permitted to defeat his opponent, or to throw him out of court and compel him to begin anew because of them. He should be able to use them simply to obtain a fair opportunity of meeting the case against him and of making his own case. For example, in case of a variance, the inquiry should be, did the party who complained ask for time or opportunity to meet the point of which he was not fairly apprised and for which he was not prepared, and was he given a fair chance to meet it? Where no other advantage could be had than securing a fair opportunity to meet proof adduced without fair notice, very few complaints of variance would be made. What this would mean may be understood by turning to a paper on 'Taking Advantage of Variance on Appeal,' in which it took twenty pages and citation of 338 decisions of the courts of this state to set out the mechanics of the subject."[42]

Put simply, this means that rules intended to save time and advance the business of the court are not to be permitted to waste time and obstruct the business of the courts by becoming the subject of contest between the parties, and that rules intended to protect the parties are to be available to that end only. The objection urged is that it is unsafe to give discretionary power to judges and that the discretion they now have should not be extended. But the judge need have no more discretion than he has now, with respect to rules intended to protect the parties, and yet the parties may be limited to use of those rules in such way as to secure fair notice of the case against them and fair opportunity to present their own case, and nothing more. Without giving the trial judge any additional power, we may insist that parties use procedural rules, not to lay the foundation of an appeal in the future, but to obtain a substantial right in the present.

Accordingly, I should propose the following proposition as one by which those who draft a practice act should be guided:—

III. *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 parties a fair opportunity to meet the case against them and a full opportunity to present their own case; rulings upon the former class should be reviewable only for abuse*

[41] Some Principles of Procedural Reform, 4 Ill. Law Rev., 388, 400-401.

[42] Kales, Taking Advantage of Variance on Appeal, 2 Ill Law. Rev., 78.

of discretion and nothing should depend on or be obtainable through the latter class except the securing of such opportunity.[43]

Another object in drafting a practice act should be to insure trial of the case, rather than the record. Our attitude of record-worship, partly a remnant of the old mode of determining causes, so far as possible, by some arbitrary, mechanical agency, partly a survival of the old writ of error, now superseded in most states by the more modern appeal, and partly due to a just fear of fraud, when amendments could only be made by erasure of a parchment record, the reasons for which have been obsolete for centuries,[44] serves no useful end and should be abandoned. No cause which has been heard on evidence should be reviewed solely upon pleadings and, if a case was made at the trial, the question should be whether the adverse party was fairly notified thereof and had a fair chance to meet it and to present his own case, not whether the record would sustain a judgment at common law.[45]

In consequence, we may lay down as a further principle:—

IV. *The court should be able at all stages to try the case, not the record, and except as a record of what has been done may be necessary to protect substantive rights of the parties as the suit progresses, the sole concern of the court with respect to the record should be to see to it that at the termination of the litigation it records the judgment rendered and the causes of action and defenses adjudicated.*

As a corollary of the foregoing principle, pleadings should exist, not to furnish a necessary formal basis for the judgment, but solely to afford notice to the respective parties. Professor Whittier has argued this in a recent paper which deserves careful reading.[46] In my paper already cited, the proposition is discussed as follows:—

"What is claimed now is that pleading separates issues of fact from those of law. But it does so most imperfectly. What is accomplished in this direction by the common counts and general issue? On the other hand, where the declaration does not set out all the elements of a cause of action and a demurrer is interposed, the separation of law and fact is formal only. In substantial result, nothing has been achieved. It is rare indeed that a cause may be disposed of finally upon the questions of law raised by demurrer. Others insist upon pleadings containing all the elements of a legal statement of the case as necessary to a proper record and to give to litigants the advantage of a plea of *res judicata*, if molested again for the same cause. But pleadings need not and do not perform this function. Who can tell from a record *in assumpsit*, with common counts, plea of the general issue, verdict and judgment, what was in fact tried and adjudged? Long ago men resorted to extrinsic evidence for that purpose. On the other hand, there are many jurisdictions where claims against the estates of deceased persons are litigated

[43] Judge Allen puts the same idea thus: "The essentials of procedure are fair statements of the claims of the parties, reasonable notice of every hearing at which any question is to be presented for decision, and a fair opportunity to produce evidence and be heard on the facts and the law; and these the legislature should require. Hard and fast rules of pleading and procedure in minor particulars are far more likely to prevent than to facilitate the administration of justice." Address, "The Revised Code of Procedure in Kansas," before the Missouri Bar Ass'n, September 18, 1909, p. 4.

[44] 3 Bl. Comm., 409-410.

[45] For an example of trying the case, rather than the record, see *Hyams* v. *Stuart King* (1908), 2 K. B. 696. Here defendant had given plaintiff a check in a betting transaction. Afterward in consideration that plaintiff would not present the check and injure defendant's credit, defendant promised to pay it. The action, according to the endorsement on the writ, which stood for a pleading, was on the consideration for which the check was given. The trial court held that although there could be no recovery upon the consideration for the check or upon the check itself, because the transaction was a wager, yet as the evidence showed the new contract, upon a new consideration, to pay the check, there could be a recovery upon that contract, and rendered judgment accordingly. On appeal, this was affirmed, the Court of Appeal saying that in such a case the judge should make or direct a formal amendment, so that the record would show what was the basis of the judgment rendered.

[46] Judge Gilbert and Illinois Pleading Reform, 4 Ill. Law Rev., 178.

with no other pleadings than an informal statement of claim in which no attempt is made to state a cause of action, and no difficulty from want of sufficient record has arisen. The truth is, a system of pleadings designed solely to afford notice to the respective parties will meet this need completely. If it provides a method by which the parties have sufficient notice, we may be sure that others who have occasion to know will find the statement and indorsed summons of a simpler procedure entirely adequate. The better it fullfils the purpose of notifying the parties of the claims and defenses of their adversaries, the better a system of pleading will meet the requirement of a record by which to maintain a defense of *res judicata*. As Mr. Justice Holmes has put it so aptly, the basis of requirement that a pleader set out all the legal elements of his case in the form of averments of issuable facts, is 'the inability of the seventeenth-century common law to understand or accept a pleading that did not exclude every misinterpretation capable of occurring to an intelligence fired with a desire to pervert.' The principle of making nothing depend upon rules of procedure beyond securing to the parties fair opportunity to meet the case against them and full opportunity to make their own case, is decisive. Requiring a statement of a cause of action affords opportunity for procedural points as such without any gain to substantive rights. Notice to the parties is enough. Neither court nor counsel requires to be told what the elements are that must go to make up the claim or defense asserted."

Hence a further principle may be laid down:—

V. *The sole office of pleadings should be to give notice to the respective parties of the claims, defenses and cross-demands asserted by their adversaries; the pleader should not be held to state all the elements of claim, defense or cross-demand, but merely to apprize his adversary fairly of what such claim, defense or cross-demand will be.*

Another principle may be suggested without discussion:—

VI. *No cause, proceeding or appeal 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.*

This principle, which obtains now in the appellate procedure of Illinois,[47] should be extended to every part of procedure. Especially should this be done with respect to venue. It was an abuse ever to introduce the idea of venue as a place where suit *must be brought*. This is particularly true in equity, where there never was such a thing as venue until introduced by statutes in some of our states. At law, the question should be one of *place of trial*, as it was at common law, and if fixed wrongly, the cause should be transferred to the proper county, if any one asks for such an order.[48]

VII. *The equitable principle of complete disposition of the entire controversy between the parties should be extended to its full content and applied to every type of proceeding.*

To carry out this principle fully, five propositions may be made:—

(1) *The courts should have power and it should be their duty in every sort of cause or proceeding to grant any relief or allow any defense or cross-demand which the facts shown and the substantive law may require.*

This proposition is argued fully, so far as it involves administration of legal and equitable remedies in the same proceeding, in the paper already referred to.[49] But a further question arises, not there discussed, as to the advisability of maintaining separate forms of action for legal relief. Mr. Gilbert does this,

[47] Practice Act of 1907, §102.

[48] See California Code Civ. Proc., §30; New York Code Civ. Proc., §987; Colorado Code Civ. Proc., §30; Wisconsin, §2621. But the Wisconsin Code prescribes too much detail as to making the change and all our codes lay down too many rules as to where causes *must* be tried. Cf. Consolidated Rules of the Supreme Court for Ontario, rule 529.

[49] 4 Ill. Law Rev., 491, 498-501.

providing an elaborate scheme of distinct actions and proceedings.[50] The Massachusetts Practice Act took the same course, but simplified the system of actions, providing for four only: real actions, contract, tort, and replevin.[51] The New York Code abolished all forms of actions and provided for one civil action.[52] Because the earlier decisions, still adhered to in some states, insisted that the common law actions inhered in nature and could not be done away with, and hence held that a plaintiff was bound irrevocably to the theory of his case which he appeared to intend to put forward in his pleading, many have asserted that this provision of the New York Code was a failure.[53] But the growing tendency today in Code states is to do away with this doctrine of "theory of the case" and carry out the spirit of the code.[54] In view of these decisions, it is an anachronism to set up a system of distinct actions at law in 1910. Whenever this is attempted, whether by legislation or, as in some of the code states, by judicial decision, there is always danger that the new system will outdo the old in rigidity.[55]

(2) *No cause or proceeding should fail or be dismissed for want of necessary parties or for non-joinder of parties, but provision should be made to bring them in.*[56]

(3) *Joinder of all parties to a complete disposition of the entire controversy should be allowed in every sort of cause and at every stage thereof, even though they are not all interested in the entire controversy.*[57]

(4) *Courts should have power in all proceedings to render such judgment against such parties before them as the case made requires in point of substantive law, to render different judgments against different parties or in favor of some and against others, whether on the same side of the cause or not, and to dismiss some and grant relief against others, imposing costs in case of misjoinder or unnecessary joinder upon the party or parties responsible therefor.*

(5) *Joinder of causes of action should be permitted although they do not all affect all of the parties to each, subject to the power of the court to order separate trial or separate prosecution of one or more of them, if they cannot be tried or prosecuted together conveniently.*

This is the English practice.[58] The Revised Code of Kansas, which contains the best provision upon the subject to be found in the United States, permits free joinder of any and all causes of action subject to the one limitation (except in foreclosure proceedings) that all of the causes of action joined must "affect" all of the parties to the cause.[59] The limitation does not seem necessary. The question is one of convenience. Hence it would seem preferable to permit the court to direct a severance or to direct separate trials, in the interest of convenience and the orderly dispatch of business, where expedient in particular causes.

VIII. *So far as possible, all questions of fact should be disposed of finally upon one trial.*[60]

[50] Act in Relation to Courts, §1.
[51] Pub. Stat. Mass., c. 167, §1.
[52] N. Y. Code Civ. Proc. §3339.
[53] *E. g.*, 2 Andrews, American Law (2 Ed.), §635 *et seq.*
[54] *White* v. *Lyons*, 42 Cal., 279; *Rogers* v. *Duhart*, 97 Cal., 500; *Cole* v. *Jerman*, 77 Conn., 374; *Gartner* v. *Corwine*, 57 Ohio St., 246; *Cockerell* v. *Henderson* (Kan.), 105 Pac. Rep., 443.
[55] See Mr. Hornblower's remarks quoted in 2 Andrews Am. Law (2 Ed.), §635, note 29.
[56] See Kansas Revised Code Civ. Proc., §93, which does away with demurrers for misjoinder or defect of parties.
[57] Cf. Mr. Gilbert's amended draft, §§184-186, permitting joinder in the alternative and joinder in case of doubt. These are excellent provisions.
[58] Rules of the Supreme Court, Order 16, rule 11.
[59] Kansas Rev. Code Civ. Proc., § 88.
[60] This principle requires abolition of the second trial of course in ejectment wherever that anachronism still exists.

In furtherance of this principle, four propositions may be suggested.

(1) *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 on appeal, to enter judgment either upon the verdict or upon the point reserved, as its judgment upon such point reserved may require.*

This is a common-law practice, still in use in some states. It ought never to have been abandoned. The proposition was recommended in the report of the committee of the American Bar Association already referred to and, after debate, was adopted overwhelmingly.[61] It is discussed in that report[62] and also in the paper heretofore referred to.[63]

(2) *In case a new trial is granted, it should only be a new trial of the question or questions with respect to which the verdict or decision is found to be wrong, if separable.*

The judicial working out of this rule was one of the triumphs of Chief Justice Doe. His argument is unanswerable:—

"There is no general rule that when there has been an error in a trial, the party prejudiced by it has a legal right to a new trial. He has a legal right to a cure of the error, but not a choice of the remedies. . . . When the erroneous part of a case is cured, the general principles of our jurisprudence do not require the application of the remedy to other parts of the case which do not need it."[64]

The rule is adopted in the Revised Code of Kansas.[65]

(3) *Wherever a different measure of relief or measure of damages must be applied, depending upon which view of a doubtful question of law is taken ultimately, the trial court should have power, and it should be its duty, to submit the cause to the jury upon each alternative and take its verdict thereon, with power in the trial court, and in any court to which the cause may be taken on appeal, to render judgment upon the one which its decision of the point of law involved may require.*

(4) *Any court to which a cause is taken on appeal should have power to take additional evidence, by affidavit, deposition, or reference to a master, for the purpose of sustaining a verdict or judgment, 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 be competent.*[66]

Perhaps, in one respect, the rule should go further. If, though in form the matter is one for the jury, yet the nature of the proof is such that the finding of the jury would be directed, the appellate tribunal should be able to receive the evidence.

IX. *No judgment should be set aside or new trial granted for error as to any matter of procedure unless it shall appear to the court that the error complained of has (a) resulted in a violation of substantive law or (b) deprived a party of some right given by adjective law to insure a fair opportunity to meet his adversary's case or a full opportunity to present his own, provided it appears that he had a case to present or had a*

[61] Rep. Am. Bar Ass'n, xxxiv, 82.
[62] *Ibid.*, 582-585.
[63] 4 Ill. Law Rev., 503-4.
[64] *Lisbon* v. *Lyman*, 49 N. H., 582.
[65] Kansas Rev. Code Civ. Proc., §307. This is also the English practice. Order 39, rule 7.
[66] Cf. Rules of Supreme Court (English), Order 58, rule 4; Kansas Revised Code Civ. Proc., §580. See discussions in 3 Ill. Law Rev., 586, 4 Ill. Law Rev., 505, Rep. Am. Bar Ass'n., xxxiv, 598-600.

real interest in meeting his adversary's case.[67]

This principle has been approved twice by the American Bar Association by more than a two-thirds majority of those voting and was embodied in the recent proposals of the judges of Cook County.[68]

X. *The jurisdiction to prevent controversy by construction of instruments should be extended to all cases upon deeds, wills, contracts or other instruments upon which questions of construction arise or the rights of parties are doubtful; it should also be extended to questions of statutory construction and constitutionality by a simple proceeding analogous to the "originating summons" of the English practice.*

So long as only questions for the court are involved and there is nothing calling for a jury, the jurisdiction to construe instruments ought not to be confined to directions to trustees and cases where equitable interests are involved. The preventive jurisdiction should be extended at this point. It should not be necessary to break a contract in order to ascertain what it means. It should not be necessary for a law-abiding citizen to break the law in order to find out what are his duties or to ascertain the constitutionality of a statute. It ought not to be that unless a case for a bill of peace can be made, often presenting the unseemly spectacle of one department of the government tying up another, one must submit to an unconstitutional statute or else to an arrest. It should be possible to notify all persons who are or whom, in case of constitutionality, the court by general rule or otherwise may determine to be entitled to notice, and to present the question of construction or constitutionality to the court without the fiction of a "test case." An excellent example of the possibilities of such a jurisdiction is furnished by the English practice of "originating summons" under Order 54*a*. That order provides that "any person claiming to be interested under a deed, will, or other written instrument, may apply by originating summons for the determination of any question of construction arising under the instrument and for a declaration of the rights of the persons interested." The wide scope of this practice has obvious advantages in preventing long and expensive litigation. But its simplicity of form is also noteworthy. Instead of the formal pleadings of a suit for construction, the summons reads:—

> "Let ——— within eight days after service of this summons on him, inclusive of the day of such service, cause an appearance to be entered for him to this summons, which is issued upon the application of ———, who claims to be [state the nature of the claim] for the determination of the following questions: [State the questions.]"

XI. *An appeal should be treated as a motion for a rehearing or new trial or for vacation or modification of the order or judgment complained of, as the cause may require, before another tribunal.*

At common law, after trial at *nisi prius*, the cause was heard by the court in bank upon rule for a new trial or motion in arrest or for judgment *non obstante*. In that simple proceeding and not in the writ of error, an independent proceeding of a formal and technical character, is the true analogy for appellate procedure. Unhappily,

[67] Cf. Wigmore, Pocket Code of Evidence, p. xi and rule 23; Report of Committee on Simplification of Procedure of Association of the Bar of the City of New York, pp. 7-8; Kansas Rev. Code Civ. Proc., §307; Rep. Am. Bar Ass'n, xxxiii, 542-546; paper of Everett P. Wheeler, 21 Green Bag, 57; 4 Ill. Law Rev., 505-506.

[68] 3 Ill. Law Rev., 586.

the other has been followed. In consequence four per cent of the points decided annually by our courts of review are points of appellate practice. In ten years, 1896–1906, our courts decided 2377 points of appellate practice—almost as many as the combined points of Master and Servant and Municipal Corporations, or of Carriers, Constitutional Law, Corporations, Negligence and Sales added together. Indeed appellate procedure is by far the bulkiest single topic in our digests. This is wholly unnecessary. Procedure on appeal may be and should be as simple as procedure upon a motion.

In aid of this proposition, two subordinate proposals may be suggested:—

(1) *So far as they merely reiterate objections already made and ruled upon, exceptions should be abolished; it should be enough that due objection was interposed at the time the ruling in question was made.*[69]

(2) *Upon any appeal, in any sort of cause, the court should have full power to make whatever order the whole case and complete justice in accord with substantive law may require, without remand unless a new trial becomes necessary.*

There should be no occasion for the cases involving construction of mandates of which our reports show so many. Wherever possible, the reviewing court should be able to and should do its work completely.

In the foregoing program I have said nothing of criminal procedure, which presents many features demanding special treatment, of the charge of the court, a subject to which forensic subtlety, which once busied itself with the writ and later with the pleadings, now chiefly attaches itself, nor of discovery. Each of these is of great importance in procedural reform; but each would demand a separate paper, if treated adequately.

If some of the propositions in the latter portion appear radical, it should be observed that as to these, a practice act such as is proposed would not require that all of them be put in the form of fixed rules and imposed on bench and bar at one stroke; rather the courts would be *empowered* to give effect to them, as the practice could be developed by rules of court and as use of such power became expedient. Moreover, nothing has been suggested which has not been tried and found practicable in some common-law jurisdiction. Let us remember that not England merely, but Canada and Australia, have put these principles, and others more far-reaching, into actual practice.

[69] Judicature Act (1873), rule 49; Kansas Rev. Code Civ. Proc., §574; Gilbert, Act in Relation to Courts, §1703.

American Editorial Comment Upon the Corpus Juris Project

PREFATORY NOTE

WE devoted our issue of February, 1910, to a discussion of the proposal that the best brain power of the profession be organized in a practical manner for the preparation of a philosophic and scientifically co-ordinated statement of the principles governing the entire body of American law. The plan was unfolded in an article entitled "Memorandum *in re Corpus Juris*," printed in the February number, pp. 59–89. An analysis of the memorandum appeared on p. 90, and expressions of opinion upon the project at pp. 91–113 from seventy or more of America's ablest men of the law, such as Governor Hughes, Justices Day and Moody of the Supreme Court of the United States, the late Justice Brewer, Judge Dillon, Judge Parker, Senator Root, Mr. Choate, General Hubbard, Mr. Stetson, Mr. Hornblower, Mr. Wheeler, Senator Manderson, Attorney-General Wickersham, Secretary of War Dickinson, Solicitor-General Bowers, Ambassador Bryce, Sir Frederick Pollock, United States Circuit Judges Gray, Grosscup and Lanning, the late Dean Ames of Harvard, the Deans of the Columbia, Cornell and Yale law schools, Hon. John Sharp Williams, the Chief Justices of numerous State Appellate Courts, etc., etc. Our own editorial comment appeared in the same number at pp. 138–139; and *passim*, in the issues following, will be found, under the title "American *Corpus Juris*," in our Review of Periodicals department, excerpts from the more important periodical comments.

The views upon the project of President Taft and of the distinguished German jurist, Heinrich Brunner of Berlin, are quoted on p. 430 of the July number. In that issue also, at pp. 420–423, is a further expression of the *Green Bag's* opinion upon the importance of the undertaking. But the judgment of keen minds outside the profession cannot but prove helpful. In the last analysis general public sentiment is expressive of the underlying forces which necessarily affect the ultimate triumph of great projects and make or mar them. Indeed, there can be no successful administration of justice in any nation without the support of the people, which manifests itself in a healthy public opinion.

Of the American *Corpus Juris* project, there has been nation-wide editorial approval and keen appreciation of its importance. The editorial pages of leading journals undoubtedly reflect public sentiment, and public sentiment will necessarily have a potent influence in moving the man or men to act who have it in their power to establish the suggested Foundation of Jurisprudence—a *sine qua non* of the success of the movement.

No single and isolated expression of opinion can be safely accepted as a guide to the sentiment of the public. This may, however, be gathered from a large volume of editorial comment, which in a very real sense serves as a true gauge of public thought. In such a movement as this, it is of importance to the profession to know the trend of public opinion. Accordingly in the pages following, we give to our readers a reprint of a number of editorials in leading journals, representative of various and widely separated sections of the country. We comment thereon in the Editor's Bag, at p. 485 of this issue.—*Editor*.

Review of Reviews:—

WANTED—AN AMERICAN JUSTINIAN

The February issue of the law magazine, the *Green Bag*, is unique in devoting its contents entirely to one subject. This subject, of the highest importance to the members of the legal profession and (did they but know it) of equal, if not greater, importance to the public themselves, is a proposal to arrange and publish an American *Corpus Juris*,—that is, a complete statement of the entire body of American law on the lines of Justinian's Pandects. The need of such a work has been felt through more than a century of our history. James Wilson,

one of the signers of the Declaration of Independence and also a justice of the Supreme Court of the United States, himself began the "Herculean task," and actually assembled 1702 statutes. . . . During the years that have passed since Wilson's day our case-law has multiplied and our statute law has increased to such an extent that in 1910 a former president of the American Bar Association, the Hon. Frederick W. Lehmann, of St. Louis, is constrained to describe the situation as follows:—

"If an American wishes to know the laws of his country he must turn to several hundred volumes of statutes, several thousand volumes of reports of adjudicated cases and almost as many more volumes of text-books, commenting upon and expounding the statutes and the cases . . . but *the rule by which he is to be governed in any transaction is somewhere in that confused mass of legal lore*, and it is so plain and so simple that it is his own fault if he does not find it or does not understand when he has found it."

Of other testimonies to the imperative need of such a work as that proposed, the *Green Bag* furnishes a-plenty. We can cite only a few. Gen. Thomas H. Hubbard, of New York, says:—

"Statutes are enacted by thousands each year in the federal and state legislatures. Judicial decisions do and must increase with bewildering rapidity, while courts . . . must attempt to reconcile all these. . . . Lawyers, courts, Legislatures, and the public are burdened with the effort to find what is the law and to apply it."

One of the ablest justices of the Supreme Court of the United States asserts:—

"Every additional day of judicial duty brings to me a deeper conviction of the absolute necessity of some system of orderly and scientific classification of the great mass of confused precedents."

Judge Dillon frankly declares:—

"This colossal body of case-law is wholly unorganized and even unarranged. . . . The infinite details of this mountainous mass in its existing shape,—bear me witness, ye who hear me,—no industry can master and no memory retain."

It must not be forgotten that, as hinted above, this matter is just as vital to the public as to the lawyers; for, so long as the latter admit their inability to determine what the law really is, litigation is bound to be needlessly expensive and delays unavoidable.

The Outlook:—

SIMPLIFY THE LAW

Law is, or ought to be, the application of common-sense principles to the determination of the material rights and duties of men in the varied relationships of modern life. The principles are comparatively few and simple; the applications are endless and complicated. . . .

To determine what are the rights of the person, of the family, of property, and of reputation, how far society will go in protecting these rights, and how far it will protect them by criminal proceedings and how far leave them to be protected by private suits at law, involves endless questions, and in solving these questions the courts of the Anglo-Saxon people have been engaged ever since they have had courts. An immense mass of these decisions has been accumulating in England since the organization of the King's Bench in the fourteenth century. In this country there are independent courts in forty-six states, besides federal district and circuit courts, and a Supreme Court of the United States. To know what law is and has been as decided by these courts would require a knowledge of all their decisions, an evidently impossible knowledge.

Some work which should embody in a well organized and analyzed system, and in a measurably compact form, a comprehensive statement of these legal principles and their application as already determined by competent authority, has long been regarded by the more eminent jurists as something greatly to be desired. It is desirable, not only for the profession, but even more so for the laity. Properly edited, and under such auspices and in such fashion as to command the confidence of the courts, and become by its own intellectual and moral value a *quasi* authority, it would both simplify and reduce litigation. It should not be enacted into law by legislation, for this would be to transfer it into a code, and experience has proved that codes tend rather to multiply than to diminish judicial decisions, since the courts are not *guided* by them but are *governed* by them, and therefore must give them authoritative interpretation. . . . It ought not to be published for private profit, because to carry moral authority it should be free from the taint of commercialism. It should be an endowed

undertaking. If its value to the community were adequately understood, it ought to be possible to procure the endowment. It is as legitimate a subject for endowment as a library, a hospital, or a university.

A plan for carrying into execution this great work, long desired by the bar, has now been so far definitely formed as to receive a full exposition and a hearty indorsement from the *Green Bag*, a leading conservative law journal. We slightly abbreviate, but in its own words, that journal's estimate of the men who are planning the work:—

A more happy combination than that of the three men who are planning this great undertaking could not have been found. Mr. Alexander unites with the physique of an athlete, the clear mind of a scholarly thinker and the executive ability of a magnetic and indefatigable organizer. Dr. Andrews is a jurist of remarkable powers of analysis, of classification and exposition, a master of the science of jurisprudence, to the study of which he has devoted himself with great industry, having proved himself one of the great constructive legal minds of the age. Dean Kirchwey, of Columbia Law School, enjoys a national reputation as a teacher and writer, is a former President of the Association of American Law Schools, and is admirably qualified for editorial duties requiring extensive knowledge of the work of the country's ablest law professors and writers.

The Outlook agrees with the *Green Bag* that "the undertaking could not be in safer hands." Demanded alike by the interests of the profession and of business men, indorsed without dissent by the ablest lawyers and jurists, with law scholars of distinguished ability ready to undertake it, the work needs only some man of financial ability to provide the necessary funds. Such an undertaking carried to completion would be at once a great service and a great honor to the country.

Literary Digest:—

TO CLEAR OUR LEGAL JUNGLE

Few people who go to law probably realize the risk they run of suffering injustice at the hands of judges and lawyers to whom the law itself is a confused chaos of uncertainties. "Bench and bar alike," says a writer in the *Green Bag* (Boston, February), "have been and are floundering in the mazes of unorganized, unsystematized, and often conflicting rules and decisions." A New York banker is quoted as saying that "the greatest risk in business is the legal risk," and William B. Hornblower, ex-president of the New York State Bar Association, declares that "the present condition of the law is little short of appalling." A Berlin jurist, who recently came to America to prosecute legal research, remarks that very soon he found himself "lost between hundreds and thousands of unsystematized decisions without any possibility of systematizing them myself." The deplorable result of this confusion is that much needless litigation crowds and clogs the courts, delays justice, and often defeats it. "It is often impossible," says Mr. Justice Day, of the Supreme Court, "for counsel to give legal advice competent to guide their clients in doing what the law sanctions and approves, and refraining from disobeying the law, which, if litigation follows, they are presumed to know."

To clear this legal jungle or jumble Mr. Lucien Hugh Alexander presents in the magazine named above a scheme conceived and worked out by Dr. James DeWitt Andrews, Prof. George W. Kirchwey, and himself. It might seem to the layman an impossible task to systematize into a well-ordered whole the formidable mass of laws and decisions of the federal and state legislatures and courts. But, as Mr. Justice Holmes observes, "the number of our precedents when generalized and reduced to a system, is not unmanageably large," and "they present themselves as a finite body of dogma, which may be mastered within a reasonable time." Judge Dillon, too, says that while "the number of cases is legion," yet "the principles they establish are comparatively few, capable of being thoroughly mastered and capable also of direct and intelligent statement." . . .

The authors of this scheme have gone so far as to figure out the actual cost of producing order out of chaos, and they set the figure at $600,000. They boldly ask some multimillionaire to come forward with this sum. . . .

The codes of Justinian and Napoleon will preserve their fame as long as laws and justice endure—why should not some American capitalist secure immortality on the same terms? Prof. Roscoe Pound, of the University of Chicago, writes:—

"It has been said that the crimes of a Bonaparte and the bigotry of a Justinian will be forgotten because at their bidding the rough places in the way of justice were made smooth. The patron under whose auspices the way of American justice shall be made smooth

will have done no less and will be the greater, in that he devoted his own while they commanded the resources of states."

The plan is commended by such eminent authorities as Elihu Root, Alton B. Parker, Governor Hughes, Justices Day, Moody, and Brewer, James Bryce, Joseph H. Choate, Attorney-General Wickersham, John Sharp Williams, Judges Gray and Grosscup, and Woodrow Wilson. Some of the important benefits of such a code are thus enumerated:—

"The proposed statement of the American *Corpus Juris* would tend to bring about uniformity between the different states in the administration of justice. It will make the administration of justice more exact and enable the average citizen to secure cheaper and more speedy justice.

"The publication of the American *Corpus Juris*, prepared in the way outlined, and representing as it would more than a century of not only the intellect and wisdom of the Federal courts, but of the learned jurists expounding the law from the benches of the appellate courts of every state in the Union, could not but place America in the lead of the world in the field of jurisprudence, and enable her to exercise a more potent influence in world councils."

Judge J. H. Reed, of Pennsylvania, is quoted as saying:—

"Nothing has contributed more to the general unrest, and to the growth of strange doctrines of government and increase of foolish and injurious legislation than the uncertainty of legal decisions. And this uncertainty is largely due to the mass of reported cases, which are increasing by the thousands yearly, and which the practising lawyer and trial judge are compelled (in most cases hurriedly) to attempt to reconcile. In most cases, the best counsel can do in advising is to guess at the probabilities. The client suffers by this uncertainty, and there can be no greater public service than is suggested by your memorandum, for every one, rich or poor, large business man or small trader, even the proverbial widow and orphan are vitally interested in knowing to a practical certainty their respective rights and duties."

The Independent:—

AN AMERICAN JUSTINIAN NEEDED

The *Green Bag*, a leading law magazine, in its February issue, draws the curtain aside and presents a graphic picture of the chaotic condition of our jurisprudence. It sets forth with merciless logic the confusion which results from a federal Congress and forty-six state legislatures adding to and changing, without system or co-ordination, our inherited common law judicature. This confusion is worse confounded by as many state and national supreme courts, establishing by their precedents tens and hundreds of thousands of precedents, printed as authorities and cited by the bar and the courts as binding precedents, but which have never been adequately analyzed or organized so as to present a complete system of principles. Yet lawyers must examine and marshal them as best they can in the presentation of causes, although they well know that "a precedent can be found for almost any proposition of law, no matter how erroneous." Little wonder is it that litigation is tedious, uncertain, unsatisfactory and expensive.

This is the fundamental cause for most of the criticism of our courts. Lord Bacon said truly: "A country in which the laws are indefinite and uncertain is in iron servitude."

The confidence of the people in the general integrity of our courts is not at all impaired; but they have lost their faith that a just decision will surely be reached in every case. If such are the conditions now, what will they be, when in a century, our population will be counted by hundreds of millions, and legal decisions numberless?

George W. Kirchwey, dean of the Columbia University Law School, James DeWitt Andrews, long the chairman of the American Bar Association's Committee on Classification of the Law, and Lucien Hugh Alexander, of the Philadelphia bar, present in the current *Green Bag* a plan for the solution of this problem from the pen of the latter. After analyzing the conditions and showing how the problem has baffled the profession for more than a century, the plan is unfolded. It provides for organizing the best brain power of our bench and bar for the preparation of a complete, philosophical and adequately coordinated statement of the American *Corpus Juris*, by which is meant the entire body of our law, national and state. . . .

As is said by Chief Justice Clark, of North Carolina, the project is *a proposal "to do for this country what Justinian did for Rome, and Napoleon for Western Europe."*

. . . The proponents of the plan estimate the cost at upward of one million dollars. . . . With such a foundation, it is believed the ablest talent could be secured, and that the entire body of principles controlling the administration of our law could be exhibited in approximately twenty volumes of a thousand pages each, not as a code nor an encyclopedia, but in the form of a well-balanced and proportioned body of legal principles.

It is apparent that this work, when published, would be a necessary part of the equipment of every judge and practising lawyer. "It would be," as the late James C. Carter declared, "the one indispensable tool of his art." Such a statement of principles would be cheap at any price. . . .

The plans have been submitted to a large group of the ablest lawyers in this and other lands, and have been enthusiastically approved. Among those endorsing the project are Justices Brewer, Day and Moody, of the Supreme Court of the United States; Judge Dillon, the Nestor of the American bar; John G. Milburn, Senator Root, Alton B. Parker, Governor Hughes, Joseph H. Choate; Ambassador Bryce and Sir Frederick Pollock, of Great Britain; William B. Hornblower, Senator Manderson, Attorney-General Wickersham, Secretary of War Dickinson, Solicitor-General Bowers, United States Circuit Court Judges Gray, Dallas and Grosscup; the deans of the Harvard, Columbia, Cornell, Yale and other law schools, and many chief justices of the different states. It is doubtful if such a galaxy of professional opinion has ever before been expressed upon one subject and with so much enthusiasm.

The success of the project is contingent upon the establishment of the suggested foundation for the advancement of jurisprudence. Here is an opportunity which should satisfy the highest kind of altruism. Greater service can hardly be rendered to our nation or civilization.

Washington Post:—

EPITOMIZING THE LAW

It is curious to observe how the great philanthropists of the world usually balk at the opportunity to do their fellow men a real service. They donate libraries to cities that take them under protest, and give large sums of money to universities which are not really in want, but when it comes to a sensible suggestion for remedying a growing evil they become strangely economical.

Attacks on the law's delays have become popular lately, and, in sharp contrast to most attacks on public institutions, an actual remedy has been suggested. Lucien Hugh Alexander, a leading lawyer of Philadelphia, who is taking an active part in the movement for reform, has suggested the practical solution of an American *Corpus Juris*—a complete and comprehensive statement, in a philosophical and systematic form, of the entire body of American law.

Such an epitome of American law, resembling in a manner the embodiment of the old English common law, is the real remedy for the delays in legal procedure. The courts, which are the safeguards of American liberty, have been for years in a very bad way. They are congested and befogged. . . . Nearly all arguments of lawyers and the decrees of courts are based on precedent cases, the more recent the better.

The result of this tendency has been to get away from the fundamental principles of logical justice. Fifty years ago a great judge may have interpreted an important law. Because of his reputation that judge's decision may have been accepted, not merely as an interpretation of the law, but as the law itself. Although honest, the judge's opinion may have been a trifle in error.

Another judge, later on, may have been called upon to decide a similar case. Instead of interpreting the original law he bases his decision almost entirely upon the precedent. And this judge may have swerved a trifle further toward error. Continuing this process through fifty years would result in the complete warping of the law, giving it a meaning it was never intended to have.

Mr. Alexander's suggestion for an American *Corpus Juris* would do away with this growing danger to American institutions. It would give America a definite form of law, a code for the government of all cases, meeting all modern conditions. Judges would then be called upon to apply this clearly defined law. . . There would be no tendency to drift along in the path of error. The new plan would do away with the day of technicality and quibble.

To accomplish this great work of codifying the laws of the United States requires a great deal of money. It is a work that will bring everlasting fame to the man who finances it. . . . Here is an opportunity for John D. Rockefeller. It lacks the feature of charity—so dear to the heart of the philanthropist—but it would be a real service to the country.

New York Sun:—

AN AMERICAN *CORPUS JURIS*

In the *Green Bag* law magazine for February Mr. Lucien Hugh Alexander of the Philadelphia bar propounds a scheme of considerable public importance and of much interest to the legal profession: for the preparation and publication of an American *Corpus Juris*. By this he means a complete and comprehensive statement in a philosophical and systematic form of the entire body of American law. The term is borrowed from the *Corpus Juris Civilis* of the Roman Emperor Justinian, the second part of which, known as the Pandects, was an abridged digest of the principles and rules of the Roman law. . . .

In planning a similar conspectus of American law Mr. Alexander has been acting in cooperation with Mr. James DeWitt Andrews, formerly of Chicago but now of the New York bar, and Professor George W. Kirchwey, dean of the law school of Columbia University. Their project has certainly been most highly commended by distinguished Judges and leaders of the bar in all parts of the country. . . . As to the desirability of such a work there can be no difference of opinion. . . .

To take the vast mass of case law as exhibited in thousands of volumes of reported American decisions and formulate therefrom a compact, clear, accurate and systematic statement of the principles and rules which constitute the common law in the United States is a work which demands a very high order of legal and literary ability. Mr. Alexander, we believe, is well fitted to undertake it and is inspired by an enthusiasm which is essential to the success of such an enterprise. Professor Kirchwey also possesses the requisite learning and experience in the elucidation of the law. . . .

The plan in outline is "to block out with the ablest expert advice obtainable, the entire field of the law under a logical system of classification so that when the work is published the law on any particular point may readily be ascertained." There is to be a board of editors, not exceeding seven in number, which will be supreme in every editorial matter. . . . The project also contemplates the co-operation of an advisory council "of twenty or twenty-five of the strongest men in the profession, both on the bench and at the bar, who would not have the time to devote to the actual work of authorship or editorship," but who would give advice on any point as to which they might be consulted by the editors. Still further provision is made in the scheme for a board of criticism of one hundred or two hundred of the ablest lawyers in the land, to whom particular parts of the work should be submitted for revision as they were prepared for publication. . . .

The complete and systematic statement of the law of the land thus planned would require about twenty volumes of 1,000 pages each. Assuming that the requisite talent can be assembled to produce it, how is the cost of preparation and publication to be met? . . .

Mr. Alexander evidently has in mind a benevolent trust to do for the law what the Carnegie Institution in Washington is doing for science. . . . [and] deserves high praise for his enthusiastic advocacy of an admirable project, and we hope that some patriotic American may be found with the wealth and disposition to defray the cost of such an undertaking.

Chicago Record-Herald:—

JUSTINIAN, NAPOLEON—WHO NEXT?

At the beginning of the consecutive history of most peoples stands a lawgiver—a systematizer of the old tangled rules of the popular law. Moses, Solon, Manu are but typical names.

Ever and again as great civilizations develop a time comes when the complexities and perplexities of the law have become so great that at last some leader undertakes the task of simplification and codification. Justinian's fame rests on his code. Bonaparte may well be remembered for his code after his other claims to fame have become much dimmer.

Some of the best American lawyers think the time has come for an American *corpus juris* to be created on a level with these others. . . .

Dean Kirchwey of the Columbia Law School, Dr. James DeWitt Andrews and Lucien Hugh Alexander are the men who have conceived the plan. Their remarks about the state of our law and the quotations they give on that subject from distinguished lawyers and jurists will astound the layman. . . . William B. Hornblower says the condition of the law is "appalling."

Justice Day says: "It is often impossible for counsel to give competent legal advice." A New York banker is quoted as saying that "the greatest risk of business is the legal risk." One of the advocates of the plan writes that "Bench and bar are alike floundering in the mazes of unorganized, unsystematized and often conflicting rules and decisions." The late James C. Carter said that a work such as is proposed "would be the one indispensable tool of every lawyer's art," and predicted fortune and fame unlimited for its creator.

It is undoubtedly true that a codification of American law such as is suggested, combined with a simplification of court procedure such as President Taft so steadily urges, would make the rendering of justice incomparably more exact, and by that very token would add immensely to the national wealth.

Philadelphia Record:—

AN AMERICAN *CORPUS JURIS*

There is a fundamental truth behind the legal maxim that "everybody is presumed to know the law." The time has come, however, when even the expert jurists find themselves hopelessly tangled in a maze of judicial and statutory verbiage. . . .

It is not on the lawyers, however, that the burden weighs heaviest. One of the best known financiers of the world recently observed that "the greatest risk in business is the legal risk." But on the common people the uncertainty of the law bears down with crushing force. The great corporations can discount the legal risk and write off an ascertainable percentage of their profits as insurance against mischance. The average man has no ready means to shift and distribute the losses suffered from the law's defects; he must bear them and grin, though it is no laughing matter. In respect to reducing the mass of statutory and judge-made law to rational and systematic *corpus juris* the English-speaking nations are a century or more behind the rest of the civilized world; and for the indefinite continuation of these anarchic conditions it would be difficult to find an apology. As Judge Dillon declared, "while the number of cases is legion, the principles they establish are comparatively few, capable of being thoroughly mastered and also of direct and intelligent statement." That this is not an unduly optimistic view can be shown by actual facts. In the Louisiana Code the whole law on the subject of principal and agent is stated in seventy short paragraphs; and it is difficult to think of any question arising out of that relation which does not find its solution in one of those articles.

It is gratifying to learn that the impulse toward a clarification of the legal chaos and a systematic reconstruction of our *corpus juris* has proceeded from a member of the Philadelphia bar. . . . It has the indorsement of the bench and of the leaders of the bar, but the high standing of the proponents in their profession would commend the plan even if it had no other sponsorship than theirs. . . .

A work of this character would certainly be a boon. There is one pre-condition of its success, however, it must be above the suspicion of commercialism. To this end a foundation will be necessary. The estimated requirement is one million dollars. Here is an opportunity for philanthropy that would do everlasting honor to the giver. Who will be America's Justinian?

Bench and Bar (New York):—

THE AMERICAN *CORPUS JURIS*

The *Green Bag* for February contains something of special interest in an article by Mr. Lucien Hugh Alexander, of the Philadelphia bar, setting forth the project of himself, Dean Kirchwey, of Columbia, and Dr. James DeWitt Andrews for the compilation of "a complete and comprehensive statement in adequate perspective of the entire body of American law,"—a statement, to quote the language of the late James C. Carter, "of the whole body of the law in scientific language and in a concise and systematic form, at once full, precise and correct." What a project! How it dazzles the eye, and stimulates the imagination! It is little wonder that many of the best legal minds in the country have paused for a moment in the midst of their labors, judicial or forensic, to wish it godspeed, at the very least.

The opinions from judges and lawyers which make part of the article are most interesting reading. There is entire unanimity of sentiment that such a work is of transcendent importance. All are agreed that it ought to be done; and there is evident a strong disposition to agree with Mr. Alexander's emphatic dictum: "*It has got to be done.*" Certainly it would go far to fend off the chaos which sometimes seems to be impending. Just as there must be a library with adequate shelf-room, properly arranged, for the volumes of reports that pour in weekly, so must there be a fit receptacle for the contents of these books. The "living body of the law" should be something more than a name. It should have a concrete embodiment, a living organism capable of assimilating this mass of decision, and, in turn, of being nourished, and growing to greater proportions, by means of it,—capable also, to carry the simile further, of rejecting what is poisonous and incapable of assimilation.

There is also an agreement, fairly complete, that such a work is, essentially, capable of achievement. It is not characteristic of the American people to be appalled by obstacles, however great. In such a work as this, however, they undertake something fairly comparable in difficulty with any engineering feat in the history of the country. . . . Just as the actual raw material, and no second-hand substitute for it, must be wrought into the finished product, so must the fabric of the law be woven out of the host of actual decisions, examined one by one. And it must be woven out of the very essence of each case, —its precise facts, the principle applied to them, and the result reached. . . . Often, too, the determining principle of the case finds inadequate expression in the opinion of the court; and in such cases, as it seems to us, it is the duty of the "expository codifier" of the law (to use Mr. Alexander's phrase) to ascertain and set forth the inevitable logic of the decision,—to draw out the hidden meaning of the case, to supplement the court's partial expression of principles, while taking care not to run counter to any actual view expressed. . . .

"Its execution," to use the words of Governor Hughes, "should be freed from the pressure of commercial demands." But what an object for the benefactions of some of our latter day philanthropists! A permanent Foundation of Jurisprudence, supporting a corps of the greatest legal experts of the country, first to bring this great work into being; then continuously to superintend its future growth,—building into the structure from year to year, patiently and scientifically, the material furnished by courts and legislatures. A dream at present; but every achievement must originate in a dream.

Legal Intelligencer (Philadelphia):—

AN AMERICAN *CORPUS JURIS*

We call the attention of our readers to an article by Lucien H. Alexander, Esq., of our bar, which appeared in the *Green Bag* of February, entitled "Memorandum *in re Corpus Juris*," wherein he presents a plan outlined by Dean Kirchwey, of the Columbia Law School, Dr. James DeWitt Andrews of the New York bar, the author of Andrews' "American Law," and himself, for the production of a work which shall be, when finished, "a complete and comprehensive statement in adequate perspective of the entire body of American law, our *Corpus Juris*."

The great value of such a work, if well executed, both to the profession and to the country, cannot be overestimated, but the difficulty of accomplishing such a task appears, at first sight, almost insuperable. The authors of the plan, however, have outlined a wholly original method of bringing to bear upon the subject, in a united effort, the highest ability of the profession. Funds for the purpose, so as to avoid "the bane of commercialism," it is hoped, can be obtained by persuading some enthusiastic philanthropist to endow a Foundation of Jurisprudence with a million dollars for the publication of this and, possibly, subsequent legal works. It is suggested by the authors of the plan that the money expended in producing the work will ultimately be repaid by its sales, and thus the Foundation be kept in funds for further activities for the benefit of the profession. At present the great *desideratum* appears to be an enthusiastic philanthropist who will be glad to put up the million dollars. While he has not yet appeared upon the scene, in view of the many far less useful projects which have been heavily endowed, there would seem to be ground for hope that he may be ultimately discovered.

It is at once perceived from the mere statement of the manner in which this work is to be produced that it will, in all likelihood,

prove of much higher authority than any general work on jurisprudence now in the hands of the profession.

As it will have no authority whatever from legislation, its standing with the profession will depend wholly upon its own merits. It must, therefore, of necessity set forth with accuracy the existing law on each point in the federal courts and in every state and where the principles in different jurisdictions vary, or where the law in any particular jurisdiction is unsettled, the true principle must be set forth and sound reasons for its support be given. The thing required is not a book of reference, but a statement of principles sustained by authority and sound reason.

While the task contemplated by the authors of the plan is stupendous, there seems to be no sound reason to doubt that, with a force properly organized and adequate funds, a work may be produced of greater merit and higher authority than anything we have at the present time. . . . The production of such a work would be a public service of the highest order.

New York American:—

THE NEED OF A NEW JUSTINIAN

A group of lawyers of high reputation—including Dean Kirchwey of the Columbia Law School—have worked out a plan for organizing in a single legal treatise the vast chaotic mass of American law.

These gentlemen say that the service performed for the Roman law by Justinian and for the French law by Napoleon could be accomplished for American law by any millionaire who was influential and liberal enough to assemble a company of the best lawyers in the country and support their joint labors for a few years at a cost of say, $600,000.

Certainly it is well worth considering whether the prestige given to the Justinian code and the code of Napoleon might not in a great democracy attach to the mere intellectual and moral agreement of representative men standing at the head of their profession.

And if it is true that an American *Corpus Juris* or compendious body of jurisprudence, worked out by a company of leading lawyers, would have authoritative weight before the general bench and bar, Dean Kirchwey and his associates have pointed out an alluring prospect to patriotic men of wealth. . .

The proposal is to block out the entire field of American case law and statute law—state and national—under a logical system of classification, so that when the work is published the law on any particular subject may be readily ascertained.

The law as it stands is a wilderness traversed by a few beaten paths.

The courts are clogged with needless litigation and justice is destroyed or defeated—because the law is a jungle infested with pitfalls and beasts of prey.

If private enterprise and professional honor and intellect can give us the legal simplicity that political action has failed to bestow, the country will hail the deliverers and build their monuments.

Detroit Free Press:—

ANOTHER NEW AVENUE TO IMMORTAL FAME FOR THE MILLIONAIRE

The American millionaire who foolishly permits his life, his money and his name to perish in the one moment of death singularly neglects his opportunities. New avenues to immortal fame are being offered to him every day.

Endowing such humanitarian works as the museum of safety we have before spoken of as a means to undying honor. Pat upon the heels of the suggestion comes that bright legal journal, the *Green Bag*, with another guide-post pointing the way of riches to immortality. . . .

Mr. Alexander would have a board of editors selected from the law school faculties of the country to carry out a plan that held a central place in the mind of Justice James Wilson, one of the first and greatest jurists who have graced the supreme bench of the nation. He would, to quote Wilson's own words, inaugurate a project "to form the mass of our laws into a body compacted and well proportioned."

What such a code might do for this nation, if it could be enacted into law, may be realized by recalling the fundamental relations other codes have had to the world's history; the Pandects of Justinian, which were the basis of all mediæval legislation and of the civil law of today in many countries and are reflected in the common law of England and of the United States; the Code Napoleon,

which is the foundation of much of the world's more recent legislation, and is preserved almost intact in several countries and in large part throughout Central and South America as well as in our own state of Louisiana; the more recent codifications of provincial, state and national laws of Germany, Italy and Switzerland.

We have no central authority or powerful dictator who can order such a consolidation of our conglomerate state and federal laws. The system of our government too, forbids the hope that legislation, either federal or national, might accomplish such a result. But what is impossible officially may be possible unofficially, Mr. Alexander thinks. An endowed foundation that would provide for the compilation and publication of such a code in a scientific and not a commercial spirit, he argues, would have as much practical influence as the enactment of the code could have.

Justinian, easily the most brilliant of later Byzantine emperors, lives now chiefly because of his Pandects and Codex. Who shall say that, in the days of universal peace yet to come, Napoleon's fame shall not rest upon his Code when his militaristic achievements shall have been forgotten? Why should not some millionaire escape oblivion by the method of Justinian and Napoleon?

Washington Correspondent of Inquirer:—

NEW LEGAL CODE NEEDED

Mr. Alexander and his associates have a proposition for the codification of all the laws of the United States into an American *Corpus Juris* somewhat similar to the movement that resulted in the Napoleonic Code in France many years ago.

Congressmen here declare that if Mr. Rockefeller wants to dispose of some of his money in a way that will do great good to the country this is his chance.

President Taft has frequently pointed out the woeful lack of unity in the decisions rendered in courts of America, with their technicalities and the delays of procedure. Again and again he has urged that something be done towards remedying this condition and Mr. Alexander and his associates say they have the answer in an American *Corpus Juris*. . . .

Justice Holmes and the late Justice Brewer, as well as a host of other great lawyers, have expressed themselves on the great need of such a well defined legal code, or plain statement of the law as it exists in this country. . . .

Judge Staake of Philadelphia says that it is pitiable that the question of financing such a project should have to be discussed.

As Mr. Alexander puts it, however, there is no plan whereby "the peril of commercialism" can be avoided but by the work being brought out on a foundation of jurisprudence established by some man of large means anxious and able to use part of his wealth in benefitting mankind; or by such a man advancing the necessary funds to proper trustees under an agreement to refund the same from the proceeds of sales, for unless the money is in hand to remunerate the right sort of writers, and to warrant contracts being entered into with them, it will be impossible to secure and co-ordinate their services.

It is now pretty certain that Rockefeller will not be able to induce Congress to grant him federal incorporation of his proposed Foundation.

If he wants to make a ten-strike, the Congressmen say, he might finance this plan to give the United States a well defined law.

Chicago Post:—

HERE'S GOOD—OUT OF NAZARETH, TOO

The remark of a New York banker that "the greatest risk in business is the legal risk" has been making the rounds of the legal journals and the state bar associations. There is no remedy save in uniform state legislation for the complexity produced by the various state legislatures, but, according to an interesting plea which fills up the current issue of the *Green Bag*, the confusion worse confounded of judicial and legislative enactments may be straightened out by the "complete and comprehensive statement in adequate perspective of the entire body of American law, our *Corpus Juris*." The late James C. Carter indorsed this proposal heartily, as indeed have many others, but the task has seemed too titanic for any one to attack.

But Mr. Lucien H. Alexander of the Philadelphia bar, Dean George W. Kirchwey of the Columbia Law School, and Mr. James DeWitt Andrews, formerly of Chicago and now of New York, have had their heads together on the matter, with the result that the *Green Bag* contains a very definite and concrete proposal which deserves the close attention of bench and bar.

They propose that a Foundation of Jurisprudence be established by some millionaire—a million-dollar foundation—which may be drawn upon for the support of this project. An editorial board of jurists of acknowledged ability would, with the assistance of leading lawyers and law school men, divide American law scientifically into its various subjects and proceed to develop them in fashion that was philosophical. Then the American lawyer would have in some twenty volumes, not a code nor an encyclopedia, but a well-proportioned statement of the legal principles of American law.

Professor Roscoe Pound of the University of Chicago Law School is quoted in approval of the plan:—

"Our jurisprudence of rules is breaking down obviously, and in the process is injuring seriously public respect for law. A great deal of our law in books is not law in action, not only because the mass of legal detail is too cumbrous for actual administration, but often because, at the crisis of decision, judges cannot but feel that they ought not to apply the mechanical details they find in the books in the hard and fast way that rules, as distinct from principles, are to be applied. But where are they to find the principles? There are suggestions here and there, and a powerful judge now and then draws a principle from the mass of rules. In general, however, the courts are too often forced to reach a conclusion on the large equities of the cause and forage in the books for cases to support it. This makes our written opinions a mere ritual. Sooner or later a system of our law must come."

It is a big conception and reflects credit upon the men who propose it. Such a project requires professional courage. Judges, lawyers and litigants would benefit from the existence of a *Corpus Juris*, and the preparation of one is not, as Mr. Alexander portrays it, beyond our reach.

Tacoma Ledger:—

NEED OF A WORK ON AMERICAN LAW

A very complete plan for the preparation and publication of a work on the entire body of American law, or the *Corpus Juris* as the lawyers call it, has been prepared by Lucien Hugh Alexander of the Philadelphia bar cooperating with Prof. George W. Kirchwey and Dr. James DeWitt Andrews. The plan was submitted to leaders of the bench and bar of the United States and with remarkable unanimity and enthusiasm they give it approval. . . . While the subject is primarily of interest to lawyers, judges and students of the law, it has a vital interest for the people generally, inasmuch as the lack of any comprehensive work setting forth the principles of American law is responsible, in no small degree, for the law's delay and the expense, and sometimes the impossibility, of obtaining justice.

What is the law and where is it to be found? The statutes express only a part of it. The law is to be found in the decisions of the federal and state courts, in digests and compilations, and in session laws. An immense mass of material must usually be examined to discover the law. The labor and time required are exhausting. Each year the burden becomes greater because of the new statutes, state and federal, and the new state and federal court decisions. The lawyers feel the need of a scientific statement of the principles of the American common law. . . .

Precedents keep on piling up until chaos is threatened, and it is believed that the time has come for a philosophic, scientific statement of principles which would be cited as authority by lawyers and judges in the future. . . .

It should not be prepared and issued as a private business enterprise for profit, although he thinks the work would ultimately become profitable. He appeals to philanthropists to establish a $1,000,000 foundation and he outlines a plan under which the best legal brains of the country would be engaged in preparing statements of the principles of the different branches that would go to make up a comprehensive treatise on the body of the American common law.

The opinion is expressed by distinguished lawyers that such a work would tend to check the annual increase in session laws. At the same time the tendency would be to reduce litigation, for the law would become more generally understood if it were stated in general principles. Advocates of uniform legislation for the different states see in the proposed undertaking a great aid to uniformity.

"The unfortunate condition in which the system for the administration of justice now is, by reason of the unmanageable and rapidly increasing mass of authorites," says Mr. Alexander, "is of course not known

to the general public and perhaps never can be appreciated by them, for it manifests itself only in delays in the administration of justice and unintentional injustice in decisions of courts."

But the public does realize that the results are not what they should be and the public is just now eagerly interested in the broad-minded discussions that are going on about the law's delay and the expense of litigation. Practice of law by principle, and not so much by precedent or cases, is the need of the time. There are so many precedents that one lawyer cannot master them. We need to have principles deduced from the century of decisions and set forth in philosophic and scientific arrangement.

Boston Advertiser:—

THE BODY OF THE LAW

It has been stated by many admirers of the late James Barr Ames, that he was specially fitted to have undertaken a task which has never been adequately performed for this generation—the preparation of a treatise which should aim to present in terms intelligible to all, the clear and concise statement of those general principles of justice which rule in all the decisions of the courts, as to essential principles of American jurisprudence, apart from mere statutory law. He did not, however, perform that task, because he was never in a position to carry it out, unaided; and as such a work would have covered years of effort, and would have demanded an independent income, Dean Ames never saw his way clear to perform it. His death, however, has called attention to the fact that such a work would be of inestimable value, not only to the legal profession, but to the whole nation, as well.

It has already been pointed out, in the discussion of the plan to compile a statement of an American *Corpus Juris*, that the leading American jurists have always recognized the need of such a statement. James Wilson, one of the first American jurists in point of time, as well as in ability, speaking not only as a member of the Supreme Court, but as a citizen, dedicated his own life to the task, so far as his time would permit. Unfortunately death intervened. Since his day, the dawn of the republic, no American has attempted it, with as much prospect of success. . . .

The idea of a *Corpus Juris* is to trace out the principles of law, settled, immutable, fixed, on which all decisions must rest. If decisions alone were to constitute the law, from one generation to another, the outlook would be hopeless. But, as Justice Holmes has pointed out, the number of our precedents when generalized and reduced to a system, is not unmanageably large: "They present themselves as a finite body of dogma, which may be mastered within a reasonable time. And this is so for the reason that the reports of a given jurisdiction in the course of a generation take up pretty much the whole body of the law and restate it from its present point of view." So also Judge Dillon has stated that "the number of cases is legion, but the principles they establish are comparatively few, capable of being thoroughly mastered and capable also of direct and intelligent statement."

In recent years men of large fortune have established "foundations" for the discovery or the statement of great truths in medicine or in science. In no other fashion, as we have recently taken pains to point out, could the progress of the healing art, for example, be so ably advanced as by the great Rockefeller foundation, which has furnished the income to support the men who are delving into the deep mysteries of such diseases as cancer, tuberculosis, the hookworm disease, etc. Mr. Phipps has done great things for the investigation of tuberculosis. Mr. Carnegie has given millons to scientific investigation. Why is it not possible for the legal profession to interest some American millionaire in the work of preparation of the American *Corpus legis*, not merely for this generation, but for all generations to come?

It is practically self-evident that in such fashion, and in no other, will this work be done, if it is to be done for all time. And it can be done, if the men of great fortune will do for the American people, in law, what has been done in medicine, in science and in general education.

Philadelphia Press:—

A BODY OF LAW

American law has grown to an unmanageable bulk. One Congress and forty-eight states and territorial legislatures are turning out new laws annually or biennially in bewildering profusion. As many supreme courts

are interpreting these statutes and adding their quota of judge-made law. Besides that we have the whole body of the common law and portions of law of other origin, making the term "learned in the law" a misnomer, since no human intellect can compass more than a small fraction of it.

The *Green Bag*, a lawyers' magazine, gives up the greater part of its February issue to the discussion of the desirability and possibility of a *Corpus Juris*, which we understand to mean a statement of the whole body of the law in scientific language in concise and systematic form. It would differ from a code in that it would be expository of the law rather than a literal statement of it. It should be done by experts who give their whole time to its preparation. It is estimated that twenty volumes of 1,000 pages each would suffice to bring the enormous body of American jurisprudence into something like order and unity.

Such an exposition of the law, if done so well that the courts would take its statement of the law as authoritative, would not merely promote the convenience of lawyers and courts, but would benefit the public as well. It should make law cheaper, because more easily ascertained, and decrease litigation by making the law less doubtful and the advice of counsel more uniform and better worth following. The proposition is highly praised by the greatest lawyers of the country and if carried out would be a very great public benefit.

With such a work completed it might be possible for the diligent to know the law, as each one is bound to do in theory.

Houston (Texas) **Chronicle**:—

A CODE OF AMERICAN LAW

Can our legal jungle be cleared? In the *Green Bag* of Boston, a lawyers' magazine, Mr. Lucien Hugh Alexander presents a scheme, worked out by himself, Dr. James DeWitt Andrews and Prof. George W. Kirchwey, which is nothing less than to call the law to order. In other words, these experts propose that the law be systematized into a comprehensive and brief whole, to have prepared an American *Corpus Juris*.

Undoubtedly this would be of enormous advantage to lawyers and laymen, to those who have to do with courts and those who wish to avoid litigation. It would make the law more certain. American law, as it exists today, is not systematized. Our federal and state statutes and jurisprudence are a mass formidable in size and by no means consistent throughout. . . .

For this condition of confusion, which W. B. Hornblower, ex-president of the New York State Bar Association, declares is "little short of appalling," the people are accustomed to thoughtlessly blame the lawyers. But the lawyers do not make the laws; they merely try to understand and interpret them; the lawyers are not the sovereign people. Elect every member of the bar to Congress or the legislature, and exclude all others, and we'd have great changes for the better.

"Codification," the late Thomas J. Semmes of New Orleans told the American Bar Association in his address as its president, "is the natural result of the evolution of the law." It is to be remembered that in an early century of our era Justinian had the law codified, as in modern times Napoleon did. American law has never been codified. The time has come to do it.

Mr. Alexander and his associates figure out that the cost will be $600,000. It must be remembered that the labor necessary would take the time of many lawyers for many months. The people are not likely to tax themselves to raise the sum necessary, so an appeal is made to some multi-millionaire to come forward and serve his country, with the reward of fame.

Hartford Courant:—

THE AMERICAN *CORPUS JURIS*

Lucien Hugh Alexander of the Philadelphia bar has outlined in the February number of the *Green Bag* a plan to make "a complete and comprehensive statement in adequate perspective of the entire body of American law, our *Corpus Juris*." The plan is the joint product of Mr. Alexander, Professor George W. Kirchwey of the law school of Columbia University, and Dr. James De Witt Andrews, long the chairman of the American Bar Association's committee on classification of the law. It is a large undertaking which these lawyers propose, and Mr. Alexander makes it plain that the difficulties in the way of its accomplishment have not been underestimated and that they are not believed to be insurmountable. . . . Of the

fitness of Messrs. Alexander, Kirchwey and Andrews to direct this work, Justice Brewer of the Supreme Court of the United States has expressed a very favorable opinion.

What is proposed is to block out "the entire field of the law under a logical system of classification, so that when the work is published, the law on any particular point may readily be ascertained." In general charge would be a board of not more than seven editors.

Of course, the work would be costly. None but high-priced men would be engaged upon it, because the services of no others would be worth while. . . . After discussing the different ways in which this great project might be financed, Mr. Alexander says that "there is no plan whereby the 'perils of commercialism' can be avoided but by the work being brought out on a Foundation of Jurisprudence established by some man of large means anxious and able to use part of his wealth in benefiting mankind; or by such a man advancing the necessary funds to proper trustees under an agreement to refund the same from the proceeds of sales." . . . A million-dollar foundation is suggested. With this, the production of the American *Corpus Juris* would be assured.

Among those who commend it are Justices Brewer, Day and Moody of the Supreme Court of the United States, former Chief Justice Simeon E. Baldwin of the Supreme Court of Connecticut, John F. Dillon, Elihu Root, Governor Hughes and Joseph H. Choate. Judge Baldwin, after speaking of questions incident to the proper execution of the work and saying that commercial considerations should have no weight, adds: "It would, however, be impossible to exclude these unless the work were financed by those who would find their compensation in the satisfaction of having done good service to the country in helping to set its judicial institutions in order on a firm and common basis."

Perhaps the million-dollar foundation of jurisprudence will be forthcoming. Assuming that the proposed work would be done in a workmanlike manner—an assumption made safe by the character and standing at the bar of the men now most directly interested—it may be said that the money would be well spent.

Omaha Bee:—

The proposed American *Corpus Juris*, designed "as an expression of the law in the words of master minds, from which all searchers may draw inspiration," is the subject of an extended explanation and discussion in the current issue of the *Green Bag*. The work is to be a compilation of legal principles drawn from American laws and court decisions, formulated by the best legal talent available. Endorsement of the project by the legal profession is well-nigh unanimous, scores of letters of approval being printed in connection with the discussion. Among the endorsers are General Charles F. Manderson of Omaha, Judge Frank Irvine, formerly on the district and supreme bench of Nebraska, now dean of the law school of Cornell University, and Judge Roscoe Pound, formerly of the Nebraska Supreme Court, now professor of law in the Chicago University.

General Manderson: Your proposition is to bring order out of chaos, for I cannot imagine anything more chaotic than the present condition of the law in this country. . . .

Judge Irvine: There cannot be the slightest doubt that such a work well carried out would be the greatest contribution ever made to our law. . . .

Judge Pound: I do not doubt that such a work as you propose, though difficult of execution, because it would be a pioneer work in the system of our Anglo-American law, is entirely feasible. The utility of the work is beyond dispute, and, I might fairly say, beyond measure.

Our jurisprudence of rules is breaking down obviously, and in the process is injuring seriously public respect for law.

Boston Herald:—

A *CORPUS JURIS*

The next great opportunity for a multi-millionaire donor to serve his countrymen, according to a legal writer of eminence writing in the *Green Bag* for February, is to duplicate in a way the work that Mr. Carnegie is doing for science, by creating a fund and naming suitable trustees to administer it, with which an American *Corpus Juris* can be brought together. This task involves the attempt to make a complete and comprehensive statement, in a logically developed and systematized form, of the entire body of

American law. It should be done by men of highest eminence and peculiar fitness, suitably aided by a large staff of clerical subordinates. . . . It is assumed, reasonably it seems to us, that in due time all the money invested in making it would return to the foundation for further use in connection with similar service to society through later expositions of law in its higher ranges. The project has the highest indorsement from judges, lawyers and publicists. It now awaits its multi-millionaire or a group of investors who will, under proper restrictions, venture on it as a speculation of a commendable type.

Philadelphia Telegraph:—

AN AMBITIOUS LEGAL UNDERTAKING

The proposition of distinguished lawyers to bring about "a complete and comprehensive statement in adequate perspective of the entire body of the American law," will strike the average layman as an undertaking almost impossible of accomplishment. The value of such a "foundation of jurisprudence" cannot, however, be doubted. It requires no legal training to comprehend that the laws of this country, in the nature of things, are more or less a jumble, the authorities not always being at agreement. . . .

It is declared by Mr. George D. Watrous, president of the Connecticut State Bar Association, that there is practical unanimity with respect to the urgent need of such a statement of the entire law, although opinions may differ as to whether and how it can be done. Mr. Lucien Hugh Alexander, of Philadelphia, Professor G. W. Kirchwey, of Columbia University, and Dr. James DeWitt Andrews of New York, have a plan which they have set forth in a memorandum. It is proposed to have a board of editors, not exceeding seven in number, who will have final and authoritative control over such matter as may be accepted for publication. Of course, this board would have to depend upon the assistance of scores of able members of the profession. The work could not be expected to pay for itself, and for that reason the question of funds becomes an important one. Mr. Watrous believes that the man who "steps forth to establish the longed-for foundation" will insure himself a fame in the history of law-givers equal to that of Justinian and Napoleon. . . .

The work contemplated would be invaluable to scholars throughout the world.

The Revolt Against Empiricism in the Criminal Law

THE appearance of a new journal devoted to the scientific study of the problems of criminal law should furnish an occasion for rejoicing to the bench and bar of the United States. The establishment of the *Journal of Criminal Law and Criminology* testifies to the awakening of a new interest in these pressing questions. The new periodical makes its appearance under an able and distinguished editorship, as the organ of the American Institute of Criminal Law and Criminology, which, it will be remembered, is the happy outgrowth of a conference on criminal law held at Chicago in June, 1909, in observance of the fiftieth anniversary of the founding of the law school of Northwestern University. The purposes of the journal are those of the Institute, namely, "to further the scientific study of crime, criminal law and procedure, to formulate and promote measures for solving the problems connected therewith, and to co-ordinate the efforts of individuals and of organizations interested in the administration of certain and speedy justice." The *Green Bag* has strongly advocated a scientific basis for legal studies, and cordially approves of this movement to bring men of science and men of the law together in closer co-operation for the attainment of results which to be valuable must be the outcome of such collaboration.

No argument is needed to show the usefulness of such a journal. The facts brought out by the editor, Professor James W. Garner of the University of Illinois, in an editorial article, are, however, of interest. To quote:—

"During the sessions of the National Conference

on Criminal Law and Criminology at Chicago the fact was brought out that there is no journal or bulletin published in the English language devoted wholly or in part to the cause of criminal law and criminology or to the problems connected therewith, although there are thirty or forty periodicals of this character published in foreign countries, notably Austria, Belgium, Denmark, France, Germany, Italy, the Netherlands, Spain, Switzerland, and even India and South America. In Germany alone there are not less than twenty journals, bulletins or periodical publications devoted wholly or in part to some phase of criminal jurisprudence, criminology, penology, criminal psychology, psychiatry, or police administration. In France there are at least seven such periodicals, and in Belgium there is one (the *Révue de droit penal et de criminologie*), founded in 1907. In Italy, where the interest in criminal science has long been active and constructive, there are at least a dozen periodical publications devoted to the problems of criminal law, criminology, penology and the allied sciences.

"America needs a journal which shall represent all classes of persons whose professional activities or private interests bring them into relation with the administration of the criminal law and who are seeking for modern solutions of some of its most important problems. Very recently there has been a remarkable awakening of interest in the scientific study of crime and penal methods—an interest which is beginning to manifest itself in a productive research and investigation as well as in destructive criticism of antiquated methods and in constructive proposals of reform. . . .

"It is believed that such a journal will appeal not only to intelligent practitioners who are interested in the progress of a scientific criminal law, but to all persons, public officials and private individuals alike, who are concerned directly or indirectly with the administration of punitive justice, as well as to a large group of scholars who are working in the allied fields of sociology, anthropology, psychology, philanthropy, etc. It is now recognized that all these sciences are more or less closely related to criminal jurisprudence and criminology and that they are capable of throwing a vast amount of much-needed light on many problems of the criminal law. Each is in a sense contributory to the others and at many points their spheres touch and even overlap."

The field of the new publication is of course a very broad one. It is impossible entirely to divorce the problems of civil from those of criminal procedure, and the agitation for a reform of procedure is taken up with much earnestness and intelligence. Such other topics as the regulation of medical expert testimony, the indeterminate sentence, probation and parole, and the administration of justice generally are absorbing so much public attention that the new journal immediately finds itself face to face with some of the most burning questions of the day. The problems of the civil branch of our jurisprudence are perhaps secondary in importance, at the present time, to those of the criminal law, so that the *Journal* at once enters upon a field of great interest and usefulness. The broad range of its editorial discussion, and its illuminating department of notable significant events, minutely and comprehensively treated, offers a striking revelation of the broad horizon of this new undertaking and of the well-conceived policy of those who will direct it.

There is naturally a division in this field of studies, between those which are legal, on the one hand, and those which belong to the general subject of criminology, on the other. The first two issues of the *Journal* afford no foundation for the fear which might readily be entertained, that this publication would devote principal attention to legal matters. For Professor Healy, director of the Juvenile Psychopathic Institute in Chicago, writes some stimulating observations on the adolescent criminal, describing some cases in his own experience, and suggesting in what large degree crime may be due purely to environmental factors the action of which can be obviated by the needed individualistic treatment. Edward Lindsey of the Warren (Pa.) bar urges the importance of the anthropometric study of the criminal, and advocates the passage of the bill introduced in Congress for the establishment of a criminological laboratory in the District of Columbia. Adalbert Albrecht contributes one of the best analyses of Lombroso's theories that we have yet seen, and shows his minute familiarity with the progress of the science of criminology in Europe. Proper emphasis is also laid on criminal statistics, which are necessary to supply the science with adequate working data. Louis N. Robinson, expressing the conviction that such statistics are in this country, "from the point of view of a student of criminology, almost without exception worthless," proposes an effective plan whereby the government can apply the same methods to criminal statistics which have already proved so successful in the reform of mortality statistics. Arthur MacDonald analyzes the statistics of Germany, France and England and draws some interesting deductions. Warren F. Spalding, secretary of the Massachusetts Prison Association, presents some appalling figures with regard to the money cost of crime in Massachusetts.

Coming now to criminal law, we find the substantive law of crime represented by a

contribution to the vexed question of the plea of insanity with reference to the crime of homicide. Frederick W. Griffin of the New York City bar writes a vivid article on the Thaw trial, in which he eloquently portrays the absurd situations of this travesty of the court room. It is not with the substantive law of homicide, however, that he is so much concerned as with the effect of a plea of insanity on practice, and the position in which it leaves the prisoner who seeks a writ of *habeas corpus* armed with an acquittal on the ground of insanity. He urges that the verdict of acquittal should be so framed in our courts as to make such a procedure impossible, as in England. He thus advocates no departure from the common law doctrine that an insane person cannot be guilty of murder.

The substantive law of punishment does not receive direct consideration in any of these articles, but it can confidently be anticipated that this important field will not be neglected, in view of the interest which has been aroused by such problems as those of probation and parole and the indeterminate sentence.

An exceedingly fruitful field is of course to be found in the adjective law of crime, which it is perhaps proper to divide into three stages: (1) detection and prosecution up to the time of the trial, (2) procedure at the trial, up to conviction, and (3) procedure after conviction, or penological treatment. In the first division we are brought face to face with such problems as those of the treatment of accused persons under detention, indemnification for wrongful detention, bureaus of identification, the "third degree," and possibly every problem of police administration. In the second, there are such questions to be investigated as those of public defenders, the selection and treatment of jurors, improvement of the jury system, simplification of pleading, restrictions on the right of appeal, reversals for technical errors, enlargement of the power of the judge, medical expert testimony, etc. In the third some of the problems awaiting solution are the classification of prisoners, the parole system, prison administration, the treatment of the insane in houses of detention, etc. The foregoing were among the one hundred and thirty-five subjects presented for discussion at the Chicago conference, from which it was decided to select, as forming the principal topics for the first year's work, the following: (*a*) system for recording data of criminals, (*b*) drugs and intoxicants, (*c*) probation, parole, pardon, and indeterminate sentence, (*d*) organization of courts, (*e*) criminal procedure.

Of these questions, that of the improvement of procedure is no doubt recognized as paramount. The chairman of the committee appointed for this investigation is Professor Roscoe Pound of the University of Chicago, than whom no man in this country has made a more profound study of the problems of procedure or writes of them with greater authority; and his associates are Judge Albert C. Barnes of Chicago, Frederick Bausman of Seattle, Prof. William E. Mikell of Philadelphia, and Prof. Howard L. Smith of Madison, Wis. A sub-committee was appointed to investigate and report on the methods of procedure in Europe, particularly in Great Britain. This sub-committee, most of the members of which are now in England, consists of Everett P. Wheeler of New York, Prof. James W. Garner, Prof. Edwin Keedy, Prof. John D. Lawson, Prof. Charles R. Henderson, Judge Marcus A. Kavanagh of Chicago, and Gino C. Speranza of New York.

The personnel of this committee is not only such as to assure hopeful results, but also promises effective co-operation with the American Bar Association, in the deliberations of which several of the members have borne an active part, on the Special Committee to Suggest Remedies and Formulate Proposed Laws to Prevent Delay and Unnecessary Cost in Litigation. One member, John D. Lawson, who is editor of the *American Law Review* as well as Dean of the law department of the University of Missouri, contributes to the first number of the *Journal* a strong paper on technicalities in procedure, in which he reviews the objectionable practices that have grown up, and makes a vigorous argument for the adoption of the remedies proposed by the American Bar Association. This helpful spirit will impress itself upon all the investigators of the Institute and lend to the recommendations of the American Bar Association added weight.

The improvement of methods with regard to the admission of medical expert testimony furnishes the subject for a thoughtful and suggestive paper by Justice Schofield of the Massachusetts Superior Court. Justice Schofield insistently opposes the plan for

officially selected boards of experts as impracticable for several reasons.

The general subject of the administration of the criminal law is approached from a new angle by Judge Gemmill of the Chicago Municipal Court, a court noted for the dispatch with which it transacts its business and for some admirable methods of procedure. Judge Gemmill believes firmly in the swift and certain enforcement of the law, as the fear of punishment is the most powerful deterrent that can be found to prevent the commission of crimes. He gives some most interesting figures with regard to the effect of this policy in Chicago:—

"While crimes based upon fraudulent business transactions have increased, all of the more serious crimes have decreased. This does not include homicide, which has remained almost stationary. The number of homicides in a city is no criterion of the crime of a city. They are usually committed by men and women who had hitherto been useful and law-abiding citizens. In the last ten years there has been a decrease of thirty-five per cent in the number of prisoners at Joliet over any other ten-year period since 1868. From July 1, 1899, to January 1, 1910, the prisoners at Pontiac, where all persons between the ages of ten and twenty-one years convicted of felonies must be sent, has decreased from 1,397 to 745—almost fifty per cent in ten and one-half years. The number of prisoners sent to the John Worthy School for delinquent boys has decreased from 913 in 1900 to 272 in 1909—a decrease of seventy per cent in nine years."

At the same time, Judge Gemmill is a believer in parole and probation, properly administered. He does not favor probation for drunkenness, as confinement over night is alone sufficient punishment for the majority of cases, and probation would generally mean a sense of degradation and loss of employment. On the subject of parole he says:—

"I am in favor of a parole law, not for drunks, but for a certain class of first offenders who may thereby be given an opportunity to make recompense for the wrong done and to change their course of conduct. But I am sure that any parole law which advertises to the world that every violator of the criminal laws shall have at least two chances to commit crimes before he is in danger of punishment, will increase crime rather than decrease it."

He earnestly advocates methods which do not debase the criminal, and he frowns upon the Massachusetts practice of exposing the prisoner to curious scrutiny in an iron cage, and points out the evil effects of the Massachusetts policy of imprisonment for drunkenness. Massachusetts, he says, has three times as many criminals in its prisons, as compared to population, as Illinois, and this notwithstanding the fact that it has "the oldest and best parole law in the United States."

Another interesting feature of the *Journal* is a series of articles presenting representative passages from the writings of those English and American thinkers who have advanced a philosophy of penal law. "Only those thinkers will be selected who stand eminent in philosophical science and have treated penal law as a part of their general philosophical system." The series will be edited by three members of the faculty of Northwestern University,—Mr. Longwell, instructor in philosophy, Mr. Kocowrek, lecturer on jurisprudence, and Professor Wigmore.

The first philosopher chosen is Thomas Hill Green, whose idealistic theory of punishment is so carefully thought out in details and so sound in many of its interpretations as to deserve attentive study from the point of view of twentieth century thought. Some of its arguments are not entirely convincing, such as that, for example, that social retribution differs in its essential nature from private vengeance. But a complete science of penology must look for its materials to every possible quarter, and the value of analytical research must not be underrated at a time when so much emphasis is laid on anthropological and biological investigation.

NOTE

Messrs. Little, Brown, and Company, of Boston, begin publishing this fall "The Modern Criminal Science Series," under the direction of the American Institute of Criminal Law and Criminology. The following titles have been chosen by a Committee appointed by Prof. John H. Wigmore, president of the Institute: "Criminal Psychology," by Hans Gross of the University of Graz, Austria; "Modern Theories of Criminology," by Bernaldo de Quiros of Madrid; "Criminal Sociology," by Enrico Ferri, University of Rome; "The Individualization of Punishment," by Raymond Saleilles, University of Paris; "Crime, Its Causes and Remedies," by the late Cesare Lombroso; "Penal Philosophy," by Gabriel Tarde; "Criminality and Economic Conditions," by W. A. Bonger, University of Amsterdam; "Criminology," by Raffaelle Garofalo, of Naples; and "Crime and Its Repression," by Gustav Aschaffenburg, editor of the *Monthly Journal of Criminal Law and Criminal Law Reform.*

The "Theory of the Case" Doctrine and Chaotic Condition of Our Pleading

AT a time when there is a widespread agitation for the disregard of technicalities of pleading and judgment on the merits, it is interesting to find the technical point of view presented with such acute logic as by Edward D'Arcy in his articles on "'Theory of the Case'—Wrecker of Law" in the *Central Law Journal*.

"Perhaps one of the most serious troubles with the law to-day, as has been pointed out in a previous article of this series," writes Mr. D'Arcy, "is the failure to understand the fundamental difference between the common law, or mandatory record, or 'record proper,' and the bill of exceptions or 'statutory record.' The difference involved goes to the root of the law, and yet owing to fancied distinctions between 'substantive' and 'adjective' law, the former being treated as all important, and the latter as merely subsidiary, our students are being impressed with the idea that the study of adjective law deserves but a small portion of their time in the school, and that its principles can be picked up in practice, without instruction.

"The result is that men trained thus get into the profession and on the bench imbued with the idea that adjective law being technical (which it is), there must be found some way of eliminating the 'technicality.' They desire, laudably enough, to 'get at the merits,' but being untrained to see that the 'merits' can be known to the court only through the pleadings and other parts of the record prescribed by law, they become impatient of the restraint imposed, depart from the state's record, allow the parties to raise new and unpleaded issues, and in doing so actually believe they are expediting the cause on its 'merits.'

"And when the practitioner objects to having his client's rights trampled upon in this manner, he incurs the animadversion of the trial court, often in the presence of the jury.

"*Multitudo imperitorum perdit curiam.*

"Now, the position taken in this series of articles is that 'form' is just as necessary in the law, if its symmetry is to be preserved, and justice is to remain certain, as it is in engineering, chemistry or medicine, or as it is in baseball, or tennis, for that matter. If you want to make an effective stroke in golf, or an effective punch in the prize ring, you must do it according to form. All of which simply means that there are principles underlying all human effort, which, if observed, make the effort effective; if not observed, make it abortive or inefficient. . . .

"There is a philosophy underlying the mandatory record, or record proper, and a philosophy underlying the statutory record, or bill of exceptions. We refer to the rules concerning error appearing in these two records, and the time and manner of attacking it. Error, in matters of substance, appearing on the face of the mandatory record, may be taken advantage of by the general demurrer, and its correlatives, the motion in arrest, motion for judgment *non obstante veredicto*, the order of repleader, objections upon collateral attack, and when questions of *res adjudicata* are raised, by insisting that the necessary facts for the *coram judice* proceeding do not appear. All these objections to substantial defects in the mandatory record, while made at different stages of the proceeding, are directed against error of the same nature, appearing in the same record; for instance, that the complaint does not state facts constituting a cause of action. . . . Underlying all these various modes of attacking a proceeding which is fatally defective, is the principle expressed in the maxim, *De non apparentibus, et de non existentibus, eadem est ratio:* what is not made to appear is to be treated as though it does not exist. This maxim is *the* great maxim of procedure—a maxim, unfortunately, which is not taught to our students, and not always enforced from the bench. It is, as W. T. Hughes expresses it, a 'constitutional implication'—that is to say, a constitutional government must necessarily respect it. Legislatures may pass laws 'abolishing' pleadings, but the courts govern and protect, and must rule. Legislatures may pass statutes of jeofails, providing that when a verdict shall have been rendered, the judgment shall not be affected or impaired 'for

the want of any allegation or averment on account of which omission a demurrer could have been maintained.' But the courts invariably annul such enactments, in so far as they attempt to cure errors of substance, that is, all errors reviewable upon *general* demurrer, or what amounts to the same thing, upon motion in arrest, and the other methods above pointed out, of calling the court's attention to the fact that there is nothing before it upon which to act. The courts, it is true, seldom by name quote the maxim *De non apparentibus*. There is a perceptible effort to ignore maxims, and to discover and set up 'new' fundamental principles of law. But the human mind has perceptions of justice which will not be denied. It works, under its own laws, in obedience to these perceptions, and asserts them in the most unexpected ways.

"What does not judicially appear, is presumed not to exist.' It is so simple, as to need no citation. For instance, the law presumes ownership from possession. Possession, like convenience, necessity and reason, is one of the big facts in the law. It is a basic, pivotal position. Therefore if A is in possession of property, B cannot recover it from him without stating (*De non apparentibus*) and proving (*Frustra probatur*) a cause of action. To let B take the property without stating, and then proving, a cause of action, would be to deprive A of his property without 'due process of law.' This is just as true in England, where they have no written constitution, as it is here, where we have. The written constitution does not change the situation on this side of the Atlantic in the slightest degree. It is an inherent perception of the justice of the thing that leads the white races to require a plaintiff to set out his cause of action where all may see it and know what it is. The difference is not one between a written constitution and an unwritten or prescriptive one. It is the difference between a constitutional government (written or unwritten) on the one hand, and a despotism, on the other. The Sultan of Turkey can take a man's property and life without the useless forms of procedure. They are too technical for him. The English and American governments have to observe these inconvenient 'technicalities'—that is the difference between the two kinds of government—a difference fundamental enough. It is to be observed, too, that some of our leaders of the bar are doing their best to eliminate pleadings, and substitute the Turkish method of transferring property. Some of our tribunals have succeeded in getting away from the 'technicalities' of pleadings, and have substituted the method of pleading for recovery of a horse, and allowing the pleader to recover on his 'theory of the case' that what he really wants is not a horse, but a cow. The position of these courts seems to be that this is a speedy method of justice, and puts an end to litigation by letting the parties 'fight it out on the *merits*' without bothering with form. But when some other court has the problem put up to it, on collateral attack, whether such a judgment for a cow instead of a horse is *coram non judice*, and void, then it begins to look doubtful whether the litigation is ended, or whether it is just beginning. 'Consider the landmarks which thy fathers have set.' It is a fairly safe proposition that the Roman knew how to govern, and therefore, how to keep the peace, and therefore how to end litigation. He had plenty of experience, and he has handed down to us no maxim that the writer has heard of, telling us that pleadings can safely be waived. It is also safe to say that minds like Bacon's, Mansfield's, Ellenborough's, Kent's, Marshall's and Story's understood the necessity of a record which would stand the tests of *res adjudicata* and of collateral attack. Neither do they countenance waiving the pleadings. . . .

"Procedure is one of the most, if not the most, important subject of the law. Unfortunately it has also been one of the most abused and neglected. Knowledge of procedure necessitates knowledge of the whole law; and, *e converso* the 'substantive' branches of the law cannot be understood without a knowledge of procedure. Yet we have become inoculated with the idea that the law can be partitioned and studied in individualized branches, while the very process has permitted its life forces to escape us. We are taught by learned authors that procedure is a local, statutory affair; that there are no fundamental, immutable principles in procedure; that the student need but learn the main body of principles of the 'substantive' law, and procedure will take care of itself.

"These writers are correct: Procedure has

taken care of itself. It has asserted itself and demonstrated its position by wrecking the house built in ignorance of its fundamental laws. We have ignored it, and its vengeance is upon us. We have 'eliminated technicalities,' with just about the same success that would attend an architect's effort to 'eliminate' solid ground under his structure. We have heard of the house that was builded on the sand. . . .

"Then works like Chitty, Stephen and Gould on Pleading, studied and followed as they have been for a century, by student, lawyer, author and judge, must have profoundly affected the whole body of the law.

"And yet these works show that their authors did not understand the fundamental rules of procedure. They nowhere cite these rules. They do not show that the maxim, *De non apparentibus et non existentibus eadem est ratio* (what is not judicially presented cannot be judicially decided) lies at the base of pleading. (2 Hughes Gr. and R.) They do not see the state in pleading, but regard the matter as one entirely between the parties. According to these authors, pleadings are only to apprise the opposite party, or the court, of the issues. Out of such a conception of the function of pleadings and of the interests of the public, has grown the idea that, if only the parties consent, pleadings may be waived in order to enable the contestants 'to get at the merits.' (Thompson on Trials.)

"It would seem that this whole discussion, and the erroneous views of waiver that have developed out of it, took rise in a note of Serjeant Williams to the case of *Stennel* v. *Hogg*, (1 Wms. Saundners 228, n., 85 English Reprint 244, n. 248,) which read as follows:

> "With respect to the former (imperfections in the pleadings which are cured at common law by verdict) case, it is to be observed that where there is any defect, imperfection or omission in any pleading, whether in substance or form, which would have been a fatal objection upon demurrer, yet if the issue joined be such as necessarily required on the trial proof of the facts so defectively or imperfectly stated, or omitted, and without which it is not to be presumed that either the judge would direct the jury to give, or the jury would have given, the verdict, such defect, imperfection or omission is cured by the verdict by the common law.

"On close reading, the ambiguity and contradiction in this statement will appear. Serjeant Williams in effect says that *defects of substance, fatal upon demurrer*, are cured by verdict. This, of course, is absolutely contrary to the cases of *Rushton* v. *Aspinall*, (Smith's Lead. Cas., 8th Ed., L. C. 3 Hughes' Gr. & Rud. 5) by Lord Mansfield, and *Jackson* v. *Pesked*, (2 Maule & S. 234, quoted by Chitty and Stephen, 85 Eng. Reprint, 248) by Lord Ellenborough, both of which Serjeant Williams cites in his note. It has been held in a great number of cases that it is beyond the power of a legislature to make a good cause of action out of one fatally bad. Neither can there be any question but that a single defect of *substance fatal on demurrer*, makes a pleading fatally bad. It appears expressly by the above language that Serjeant Williams did not have in mind merely the imperfect *statement* of matter of substance. This would be merely matter of form, and would be curable. He extends the cure to matters of substance '*omitted*.' Illinois has been led into error by this quotation and mischievous decisions have followed. (*Chicago R. R.* v. *Hines*, 132 Ill. 161, 166.)

"We have become involved in unending discussions about trivialities, and in the confusion, have forgotten the fundamentals.

"Take Serjeant Williams' 'learned' note as an example. What a prolific source of error it has proved. The note is an attempt to mark a line of distinction between defects that are cured after verdict by the common law and defects that are cured after verdict by the statute of jeofails. What the difference amounts to, he does not state, but merely says there is a difference. There may have been, and may not. We are told on good authority that there is no difference; that the statute of jeofails 'is only a declaration of the common law.' (Bliss, Code Pl., Sec. 442; *Welch* v. *Bryan*, 28 Mo. 30; *Frazer* v. *Roberts*, 32 Mo. 457.)

"But that is not the point. The point is that in making this distinction, Serjeant Williams totally overlooked the harm he might do to jurisprudence. (*Uno absurdo dato infinita sequuntur*. 4 Gr. & R. 1084.) He made an opening for the 'Theory of the Case' doctrine, in countenancing the possibility of curing a fatally defective pleading—a nullity. . . .

"He did not understand the effect of putting in those words 'substance' and 'fatal objection on demurrer.' He made a mistake and it has done incalculable harm. The theory of the law was disarranged; its harmony was broken. The error spread through its entire structure;

and has been taken up and approved by the writers above named and by others equally popular, until now it is solemnly laid down as law, 'too well settled to be shaken,' that one man can take the property of his fellow without ever setting up a cause of action against him. If such be the law, what becomes of our boasted 'due process of law'; what becomes of 'substantive' rights, when they can thus be subverted by a rule of procedure? Can a lawyer be a leading lawyer, or, indeed, a lesser one, and understand these matters, and remain silent? There is a way out, and one way only—a knowledge of the fundamental principles of Procedure. 'The study of Procedure is a study of Government.' It is susceptible of demonstration that the principles of the law are few; that they can be arranged in order and stated in black and white, in small compass. The law in that sense is a little thing. It is a beautiful harmony of principle, but capable of being distorted into an unsightly wreckage of cases."

Notes of Periodicals

"If we only had some one like him!" says Sydney Brooks, in *McClure's* for July, was the thought behind the attentions that were showered upon Mr. Roosevelt in Europe. "Any nation would be glad to reckon him among its assets if it could." At the bottom of the enthusiasm attending his welcome was "the consciousness that every country in Europe needs a Roosevelt of its own." People in England "feel that they would know what to do with Mr. Roosevelt, and I dare say Mr. Roosevelt feels that he would know what to do with them."

"Any mine, no matter how rich, or how large, begins to be exhausted from the time the first pick is stuck into the ground, and all its profits ought to be figured on the basis of diminishing deposits," says Emerson Hough in *Everybody's* for July. "A mine is the reverse of a mortgage or a bond. The security does not remain stable nor increase in value, but, on the contrary, *continually decreases* in value. In a mortgage we do not look to the interest to pay us back our principal; in a mine we *must* look to *dividends* to pay us back our *principal and interest* also. When the mine is done, our principal is gone. But how many mining investors ever thought of that?"

"It is Mr. Taft's misfortune that he comes to the Presidency at a time when the country is in one of its Radical moods," says Mr. A. Maurice Low, writing of "American Affairs" in the *National Review* for June. "Mr. Taft is not a Radical. He does not believe in the purification by fire. By tradition and education he is Conservative—the Conservatism that comes from a knowledge and respect for the law. He has wanted to do everything within the limitation prescribed by the law, but unfortunately for his reputation and peace of mind that has not met with the approval of the public, which has come to regard the law as of less consequence than an empiric remedy, and that is one of the reasons why the Republican Party is in such bad shape at the present time."

The legislative scandal in New York growing out of the Allds-Conger affair furnishes the subject for a dramatic article in the July *Cosmopolitan* by Charles Edward Russell, who, after reviewing all the startling facts of this infamous chapter of legislative corruption, concludes: "Obviously the source of all the evil in our legislative bodies is not Bad Men nor any other kind of men, but simply and solely Privilege. Privilege requires more privilege that it may make more profits. By only one way in this world can it attain its desire, and that is by the corruption of public servants and the perversion of government. Whether that be done by distributing money in envelopes or by awarding fat attorney fees or by retainers from the railroads or by so-called opportunities in stock speculation or by brokers' accounts mysteriously swelled or through mysterious kings of legislation or in some other way—what matters? By whatsoever means employed the result is the same. Men are corrupted, government is perverted, we are betrayed."

Index to Periodicals

Articles on Topics of Legal Science and Related Subjects

Accidents. "The Cruelties of Our Courts." By John M. Gitterman. *McClure's*, v. 35, p. 151 (June).

Treating of the delays and miscarriages of justice, viewed from the point of view of litigation to recover for personal injuries.

Admiralty. "The Harter Act and Its Limitations." By I. L. Evans. 8 *Michigan Law Review* 637 (June).

Explaining the provisions of the federal act relieving owners of vessels from liability as common carriers, under proper limitations.

Aerial Navigation. "The Air—A Realm of Law—I." By G. D. Valentine. 22 *Juridical Review* 16 (May).

Some considerations with regard to the probable future development of this branch of international law.

Agency. "The Liability of an Undisclosed Principal, I and II." By Floyd R. Mechem. 23 *Harvard Law Review* 513 (May), 590 (June).

A very thorough treatment of the subject in two articles, admirable for clearness of arrangement.

Attorneys' Liens. "Attorneys' Liens." By Raymond D. Thurber. 21 *Bench and Bar* 94 (June).

A succinct statement of the law in New York on this subject, with full citations.

Bankruptcy. "Bankruptcy Law, Its History and Purpose." By H. H. Shelton. 44 *American Law Review* 394 (May–June).

A brief *résumé* of the history of our bankruptcy legislation, the main purpose of which is by no means the granting of a discharge to dishonest debtors.

Baseball. "Baseball Jurisprudence." By John W. Stayton. 44 *American Law Review* 374 (May–June).

Read before the Arkansas Bar Association. Discussing the law applicable to such bodies as the National Association of Professional Baseball Clubs, and contracts with professional baseball players.

Carriers. See Admiralty, Public Service Corporations.

Conflict of Laws. "The Individual Liability of Stockholders and the Conflict of Laws." By Wesley Newcomb Hohfeld. 10 *Columbia Law Review* 520 (June).

The author's third and final instalment (see 21 *Green Bag* 401, 22 *Green Bag* 338), concluding his searching and able analysis of all the issues involved in the English case of *Risdon Iron & Locomotive Works* v. *Furness*, and of the application of the rule of the *lex loci contractus* to problems of American corporation law.

Contracts. "The Defense of Payment Under Code Procedure." By Carlos C. Alden. 19 *Yale Law Journal* 647 (June).

An article suggested by the recent decision of the New York Court of Appeals in *Conkling* v. *Weatherwax*, 181 N. Y. 258, 73 N. E. 1028.

See Agency, Measure of Damages.

Corporations. "Promoters' Frauds in the Organization of Corporations: the *Old Dominion Copper Mining* Cases." By Charles G. Little. 5 *Illinois Law Review* 87 (June).

Pointing out some defects in the attitude of the courts toward promoters' frauds on stockholders, and discussing what principles might be applied to bring such frauds within the scope of the law. The writer's topic is suggested by the decisions of the United States Supreme Court and the Massachusetts Supreme Judicial Court in the *Old Dominion Copper Mining* cases, 210 U. S. 206, 188 Mass. 315, and 89 N. E. Rep. 195 (see 21 *Green Bag* 531).

"Financing a New Corporate Enterprise." By C. B. Masslich. 5 *Illinois Law Review* 70 (June).

A most complete exposition of the methods of financing corporate enterprises. The author takes up the marketing of bonds and stock issues, the underwriting syndicate, mortgages, and guaranties of securities in detail, and offers many most practical suggestions.

See Conflict of Laws, Public Service Corporations, Railways.

Criminal Law. "Criminal Law—The Essentials of Crime." By N. W. Hoyles, K. C. 46 *Canada Law Journal* 393 (June 15).

The author analyzes such subjects as "act of the will," "malice," "attempt or overt act," etc., and introduces both American and British citations.

"Insanity as a Defense to Crime; with Especial Reference to the Thaw Case." By Frederick W. Griffin. 1 *Journal of Criminal Law and Criminology*, no. 2, p. 13 (July).

See p. 473 *supra*.

See Criminology, Homicide, Penal Law.

Criminal Procedure. "Medical Expert Testimony: Methods of Improving the Practice." By Justice William Schofield of the Massa-

chusetts Superior Court. 1 *Journal of Criminal Law and Criminology*, no. 2, p. 41 (July).

See p. 474 *supra*.

See Criminology, Procedure.

Criminal Statistics. "A Plan for the Reorganization of Criminal Statistics in the United States." By Louis N. Robinson. 1 *Journal of Criminal Law and Criminology*, no. 1, p. 44 (May).

See p. 472 *supra*.

"Criminal Statistics in Germany, France and England." By Arthur MacDonald. 1 *Journal of Criminal Law and Criminology*, no. 2, p. 59 (July).

See p. 472 *supra*.

"The Cost of Crime." By Warren F. Spalding. 1 *Journal of Criminal Law and Criminology*, no. 1, p. 86 (May).

See p. 472 *supra*.

See Criminology.

Criminology. "The Individual Study of the Young Criminal." By Professor William Healy. 1 *Journal of Criminal Law and Criminology*, no. 1, p. 50 (May).

See p. 472 *supra*.

"The Bill to Establish a Criminological Laboratory at Washington." By Edward Lindsey. 1 *Journal of Criminal Law and Criminology*, no. 1, p. 103 (May).

See p. 472 *supra*.

"Cesare Lombroso: A Glance at His Life Work." By Adalbert Albrecht. 1 *Journal of Criminal Law and Criminology*, no. 2, p. 71 (July).

See p. 472 *supra*.

See Criminal Law, Criminal Procedure, Criminal Statistics, Penal Law, Police Administration.

Equity. See Mistake.

Eugenics. See Heredity.

Expert Testimony. See Criminal Procedure.

Government. "The Crown and the Constitution." By J. A. R. Marriott. *Nineteenth Century and After*, v. 67, p. 969 (June).

The writer speaks of the amazing extension of the formal executive powers of the Crown of late years, and considers the political influence of the Crown to have entered on a new phase because of the growing sentiment of imperial unity.

"Significance of the Woman Suffrage Movement." Supplement to *Annals of American Academy of Political and Social Science*, May, 1910.

This brochure contains the following papers presented at the session of the Academy, Feb. 9, 1910: Introductory Remarks of the President of the Academy, by L. S. Rowe; Introductory Remarks of the Presiding Officer, by Robert L. Owen; "The Logical Basis of Woman Suffrage," by Anna G. Spencer; "The Position of the Anti-Suffragists," by Mrs. Gilbert E. Jones; "The Woman Suffrage Movement in Great Britain," by Alice Paul; "Answer to the Arguments in Support of Woman Suffrage," by Lyman Abbott; "Woman Suffrage an Aid to Social Reform," by Mrs Frederick Nathan; and "The Inadvisability of Woman Suffrage," by Charles H. Parkhurst.

"The Australian Labor Party." By Frank Fox. *National Review*, v. 55, p. 680 (June).

An informing study of Australian party politics.

"What Are You Going to do About It?—I, Legislative Graft and the Albany Scandal." By Charles Edward Russell. *Cosmopolitan*, v. 49, p. 147 (July).

A sketch of the conspiracy brought out by the Allds-Conger disclosures. See p. 478 *supra*.

See History, Penal Law.

Heredity. "The Future of the Human Race." By Professor T. D. A. Cockerell. *Popular Science Monthly*, v. 77, p. 19 (July).

Discussing the permanence of unit-characters, together with the possibility of getting rid of undesirable qualities. The author thinks "it would pay society to furnish ample means for the industry of child raising to those who are especially fitted to engage in it."

History. "Biological Analogies in History." The Romanes Lecture delivered at Oxford University, June 7, 1910. By Theodore Roosevelt. *Outlook*, v. 95, p. 297 (June 11).

This essay covers a field of astonishing breadth, surveying the whole history of civilization from earliest times, and seeking many comparisons between the life of races and that of the lower animal species.

"The Trial of John Brown." By George E. Caskie. 44 *American Law Review* 405 (May–June).

That John Brown had a fair and impartial trial, that he met with no mob violence, and that his views on the question of slavery cannot be deemed to outweigh his treasonable contempt for law and order, is the gist of this review of an interesting chapter of American history, read recently before the Virginia Bar Association.

"The Making of the Constitution." By Oliver H. Dean. 44 *American Law Review* 341 (May–June).

A paper which eulogizes the work of the leaders of the Constitutional Convention, and which declares the Constitution adaptable to

the conditions of all peoples on the face of the earth.

Homicide. "Malice Aforethought, in Definition of Murder." By Howard J. Curtis. 19 *Yale Law Journal* 639 (June).

The author considers the standard method of charging the jury in murder trials as to the meaning of the term "malice aforethought." He reaches the final conclusion that "malice aforethought has no useful function outside of the indictment, and that as to its being defined in an intelligible way for the guidance of the jury as a recognizable state of mind, it is a simple impossibility. In truth it has no meaning whatever in that sense. It is a technical term which is used for convenience as covering all unlawful killings which the law deems murder."

International Arbitration. "The Need of Strengthening International Law—A Japanese Point of View for Making Arbitration Effective." By Masujiro Honda. *Editorial Review*, v. 2, p. 567 (June).

A notable appeal for the development of international law, so that questions involving national honor and vital interest may be settled in the same way as other questions giving rise to international disputes.

"Elihu Burritt." By James Brown Scott. *Advocate of Peace*, v. 72, p. 131 (June).

An outline of Burritt's views, his work for a congress and court of nations, and his agitation for a more precise and certain formulation of the rules of international law.

"War Not Inevitable." By Hon. John W. Foster. *Advocate of Peace*, v. 72, p. 134 (June).

Urging the great importance of international arbitration, even of questions involving "national honor," ex-Secretary of State Foster reviews the origin of the controversies which precipitated the wars in which the United States has engaged, showing that all these wars might have been avoided by the use of prudence and conciliation.

"How War is to be Abolished." By Dean Henry Wade Rogers. *Advocate of Peace*, v. 72, p. 138 (June).

A vigorous plea for the establishment of a permanent international court and for disarmament.

"Another Step Towards International Peace." By Hon. John W. Foster. *Independent*, v. 68, p. 1288 (June 9).

Ex-Secretary Foster considers the policy of the United States in submitting recent controversies to arbitration a proper object for patriotic pride, and shows how the friendly offices of the United States in the boundary dispute between Peru and Ecuador have opened up a new era of enlarged usefulness for the Hague peace treaty.

"An International Court of Arbitral Justice." By James Brown Scott. *Outlook*, v. 95, p. 348 (June 18).

Irrigation. See Waters.

Labor Regulation. "The Illinois Ten-Hour Law." By S. P. Breckinridge. *Journal of Political Economy*, v. 18, p. 465 (June).

A review of the recent case of *Ritchie* v. *People*, in which the Illinois ten-hour law for women was held constitutional.

Legal Fictions. "The Reasons for Some Legal Fictions." By Sidney T. Miller. 8 *Michigan Law Review* 623 (June).

An attractive presentation of the history of some legal fictions, which may be grouped in three classes, sketching some of the fictions still in use.

Legal History. "The Inns of Court." By W. H. Wardrope, K. C. 30 *Canadian Law Times* 497 (June).

A readable review of "The Inns of Court," by Hyacinthe Ringrose, D. C. L., published last year.

See Legal Fictions.

Legislative Procedure. "The Speaker and the House." By Asher C. Hinds. *McClure's*, v. 35, p. 195 (June).

A well-known authority on parliamentary law here describes the change in the powers of the Speaker of the National House of Representatives.

Lombroso. See Criminology.

Marriage and Divorce. "Uniform Divorce Legislation." By Henry C. Spurr. 17 *Case and Comment* 17 (June).

This writer considers the differences in the divorce laws of various states to be the outgrowth of policies too deep-seated to be changed, and that uniformity is not so desirable as that vigilant administration of the laws which reduces the evils of fraud and perjury to the minimum.

"The Law and Procedure in Divorce." By Mr. Justice Henry B. Brown of the United States Supreme Court, retired. 44 *American Law Review* 321 (May–June).

This paper was read last year before the Maryland State Bar Association and was printed in *Law Notes* for October, 1909. It has already been noticed, 21 *Green Bag* 631.

Measure of Damages. "The Measure of Recovery Upon Implied and Quasi-Contracts." By Prof. Joseph H. Beale. 19 *Yale Law Journal* 609 (June).

A careful study of four classes of cases: (1) Where there is an express contract substantially performed; (2) where there is an express contract unperformed; (3) where an express contract has been rescinded; (4) where there never was an express contract.

Military Law. "Military Law: Its Origin, Development and Application." By Col. W. E. Hodgins. 30 *Canadian Law Times* 485 (June).

The subject is treated from a Canadian standpoint.

Mistake. "Mistake of Fact as a Ground for Affirmative Equitable Relief." By Edwin H. Abbot, Jr. 23 *Harvard Law Review* 608 (June).

The author thus summarizes his propositions:—

"1. To be a ground for relief the mistake must relate to a present existing fact and must not be due to a want of ordinary care on the part of the plaintiff.

"2. If the plaintiff seek reformation of a writing intended to set forth a transaction based on valuable consideration, the plaintiff must establish a prior bargain upon which the parties agreed, and that by mutual mistake, or mistake on the part of the plaintiff, and knowledge thereof on the part of the defendant, that writing fails to express the prior bargain.

"3. If the plaintiff seek reformation of a writing intended to set forth a gift, he must show that by mistake in reducing the terms of the gift to writing, the writing fails to express the donor's intention; but in such a case the donor is the only party who may obtain this relief, since equity will not interfere to increase the gift in favor of the donee who is a mere volunteer.

"4. If the plaintiff seek rescission, he must show that the parties entered into the agreement under a mutual mistake as to some matter actually contracted about; or else that the defendant became cognizant of the plaintiff's mistake at, or prior to, the making of the agreement."

Monopolies. "Modern Mediævalism." By Dr. Frank T. Carlton. *Popular Science Monthly* v. 77, p. 56 (July).

The writer considers economic heresy as bitterly condemned in the twentieth century as religious heresy in the middle ages. The mediævalism of which he writes is found in the alliance of capital with the state and in modern forms of special privilege. There are signs that the age of competition has passed. The coming epoch will be marked by many resemblances to the mediæval period.

Mortgages. See Railways.

Negotiable Instruments Act. "An Ambiguity in the Negotiable Instruments Law." By Prof. Samuel Williston. 23 *Harvard Law Review* 603 (June).

The ambiguity is found in a section of the uniform act relating to the presentation for payment of instruments falling due on Saturday, an ambiguity which caused such uneasiness to Boston bankers that it has secured an amendment of the Massachusetts act this year.

Pardons. "The Pardoning Power." By Hon. Charles J. Bonaparte. 19 *Yale Law Journal* 603 (June).

Mr. Bonaparte takes the abuse of executive clemency by the Governor of Tennessee in the recent *Cooper* case as his text, and declares that "the exercise of any form of executive clemency for whatever purpose is undoubtedly open to grave abuse; responsibility to public opinion for its employment to proper ends should be strict and carefully defined."

Penal Administration. "Crime and its Punishment in Chicago." By William N. Gemmill, Judge of the Chicago Municipal Court. 1 *Journal of Criminal Law and Criminology*, no. 2, p. 29 (July).

See p. 474 *supra*.

See Criminology.

Penal Law. "A Plea for Standardizing Legal Punishments in India." By an Old Judge. 22 *Juridical Review* 1 (May).

Urging the recasting of the Indian Penal Code to remove serious defects which the author considers to arise from the great latitude and uncertainty of the law as to sentences.

"Anglo-American Philosophies of Penal Law: I, Thomas Hill Green." 1 *Journal of Criminal Law and Criminology*, no. 1, p. 19 (May).

See p. 474 *supra*.

See Criminology, Pardons, Police Administration.

Pleading. See Procedure.

Police Administration. "The Police Authorities of the United Kingdom: Their Constitution, Revenue, and Responsibility at Law." By J. Anderson Maclaren. 22 *Juridical Review* 38 (May).

"The Lighter Side of My Official Life: Some Scotland Yard Stories." By Sir R. Anderson, K. C. B. *Blackwood's Magazine*, v. 187, p. 832 (June).

Very readable reminiscences are given in this instalment, of running down criminals at Scotland Yard by some ingenious methods.

Police Power. See Labor Regulation.

Practice of Law. "The Country Lawyer." By W. U. Hensel. 58 *Univ. of Pa. Law Review* 521 (June).

An address given before the Sharswood Club of the Law School of the University of Pennsylvania, at its twenty-seventh annual dinner, at the Bellevue-Stratford, Philadelphia, last April. Dealing with the needed equipment of the country practitioner, and indicating some of his opportunities.

"The Legal Profession in Scotland." By G. W. Wilton. 22 *Juridical Review* 28 (May).

Discountenancing as improper a practice

already denounced by certain Scottish professional bodies, whereby London solicitors are wont to divide their fees with their correspondents in Scotland without the knowledge of the client—an evil which has become "apparently the rule and not the exception in the conduct of litigation in the Supreme Court."

Procedure. "'Theory of the Case'—Wrecker of Law, III, IV." By Edward D'Arcy. 70 *Central Law Journal* 402 (June 3), 455 (June 24).

Continuing the two articles noticed in 22 *Green Bag*, p. 346. See p. 475 *supra*.

"Technicalities in Procedure, Civil and Criminal." By John Davison Lawson. 1 *Journal of Criminal Law and Criminology*, no. 1, p. 63 (May).

See p. 473 *supra*.

Procedure. "Congestion of the Appellate Court Docket—How Can It Be Relieved?" By Jesse Holdom, Presiding Justice of Illinois Appellate Court, first district. 5 *Illinois Law Review* 65 (June).

Read before the Chicago Bar Association last March. Favoring certain reforms in Illinois procedure, including those set out in the bill proposed by Mr. Gilbert, and including legislation limiting every case to one review, with rare exceptions, and allowing sufficiently important cases to go to the Supreme Court direct.

See Accidents, Criminology, Marriage and Divorce.

Professional Ethics. See Practice of Law.

Public Service Corporations. "Illegality as an Excuse for Refusal of Public Service." By Bruce Wyman. 23 *Harvard Law Review* 577 (June).

Showing how the doctrine of public service corporations being excused from the duty to furnish service by public policy is being worked out. Many illustrative cases are discussed.

See Waters.

Quasi-Contracts. See Measure of Damages.

Railways. "Rights and Remedies of General Creditors of Mortgaged Railways." By Dean Henry H. Ingersoll. 19 *Yale Law Journal* 622 (June).

Discussing general features of modern railway mortgages, rights of creditors before and after appointment of a receiver, and the remedies of general creditors. The paper is based upon the principles of the common law and doctrines of equity as applicable in ordinary cases.

"Cassatt and His Vision." By C. M. Keys. *World's Work*, v. 20, p. 13187 (July).

Telling how the trio consisting of Cassatt, Rea and Jacobs brought the Pennsylvania into Manhattan.

Real Property. "Computation of the Period of Suspension Under an Instrument in Execution of a Power." By Stewart Chaplin. 10 *Columbia Law Review* 495 (June).

Construing section 178 of the New York Real Property Law, in the light of New York decisions.

"The Legal Estate in English Property Law." By J. Edward Hogg. 22 *Juridical Review* 55 (May).

This writer considers that the legal estate doctrine, in English law, furnishes a test for determining whether a *jus in rem* has been created, corresponding to the test supplied by the Scottish and Roman-Dutch systems of registration of conveyances.

Social Betterment. "Philanthropy and Sociology." By Prof. Charles A. Ellwood of the University of Missouri. *Survey*, v. 24, p. 397 (June 4).

Dealing with the methods of scientific philanthropy, as an applied science.

Tariff. "The Tariff Law of August 5, 1909." By Hon. Sereno E. Payne. *Editorial Review*, v. 2, p. 574 (June).

A summing up of the attitude of those who framed the Aldrich-Payne tariff law, by the chairman of the Committee on Ways and Means of the national House of Representatives. He declares it "a tariff law that fulfills the pledges of the platform, . . . stops no wheel of industry, and deprives no man of his daily wage."

Trade Marks. See Unfair Trade.

Uniformity of Laws. See Marriage and Divorce, Negotiable Instruments.

Unfair Trade. "The Unwary Purchaser: A Study in the Psychology of Trade Mark Infringement." By Edward S. Rogers. 8 *Michigan Law Review* 613 (June).

The courts commonly reserve for their own determination the question of the likelihood of deception of the "unwary purchaser," or the normal, everyday purchaser, by labels and trademarks likely to be mistaken for those of a dealer whose rights may be infringed. The author thinks that experimental psychology should furnish data regarding the likelihood of the average person being so deceived, and anticipates early progress in this investigation, and a diminution of the conflict between irreconcilable decisions.

Waters. "Public Control of Irrigation." By Samuel C. Wiel. 10 *Columbia Law Review* 506 (June).

The author believes that contract regulation, so soon as the experimental stage of development of a given region is passed, results in great evils. In seeking to avoid

public ownerships and to enforce public control, the experience of states with an administrative system like that of some of the western states may prove serviceable; and California may find the solution in the New York experiment of a public service commission.

Miscellaneous Articles of Interest to the Legal Profession

Biography. *Gaynor.* "Gaynor." By William Bayard Hale. *World's Work*, v. 20, p. 13139 (July).

A sketch of Mayor Gaynor's life, personal traits, and beliefs.

Halsbury. "Lord Halsbury, England's Grand Old Man." By the Editor. 17 *Case and Comment* 20 (June).

Hughes. "Mr. Justice Hughes: An Upright and Fearless Public Servant." By the Editor. 17 *Case and Comment* 1 (June).

Kaiser Wilhelm. "The Real Kaiser." By Sydney Brooks. *McClure's*, v. 35, p. 331 (July).

Roosevelt. "What Europe Thinks of Roosevelt." By Sydney Brooks. *McClure's*, v. 35, p. 271 (July).

Expressing the writer's personal impressions of Roosevelt; full of frank and hearty admiration.

Fiction. "The Griswold Divorce Case." By Frederic Taber Cooper. *McClure's*, v. 35, p. 203 (June).

Mr. Cooper has written a story of tense dramatic interest of a man and his wife who have been sundered through a misunderstanding—a story of strong human feeling, culminating in a situation of much emotional force.

"Justice While You Wait." By Owen Oliver. *McClure's*, v. 35, p. 189 (June).

A good story of an impromptu trial before a Vigilance Committee in a rough frontier settlement.

Finland. "Finland." By Count De Witte. *Contemporary Review*, v. 97, p. 663 (June).

The Russian statesman favors the assimilation of Finland not by drastic and violent measures, but by gradual and pacific means.

Foreign Relations. "Commercial Relations between the United States and Japan." Supplement to *Annals of the American Academy, of Political and Social Science*, July, 1910.

Containing the following papers: "The Japanese Commercial Commission," by Baron Eiichi Shibusawa; "Education in Japan," by Baron Naibu Kanda; "Relations of the East to the West," By M. Zumoto; "Japan's National Ideal," by Hon. K. Midzuno; Introductory Remarks by Dr. L. S. Rowe, president of the Academy; "The Significance of the Awakening of China," by Dr. Wu Ting-Fang; and "The Commercial Significance of China's Awakening," by Charles R. Flint.

"Our Blundering Diplomacy in the Far East." By Thomas F. Millard. *American Magazine*, v. 70, p. 417 (July).

The writer assails our lack of a vigorous, consistent Manchurian policy.

Mining Investments. "The Gold Brick and the Gold Mine." By Emerson Hough. *Everybody's*, v. 23, p. 44 (July).

Railways. "Speaking of Widows and Orphans." By Charles Edward Russell. *Hampton's*, v. 25, p. 79 (July).

The author reviews the case of *Colton* v. *Stanford et al.*, gleaning his facts from the testimony in that case, and depicting the conspiracy which led to the death of Colton and the spoliation of his widow, by which the Big Four achieved its purpose. A vivid chapter of Mr. Russell's series of articles on the Central Pacific Millionaire Mill.

Russia. "The Reaction of Russia; II. The Dumas, the Czar, and the 'True Russias.'" By George Kennan. *Century*, v. 80, p. 403 (July).

The author considers that the *Third Duma*, more conservative than its two predecessors and elected on a different basis of representation, does not represent the Russian people or exercise anything beyond mere bureaucratic powers.

Stocks. "Stocks and the Stock Market." *Annals of the American Academy*, v. 35, no. 3 (May).

This issue is made up of sixteen articles on the stock market, stocks as investments, sources of market news, economic crises, and bibliography of securities and stock exchanges.

Taft's Administration. "The Measure of Taft." By Ray Stannard Baker. *American Magazine*, v. 70, p. 361 (July).

The writer is impressed with Mr. Taft's candor, his clean life, his simple manners. But his policies are not his, but Roosevelt's. He has not seen that principles are greater than parties. He has shown his unfitness for a leadership with convictions.

"How Taft Views His Own Administrason: An Interview with the President." By George Kibbe Turner. *McClure's*, v. 35, p. 211 (June).

Turkey. "Developments in Turkey." By Sir Edwin Pears. *Contemporary Review*, v. 97, p. 692 (June).

Interesting facts are here given regarding the political and social awakening in Turkey.

The Editor's Bag

A PRESS ENDORSEMENT OF THE *CORPUS JURIS*

THE proposal for a comprehensive, scientific statement of American law, in a more condensed and convenient form than has ever yet been attained, seems already to have successfully run the gauntlet of professional criticism. The opinions of leading jurists assembled in our February number constituted perhaps the most remarkable collection of comments on any legal proposition that have ever been got together. Whatever slight opposition may have since developed among lawyers has been vague, inarticulate, and negative. The tremendous endorsement secured from leading members of bench and bar, on the contrary, has expressed itself in the irresistible rhetoric of cogent logic and intelligent conviction. The inference is not to be avoided that the project has only to be actually launched, under the direction of a suitable editorial staff supplied with adequate funds to guarantee complete fulfillment, for the legal profession throughout the United States to show its earnest, united support of an undertaking sure to result in priceless benefits.

But our leading benefactors are not lawyers but laymen. A philanthropist is sometimes able to appreciate needs which can be fully realized only by those of technical training. To this circumstance we owe such endowments as those for advanced medical research, for investigation in the natural sciences, and for the increased efficiency of university equipment. The fact is that a layman who is sufficiently alert and desirous of making himself useful need not confine his attention to the time-honored channels of giving. It is not too much to hope for, that laymen will quickly appreciate the demand and the opportunity of this proposed *Corpus Juris*. For they have already shown their ability to comprehend the pregnant and invulnerable arguments advanced for it, as appears from the editorial comments published elsewhere in this number.

This collection of editorial comments is striking not only on account of the readiness with which the imperative need has been comprehended and the remedy accepted with the enthusiasm born of conviction, but also because of the absence of any earnest adverse criticism. We do not recall a single instance, among all the comments which have been printed in the press of the country, in which an editor has taken the pains to write in opposition to Messrs. Andrews, Alexander, and Kirchwey and the learned jurists who have endorsed their views. The group of editorial comments now printed is doubtless not less significant, in its own way, than the former collection of professional opinions. Just as the latter may be taken as gauging the sentiment of the enlightened portion of the profession, so the former must

show the attitude certain to be assumed by intelligent laymen who have the opportunity to familiarize themselves with the details. We confidently predict that with the steady swelling of the stream of discussion which this most important proposal must inevitably evoke, popular sentiment in favor of its execution cannot but gain in strength, until the last remaining obstacle to its fulfillment will fall to the ground. As Mr. Alexander has said of this work of stating the law of the United States in legible black and white, "it has got to be done." It will be done some day anyway, of course, but publicity and discussion can only hasten the day of fulfillment.

UNUSUAL RECOLLECTIONS OF CHIEF JUSTICE FULLER

I WAS the only person present when Melville W. Fuller received the unofficial announcement of his appointment as Chief Justice.

I had been playing billiards at the Iroquois Club, the Democratic organization of Chicago, whose principal members were Cleveland men from his first nomination to his last, or as long as any of them lived.

It was this Club which placed Lawyer Fuller before President Cleveland. I do not mean that Mr. Cleveland had never heard of Lawyer Fuller, for the latter was a friend and adviser of William C. Goudy, the great railroad attorney, and Mr. Cleveland's friend and manager in Illinois and adjacent states north and northwest, during the first Cleveland administration. Whatever knowledge President Cleveland had of Lawyer Fuller, was as a lawyer, for Melville Fuller was never a politician.

At the Iroquois Club at the time referred to, I overheard a conversation between three of its officers about Fuller's appointment. One of the officers said that President Cleveland would notify Fuller that day of his nomination as Chief Justice of the Supreme Court.

If a bit of newspaper parlance may be permitted, I was "doing politics" at the time on the Democratic morning newspaper in Chicago. Of course, the conversation alluded to was in my line, and I dropped my other cue at once. The President of the Club told me I had heard correctly.

Lawyer Fuller's office was not far away, and I never made better time on any newspaper tip I ever had. He was seated at the end of a long table—he never had a desk. The table was buried under legal documents, books and correspondence. Of course in my capacity he had known me some time, and he asked me to sit down, following the invitation with the usual inquiry as to how he might serve me.

I asked him if had heard from Washington that day. He was too honest and candid to be diplomatic. He smiled and asked me how I knew he was expecting to hear from Washington. Whatever the reply was he said, as nearly as I recall his words, "Well, if you are not too busy you may wait awhile and see what comes."

I thanked him and asked him not to allow my presence to interfere with his business. He said "all right," and plunged into a bundle of documents. Soon after, a Western Union fast-footer entered and laid a message on the lawyer's desk. Mr. Fuller receipted, and then resumed his work. He did not open the envelope containing the message for several minutes. After he had read it he handed it to me.

It was the unofficial announcement of his nomination as Chief Justice of the United States Supreme Court. And it was from "Grover Cleveland." My recollection is that the words "President of the United States" did not appear.

When I handed back the message he was immersed in his legal work in a manner that indicated no concern about the great honor that had been conferred. I suppose all reporters say things that must appear ridiculous when the game is over. I recalled after, that I had said to Lawyer Fuller, as I handed him the despatch, "Of course you will accept?" I distinctly recall that he looked at me in his wonderfully kind manner, and that his splendid face was aglow as he replied, "What would you advise?"

And then I realized how unconsciously I had diminished.

Some years later I was in Washington. I called at the Supreme Court chamber. I gave my card to one of the officers of the great tribunal and then sat down, simply

to take in the surroundings. A few moments later the bearer of my card returned and said that the Chief Justice would see me "behind the curtain."

I had not expected this. I had only sent up my card to notify the presiding justice that I had called. I asked the man who brought back the invitation if it would be a contempt of court if I failed to obey. He put on a grin as he said, "Chief Justice is the speaker of the highest tribunal, and you had better mind."

I was shown behind the curtain that is suspended back of the bench. There I saw the Chief Justice in his robe. I assured him of my appreciation of the honor, and apologized for what I had done. Of course the audience was brief, and as I was leaving he said, "Do you remember the day you were in my office in Chicago when I received the message about my nomination?"

Trivial incident? Maybe. But do not these trivial incidents in the working of a great mentality reveal those characteristics which draw ordinary mortals closer to the seat of Genius?

I am constrained to tell how, one winter's night, I stood in the library of the great hearted man in Washington, the bearer of the news of an unpleasant episode that had shadowed his home. I only recall the incident, because it revealed a resignation that was sublime. His face as I saw it that night—the last time I ever saw it—is the one I shall always remember.

FRANK H. BROOKS.

HOW JUDGE GROSSCUP GOT HIS START

THE manner in which Judge Peter S. Grosscup, as a young man, got a foothold in the practice of law in Chicago is thus recounted by James B. Morrow in a newspaper interview:—

"After running again for Congress," said Judge Grosscup, referring to an Ohio experience in which he was unsuccessful, "I moved to Chicago. I had practised six years in a rural community and was a pretty good rough-and-tumble lawyer. John Sherman gave me a letter to Leonard Swett, once the partner and friend of Abraham Lincoln. He had cleared nineteen men charged with murder, and had a large business of a civil character. I was put on trial in his office, being given a cumbersome abstract of title, which he told me to examine. Toward the close of the afternoon I took the papers to Swett and laid them on his desk.

"'I never did such work,' I said, 'and never again shall I try it. With me, abstracts of title are simply impossible. However, I can get ready to try a lawsuit between here and the courthouse.'

"'If you can try lawsuits,' Swett replied, 'go to court at ten o'clock tomorrow morning. Here are the documents.'

"The trial lasted for ten days, and I won it. I was immediately admitted to the partnership, and so my troubles in Chicago, somewhat drearily begun, were soon ended."

Hon. James T. Mitchell, Chief Justice of the Supreme Court of Pennsylvania, has compiled a collection of newspaper caricatures of Presidents of the United States. In it every newspaper and magazine in America that prints pictures, and every political party, are represented. It is thought to be unique in the world. Judge Mitchell has arranged the collection with his own hands, for mental relaxation, notwithstanding the fact that it contains 70,000 pictures.

SIZE IS ONLY A RELATIVE TERM, ANYHOW.

HIS PICTURE IN EVIDENCE

SOME Chariton bottom farmers were suing the Cataract Pipe Line Company for $100,000, alleging that a break in the line had flooded their land with oil and blighted it. The case came on for trial in the La Plata Division of the Macon county, Mo., Circuit Court. The defendant's claim attorney, Barney Malone, was a short, fat man, with a round, good humored face, and receding hair. Mr. Malone had been very active in securing evidence and in looking after all features of the defense.

When the defense came on Mr. Malone introduced a large number of photographs of the flooded area to show vegetation was still growing thereon luxuriantly. In order that comparisons might be made, Mr. Malone was photographed with the natural scenery.

John T. Barker, a tall, slender young man, with Joe Chamberlain eye-glasses, cross examined Mr. Malone on behalf of the injured farmers.

"I notice here on defendant's exhibit, A, some one posing amid the verdure," remarked Mr. Barker, adjusting his glasses and regarding the photograph intently. "Who is that?"

"Me," replied the witness.

"And who are you?"

"Barney Malone, they call me."

"Your profession is?"

"Claim attorney."

"For the Standard Oil Company?"

"No, sir! For the Cataract Oil and Gas Company."

"Oh!"

Mr. Barker gingerly fingered another exhibit, examined it as though he were studying some Egyptian hieroglyphics, and asked:—

"Who is this bald headed man there in the weeds?"

"Barney Malone is his name."

"Will you please point Barney Malone out to the jury?"

"That's me, sir."

"Oh! And you are—."

"An attorney."

"For the Standard Oil Company?"

"No, sir! For the Cataract Company. I told you that once."

"So you did. Now, here's defendant's exhibit D, I believe. The evidence offered is a man, with a smooth round head, and a moon-shaped—"

"That's me, sir," exclaimed the witness, angrily.

"Ah, so it is. I beg your pardon. My eyesight is not of the best. And your name is?"

"Barney Malone, claim attorney Cataract Oil and Gas Company," replied the witness, wearily.

"Thank you," said Barker, pleasantly. "I was going to ask you that."

"I'm in all those pictures."

"Indeed?"

"Yes, sir."

"You had all these pictures taken to show yourself to this jury?"

"To show them how high the grass and things were growing as compared with the height of a man."

"I see. This"—indicating—"is the man and this the grass and growing things?"

"That's me all right."

"Did the Standard Oil—"

"The Cataract Oil and Gas Company."

"Excuse me. Did the Cataract Oil and Gas Company pay for all these pictures of its claim attorney to exhibit to this jury?"

"They paid for these photographs that show how things will grow on land you claim we blighted."

"You think these pictures show nothing there that is blighted?"

"Sure."

"You are in all of these?"

"I admitted that a dozen times. Do you want me to keep repeating it all day?"

"No. We'll stop when we get through with the pictures. Now, I hand you defendant's exhibit E. The gentleman sunning himself amid the growth there is?"

"Barney Malone, claim attorney Cataract Oil and Gas Company."

"And will you be good enough to indicate to the jury where Barney Malone is?"

The claim attorney pointed to himself.

"I'm simply taken with the weeds to—"

"To show how you both grow up," finished Barker. "There's nothing wrong in that, I'm sure. Now, defendant's exhibit F likewise represents some well-grown weeds and a fairly well grown man in the garden—some farmer, possibly, judging—"

"The man in the picture is Barney Malone, and that's me!"

"Barney Malone, claim attorney for the Stand—"

"For the Cataract Oil and Gas Company. Please remember that, Mister."

"So I will. You say you're in all of them?"

"I said it about twenty-five times, I think."

"You were not posing for a moving picture show?"

"They were to be hung in the Hall of Fame," sarcastically.

"Done in oil?"

Here the Court took a hand to relieve the witness of further torture.

"It is admitted," he dictated to the official stenographer, "that in all the photographs introduced by the defendant the man shown therein is Mr. Barney Malone, who is claim attorney for the Cataract Oil and Gas Company. Is that sufficient Mr. Barker?"

"If your Honor will be good enough to add that in each picture Mr. Barney Malone has his hands on his hips, and is grin—I mean smiling, it will be entirely satisfactory to us," replied Mr. Barker, good-naturedly.

While the jury was out a message was sent to the court, asking if it would be legal to award damages in double the amount of the claim.

ASTUTE BUT TRUTHFUL

ONE of our friends kindly sends us this anecdote from Kansas City, Kas:—

A lawyer down in Cherokee county, Kansas, of Irish extraction, got off a pretty good thing unwittingly before a jury.

A man who had lost one arm in a thrashing machine was being tried on a little misdemeanor. His attorney, in order to manufacture sentiment, thought he would play him for an old soldier. When he got before the jury, he said among other things, "And would ye convict, on such a charge, this old soldier *who carries his right arm* in an empty sleeve?"

This immediately amused everybody, and the more they thought of it the funnier it sounded.

USELESS BUT ENTERTAINING

The case concerned a will, and an Irishman was a witness. "Was the deceased," asked the lawyer, "in the habit of talking to himself when alone?"

"I don't know," was the reply.

"Come, come, you don't know, and yet you pretend that you were intimately acquainted with him?"

"The fact is," said Pat dryly, "I never happened to be with him when he was alone."

—*Pittsburg Observer.*

An East Side resident was taken before the magistrate in one of the police courts charged with a trivial offence.

"Tell him he must not do it again. He is discharged," the magistrate said to the policeman on the bridge.

"The judge says you dassent do it. Understand?" almost shouted the policeman to the prisoner.

"Hold on, officer. I didn't dare him to break the law again. I said 'must not.'"

"That's all right, your honor. He understands what I said better'n he would what you said," explained the policeman.

—*New York Sun.*

Mark Twain was waiting for a street car in Boston when a young girl approached him, smiling. She was a lovely girl, fresh, blooming, ingenuous, bubbling with enthusiasm, and evidently on her way home from school.

"Pardon me," she said. "I know it's very unconventional, but I may never have another chance. Would you mind giving me your autograph?"

"Glad to do it, my dear child," said Mr. Clemens, drawing out his fountain pen.

"Oh, it's so good of you," gurgled the girl. "You know, I've never seen you but once, Chief Justice Fuller, and that was at a distance; but I've seen your portrait so often that I recognized you the moment I saw you here."

"Um—m—mm!" said Mr. Clemens, noncommittally. Then he took from her eager hands her nice little autograph album and wrote in bold script these words:—

It is delicious to be full,
But it is heavenly to be Fuller.

I am cordially yours,
MELVILLE W. FULLER.

—*Harper's Weekly.*

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

The Legal World

Personal — The Bench

The appointment of Arba S. Van Valkenburgh of Missouri to be United States District Judge, western district of Missouri, *vice* John F. Phillips, resigned, has been confirmed by the Senate.

Judge Horace E. Palmer of the Court of Civil Appeals, Knoxville, Tenn., retired on June 18, at the expiration of his term of office. He was appointed by Governor Patterson in 1907, when the court was changed from the Court of Chancery Appeals, and the number of judges was increased from three to five. He returns to the practice of law at his home in Murfreesboro, Tenn., having made many friends and won high esteem through his able service on the bench.

Former Chief Justice Simeon E. Baldwin of Connecticut made the address at the graduating exercises of the Springfield High Schools, held in Hartford June 29. His subject was "The Good of Books." "Half of the disagreements and difficulties between men," he said, "arise out of mutual misunderstandings. Half the lawsuits over written contracts arise because the writers did not say exactly what they intended. Every educated American, and I am talking to those who have some right to the name, and can make it a perfect right—every educated American ought to be able to write a clear business letter, or family letter, or love letter, containing in plain terms just what he means to say. Benjamin Franklin had that art. Read his autobiography and some of his essays, and it will help you to catch the secret of his power."

Justice Henry Billings Brown of the United States Supreme Court retired, delivered an address on "International Courts" at the Yale Commencement. Urging the importance of doing everything in one's power to hasten the advent of universal peace, he said: "No opportunity should be lost; no argument overlooked. The general agreement of nations to submit their differences to arbitration will doubtless contribute powerfully to fix public attention upon the subject and ultimately strengthen a general movement for a reduction of armaments. Indeed, wars are not more often the deliberate acts of the ruling powers of nations than of the ebullition of popular feeling, against which the people need to be educated as against other epidemics. This should be the province of an educated press. But, unhappily, in their overweening desire for sensations they are generally too willing to lend themselves to popular passions and become the most uncertain and dangerous of political guides."

In an address given before the Law Academy of Philadelphia June 14, Judge Peter S. Grosscup of Chicago, of the United States Circuit Court of Appeals, explained his view of the way to deal with large corporations. He thus stated his own solution of the problem: "I see but one ultimate remedy, and that is to deal with the railroads that are natural monopolies, and the great industrial combinations that have made themselves monopolies, upon the basis of their being in law, just what they are in fact—monopolies that modern conditions have made necessary; and then, putting upon them a valuation that takes into consideration everything through which they have gone, as well as what they now possess, allow rates and prices that will secure a fair return on such valuation and no more."

Personal—The Bar

Francis Newton Thorpe, of the Erie (Pa.) bar, has been elected to the professorship of the recently established chair of political science and constitutional law at the University of Pittsburgh. Professor Thorpe is known chiefly as a writer of constitutional history. He has been granted a year's absence, which he will spend with his family in Germany.

Hon. George W. Wickersham, Attorney-General of the United States, delivered the oration before the Harvard Law School Association at Cambridge, Mass., June 28, taking for his subject "The Relation of Legal Education to Governmental Problems." Speaking of contentment with mediocrity of attainment, that appears to be prevalent even among college-trained men, he said: "It is in my opinion one of the greatest dangers which confronts successful democracy everywhere, the hope of averting which rests largely in men of sound legal education. The methods and standards established by Langdell and carried on by Ames are those peculiarly adapted to the training of men to deal with the great questions of law and government with which this country is today confronted. It is only by the labors, the thought, and the criticism of men who have found this living law that our government may be guided and governed on safe and progressive lines, and our jurisprudence developed along paths of natural, sound and wholesome growth."

Governor Charles E. Hughes of New York, in his Phi Beta Kappa address at Harvard said: "The constant endeavor, prosecuted with regrettable measure of success, to place men in public office who are not corrupt in the ordinary sense, but can be relied upon to serve some particular interest, has honeycombed

administration and made our statutes to a large extent a patchwork of special favors. Much of this sort of thing is done without a sense of wrongdoing. A natural outgrowth of the evils to which I have referred, but a disposition which no wrongs can excuse, is the spirit of lawlessness. The lawless spirit is frequently manifested in reckless abuse and indiscriminate censure of public officers. Democracy must prize its public life. Those who cultivate the true democratic spirit will be as earnest in their support of faithful officers as they are unsparing in their condemnation of the faithless."

The Academic Roll of Honor

The following lawyers received honorary Commencement degrees in June:—

William Howard Taft, Doctor of Jurisprudence, Villanova; D.C.L., Marietta.

President Taft is the third to receive this honor from Villanova, his two predecessors being Grover Cleveland and Judge Gray.

Charles Evans Hughes, LL.D., Harvard; LL.D., Pennsylvania; LL.D., Williams.

"Lawyer, Governor, and judge, who, beset by foes, has fought with firmness in the right as God gave him to see the right; now a guardian of our institutions in a tribunal that demands both the learning of the jurist and the wisdom of the statesman."

Samuel Williston, LL.D., Harvard.

"Brilliant master and keen teacher of the common law, who for a score of years has trained and inspired a generation of lawyers."

Richard Cockburn MacLaurin, LL.D., Harvard.

"A scholar distinguished in three continents for his knowledge of the laws of nature and of man."

Walter Francis Frear, LL.D., Yale.

Chief Justice and present Governor of Hawaii, "scholar, jurist, and statesman of compelling influence and efficiency."

William Mershon Lanning, LL.D., Princeton.

United States judge for the third judicial circuit; "a lawyer of distinction, an efficient educational servant."

James Montgomery Beck, LL.D., Pennsylvania.

"One of the recognized masters in the realm of law, an interesting analyst of the consequences that flow from formulating political dogmas, an accredited ambassador to elucidate economic principles affecting industry and finance."

Edward Church Dubois, LL.D., Brown.

Chief Justice of the Supreme Court of Rhode Island, "who has climbed by studious and faithful years to become the interpreter of the sovereign law, guardian by training and by office of the rights of the people."

Francis Cabot Lowell, LL.D., Williams.

Justice of the United States Circuit Court.

Willard Penfield Voorhees, LL.D., Rutgers.

Associate Justice of the Supreme Court of New Jersey.

George Lockhart Rives, LL.D., Amherst.

Chairman of the trustees of Columbia University, "an eminent lawyer, a public-spirited citizen."

General James A. Beaver, LL.D., Edinburgh.

Judge of the Superior Court, Pennsylvania, "gallant general and learned judge."

Judge Abel Edward Blackmar, LL.D., Hamilton.

Justice of the Supreme Court of New York.

Judge John Jay Adams, LL.D., Kenyon.

For distinguished services on the Ohio bench.

D. Newton Fell, LL.D., Lafayette.

Justice of the Supreme Court of Pennsylvania.

John Franklin Fort, LL.D., Lafayette.

Governor of New Jersey.

James Brooks Dill, LL.D., New York Univ.

"Recognized by his profession as an upright, fearless and learned judge."

Edward Augustine Moseley, LL.D., Notre Dame.

Secretary of the Interstate Commerce Commission.

Warren Coffin Philbrook, LL.D., Colby.

Attorney-General of Maine.

William J. Gaynor, LL.D., St. John's.

Mayor of New York City.

Judson Harmon, LL.D., Marietta; D.C.L., Denison.

Governor of Ohio.

John E. Sater, LL.D., Marietta.

United States district judge.

George V. Massey, LL.D., Ursinus.

"A counsellor in the law, a patron of learning, a friend of man and a benefactor in society."

Ruby R. Vale, D.C.L., Dickinson.

Lawyer, of Philadelphia.

Lewis Stuyvesant Chanler, D.C.L., St. Stephens.

Lieutenant-Governor of New York.

Albert Stillman Batchelor, Litt. D., Dartmouth.

"Distinguished student of the law and one resourceful in its practice, who to a clear perception and sound historical judgment adds the charm and grace of literary expression."

Col. Thomas Leonard Livermore, A.M., Harvard.

"Soldier, lawyer, man of affairs, and writer; who almost in boyhood fought in the Civil War; now a profound student of its history; pre-eminent among statisticians of the conflict."

William Langley Granberry, A. M., Princeton.

"A lawyer and a business man of marked ability and rare honor."

William M. Ingraham, A. M., Bowdoin.

"Efficient public servant, Judge of Cumberland County Probate Court."

Walter Perley Hall, A. M., Brown.

Chairman of the Railroad Commission of Massachusetts, "devoted servant of the state, who by energy and insight is making transportation the servant of the people and the builder of common good."

THE YOUNG ATTORNEY'S FIRST CASE.

Bar Associations

The state bar associations of Virginia and Maryland held a joint annual meeting during the last week in July at Virginia Hot Springs.

The annual meeting of the Arkansas State Bar Association was held at Pine Bluff, June 1 and 2. The subject of President Norton's address was "The Initiative and Referendum." Officers for the ensuing term were elected as follows: President, W. V. Tomkins, of Prescott; vice-president, Ashley Cockrill, of Little Rock; secretary, Roscoe Lynn, of Little Rock; treasurer, P. C. Dooley, of Little Rock.

The notable feature of the annual meeting of the Wisconsin State Bar Association, held at Milwaukee June 28–30, was the striking address by Federal District Judge George C. Holt of New York, on "The Extent of Unpunished Crime in this Country and the Remedy for it." The subject of the president's address, delivered by James G. Flanders, was "The Lawyer in Public Life." Hon. James G. Jenkins, formerly United States Circuit Judge, delivered an address on the late Judge Ryan, and Justice William H. Timlin of the Wisconsin Supreme Court presented a paper on "Delegation of Legislative Power."

The American Bar Association will hold its annual meeting at Chattanooga, Tenn., August 30–31 and September 1–2. The Commissioners on Uniform State Laws, presided over by Judge William H. Staake of Philadelphia, will meet in the same place August 25 and continue in session till the Association meets. The principal address before the Association will be made by President Woodrow Wilson of Princeton. The Tennessee Bar Association will hold its annual meeting in Chattanooga on August 29, and for the following days will observe the program of the national association meeting.

The twelfth annual meeting of the North Carolina Bar Association was held at Wrightsville Beach June 28–30. The president's address, delivered by John W. Hinsdale of Raleigh, dealt with "Trial by Jury in Civil Actions." Col. N. A. McLean of Lamberton deprecated the repudiation of its bonds by North Carolina, and addresses were made by Hon. James Byrne of New York and W. H. Pace of Raleigh. The following officers were elected: president, Hon. C. W. Tillett, Charlotte; secretary and treasurer, Thomas W. Davis, Wilmington.

At the annual meeting of the Iowa Bar Association, held at Des Moines June 23–24, much time was devoted to the divorce problem. A resolution presented by Justice Horace E. Deemer of the Iowa Supreme bench, on behalf of the Law Reform Committee was unanimously adopted, suggesting that the legislature pass an act requiring that a full report of the evidence in all divorce cases be placed on record and that the state be represented by an attorney who shall cross-examine witnesses in every case where a decree may be taken by default. As a majority of the divorces in Iowa are secured by default, this resolution is of interest. The annual address was given by Ex-Governor C. S. Thomas of Denver, Col., on the subject, "Justice Delayed is Justice Denied." The following officers were elected: president, J. L. Carney, Marshalltown; vice-president, C. G. Saunders, Council Bluffs; secretary, Charles M. Dutcher, Iowa City; treasurer, Charles S. Wilcox, Des Moines.

Reforms in procedure enlisted more attention than any other topic at the annual meeting of the Georgia Bar Association, held at Athens June 9–10. The annual address, delivered by Hon. William M. Ivins of New York, on "The Life of the Law," aroused much interest. Mr. Ivins propounded the question, "What is the economic mind of the Supreme Court of the United States," and analyzed the decisions of late years bearing on the freedom of contract and restraint of trade with much acuteness. The conclusions of this address were courageously applied, the speaker vigorously defending freedom of contract, and declaring that the efforts of lawmakers or of the courts to limit or repress this fundamental right were bound to prove futile. Judge T. M. Cunningham, Jr., of Savannah, delivered the president's address on "Problems of the Times," and a special address on "The Lawlessness of Law Reform" was given by Hon. Alexander C. King of Atlanta. An outline of proposed reforms

in Georgia procedure, prepared by Judge Andrew J. Cobb of Athens, chairman of the committee on jurisprudence, law reform, and procedure, received extended discussion, Judge George Hillyer of Atlanta, Judge S. Price Gilbert, and others participating.

The question of state rights was brought forward at the annual meeting of the New Hampshire State Bar Association, held at Newcastle June 25. Ex-Senator William E. Chandler, at the banquet, criticized the views expressed by the guest of honor, Judge Alton B. Parker, in his address in the afternoon on "The Lawyer's Opportunity for Patriotic Public Service." He contrasted his opinions on conservation and state rights with those of Hon. Oliver E. Branch, who had read a paper on "The Conservation of the Constitution," and Judge Parker rose to reply that he had not intended to make his talk a political one, and to state more fully his views on state rights. The president's address at the meeting was given by Judge William M. Chase of Concord, and Judge Edgar A. Aldrich of Littleton, of the United States District Court, spoke on "Admiralty Jurisdiction." The following officers were elected: president, Judge Edgar A. Aldrich; vice-president, Charles H. Hersey; secretary, Arthur H. Chase, Concord. Hon. Calvin Page of Portsmouth acted as toastmaster.

Members of the New Jersey Bar Association approved the "Canons of Professional Ethics" adopted by the American Bar Association with some modification of the contingent fee canon, at their annual convention, held at Atlantic City June 17–18, and went on record in favor of the use of the bar to prevent political considerations being made the biggest factor in the appointment of judges, and of fixing legal fees in exact proportion to the services rendered and not to the ability of the client to pay. The following resolution with regard to contingent fees was adopted after a warm discussion: "That bills or compensation of attorneys, solicitors or counsel for services rendered and to be rendered in the conduct of causes may be fixed by a written contract before the commencement or at any time during progress of the cause, and may be made contingent upon the result of the litigation, which contract shall at all times be under the supervision of the trial court and the amount fixed upon may be reduced by such court if the same appears unconscionable for the services rendered." The president, Samuel Kalisch, discussed in his address "Administration of the Law, and As the Layman sees Us," and the annual address was delivered by Congressman Wayne Parker, who took for his subject "Federal Courts." The following officers were elected: president, Howard Carrow; first vice-president, William M. Johnson; second vice-president, William I. Lewis; third vice-president, Halsey M. Barrett; directors, Walter H. Bacon of Bridgeton, Norman Grey of Camden, Peter Vredenburg of Freehold, Edwin E. Marshall of Trenton, Edwin S. Atwater of Elizabeth, John B. Vreeland of Morristown, Thomas A. Davis of Orange, William B. Brinkerhoff of Jersey City, Eugene Emley of Paterson.

George W. Kirchwey of New York, dean of Columbia Law School, delivered the annual address at the thirteenth annual meeting of the Colorado Bar Association, held at Colorado Springs July 1–2. Dean Kirchwey's subject was "The Vocation and Training of the Lawyer." The sudden death of Lucius W. Hoyt of Denver, president of the Association, on the morning of the first day of the meeting, threw a shadow over the proceedings, and for this reason the annual banquet was omitted. The committee on biography was instructed to draw up suitable resolutions of regret on Mr. Hoyt's death, as well as on that of the late Louis J. Carnahan of Grand Junction, who died during the past year. The addresses made included: "Thomas Jefferson, the Lawyer and Citizen," by James R. Killian of Denver; "Side Issues of the Lawyer," by Francis E. Bouck of Leadville; "Interstate Waters," by Arthur Ponsford of Denver;" and "Good Citizenship *vs.* So-Called Civic Virtue," by A. L. Abrahams of Denver. A committee was appointed to seek legislation providing for a commission of not more than three members to aid the Colorado Supreme Court to dispose of its arrears. The officers elected were: Charles D. Hayt of Denver, former judge of the Supreme Court, president; Jesse G. Northcutt of Trinidad, first vice-president; Ira Harris of Colorado Springs, second vice-president; and William H. Wadley of Denver, secretary and treasurer, to succeed himself.

Illinois State Bar Association

In an address delivered before the Illinois State Bar Association, at its thirty-fourth annual meeting at Chicago June 23–24, Attorney-General Wickersham argued in favor of "Federal Control of Stock and Bond Issues of Interstate Carriers." He pointed out that opposition had been made to every progressive measure of commerce regulation. "But," he declared, "the centralizing tendency has gone steadily on, and the control of Congress over interstate railroad companies has been exercised in an increasingly comprehensive manner. Such progress is inseparable from growth." Numerous legal authorities were cited, from which Mr. Wickersham declared it may confidently be asserted that while Congress may itself create corporations for the purpose of carrying on interstate commerce, it may also prescribe rules and regulations under which a corporation created by the laws of a state may conduct such commerce, and that when it does so, such state corporation might engage only in such commerce in conformity with the rules and regulations so laid down by Congress; and that these rules may have reference not only to the exchange of goods

and commodities, but to the subject, the vehicle and the agent of such commerce, and their various operations.

The chief topic for discussion at the meeting was "Reforms in Practice and Procedure in the Courts," which was opened by an address by Prof. Roscoe Pound of Chicago. This address is printed in this number of the *Green Bag*. A representative of each of the Supreme Courts of Illinois, Indiana, Michigan, Wisconsin, Iowa, Missouri, and Kentucky took part in this discussion, which was followed by a general discussion of the subject.

The president's address, delivered by Edgar A. Bancroft of Chicago, was concerned with the state legislation of the year, workmen's compensation, and procedural reform.

Several committee reports were presented, those of Edgar B. Tolman of Chicago, for the Committee on Law Reform, and Albert M. Kales, for the Committee on Judicial Administration, being of special interest and importance.

A permanent conference on reform of legal procedure, with Edgar B. Tolman as president, was organized, to consist of fifteen members. A committee was authorized to draft proposed new legislation, which will be discussed at meetings of the conference.

Judge W. R. Curran, of Perkin, was elected president for the ensuing year.

Pennsylvania Bar Association

Two hours of lively debate, and strenuous efforts on the part of the advocates of uniform rules of professional ethics for the entire American bar, were required at the sixteenth annual meeting of the Pennsylvania Bar Association, held at Cape May, June 28–30, to prevent the Association from adopting the majority report of its Committee on Legal Ethics, which had presented its own specially prepared code of ethics for approval. This report might readily have been adopted, as was the case at the last annual meeting of the Connecticut Bar Association, had not so scrappy a debate developed. As it was, the minority report, favoring the adoption of the American Bar Association Canons, was approved by an overwhelming vote, after Alexander Simpson, Jr., and other members of the committee, had defended the majority report.

Another subject which occasioned debate was that found in the report of the Committee on Contingent Fees, which recommended a statute giving the court power to regulate contracts relating to such fees. A strong sentiment in favor of such regulation showed itself, but the bill was referred back to the committee for revision.

The matter of compulsory workmen's compensation also came up, the Association adopting a resolution introduced by Francis Fisher Kane of Philadelphia, advocating a legislative commission to investigate and report on the whole subject. The Committee on Contingent Fees reported in favor of workmen's compensation.

The special Committee on Judiciary submitted the text of a proposed amendment to the constitution to carry into effect the changing of the terms of judges to twenty-one years, together with an act of assembly of the same purport.

Hon. Gustav A. Endlich of Reading, President Judge of Berks county, in his president's address discussed the legislation of the year and severely criticized the tendency to over-legislation and excessive regulation by statute.

The annual address, delivered by Hon. James Penniwell, Chief Justice of Delaware, had for its subject "The Layman and the Law," and viewed defects in procedure from the layman's point of view. An address of a high order of literary and historical merit was delivered by Hon. Hampton L. Carson of Philadelphia, on "The Genesis of Blackstone's Commentaries and Their Place in Legal Literature." This paper was illustrated by exhibits of a number of portraits, autograph letters and original documents. H. Frank Eshleman of Lancaster read a paper on "The Constructive Genius of David Lloyd in Early Colonial Pennsylvania Legislation and Jurisprudence." Governor Fort of New Jersey was also a speaker.

The Association approved the Uniform Stock Transfer Act and the Uniform Bills of Lading Act, which have been passed in Massachusetts and in Maryland, and will be introduced in the next Pennsylvania legislature. A resolution favoring the consolidation of the Pennsylvania statutes was adopted.

The following officers were elected: president, Edwin W. Smith, Allegheny; vice-president, W. A. Blakely, Allegheny; R. T. Cornwell, Chester; Allison O. Smith, Clearfield; Andrew H. McClintock, Luzerne; A. Mitchell Palmer, Monroe; secretary, Judge William H. Staake, Philadelphia; treasurer, William Penn Lloyd, Cumberland.

Legal Education

Forty-five young attorneys were graduated from the Detroit College of Law June 16 and admitted to the bar the next day at Lansing.

The Y. M. C. A. School of Law of San Francisco was incorporated June 7, although it has been in operation for over eight years. The ninth term of the school will open next September.

One hundred and ninety-four men passed the Ohio state bar examinations and were sworn in by the Supreme Court of Ohio June 24. Only twenty-five out of two hundred and nineteen failed to pass.

There were upwards of one hundred applicants for admission to the bar in Oklahoma, at the semi-annual bar examinations in June, some of them having already been admitted in other states. Sixty-three passed the examination.

The commencement exercises of the Y. M. C. A. Evening Law School of Boston were held June 15 at Ford Hall. Ex-Governor Guild of Massachusetts delivered the address. The class numbered fifty-nine.

Higher standards for admission in the Yale Law School to courses leading to the degree of Doctor of Civil Law and Juris Doctor were adopted at the corporation meeting of Yale University held June 21. In addition to the Bachelor of Laws degree now required a student must now have a Bachelor's or higher degree in arts, science or philosophy.

The graduating class of 1910 of the Mercer Law School, at Macon, Ga., gave a banquet on the evening of June 3. The faculty and the fifty-seven members of the class of 1910 were present. Judge Emory Spear, Dean of the Law School, responded to a toast, while speeches were made by O. A. Park, E. P. Mallary, and H. A. Coddington. This is the last class which will be graduated from Mercer in the one-year course.

The bar examinations in Virginia were held this year in Roanoke, instead of being given by the Supreme Court of Appeals at Whyteville as in former years. This change is due to an act passed at the last session of the General Assembly, which took the matter from the hands of the Supreme Court of Appeals, and vested it in an examining board of five members, who must be "competent lawyers."

The fifty-ninth annual commencement exercises of the Albany Law School were held June 9. The degree of LL.B. was conferred on members of a large class, in which Harold H. Corbin of Saratoga took the chief honors. Pliny T. Sexton, State Regent and president of the Wayne County Bar Association, delivered an address on "Legal Ethics." J. Newton Fiero, LL.D., head of the school, presented the candidates.

One hundred and thirty-two young men were graduated from the Law School of the National University at Washington, June 6. Representative Charles L. Carlin, of Virginia, a member of the class of '91, delivered the principal address. At the same time one hundred and sixty-five diplomas were presented to graduates of the Georgetown Law School. The graduation exercises of the National University were held at the National Theatre, while those of the Georgetown Law School were held at Chase's Theatre on the same evening. The young men of the latter school were addressed by Secretary Charles Nagel, of the Department of Commerce and Labor.

Necrology—The Bench

Baxter, Edmund.—At Ridge Top, Tenn., June 12, aged 71. General counsel of the association railroads of the South in matters relating to interstate commerce; formerly counsel in Tennessee for the Louisville and Nashville Railroad; member of the faculty of the Law School of Vanderbilt University; an eloquent orator whose success in his profession was phenomenal.

Cochran, Morris Johnson.—At Los Angeles, Cal., June 21, aged 56. United States land commissioner at the new town of Parker, Ariz.; had held many positions of trust.

Dantzler, Charles G.—At Orangeburg, S. C., June 20, aged 52. Member first circuit of the judiciary.

Lillard, C. M.—At Lawrenceburg, Ky., June 19, aged 91. Formerly county judge.

Love, John G.—At Bellefonte, Pa., June 13, aged 67. President Judge of Centre county, Pa., 1895–1905.

Milburn, George R.—At Helena, Mont., June 24, aged 60. Graduated from Yale, 1872; engaged in real estate operations in Washington, D. C., and later held a clerkship in the United States pension department; was admitted to the bar in Santa Fe, N. M., in 1881; for several years United States special Indian agent, and built the Crow Indian Agency in Montana; first county attorney of Custer county, Mont.; elected district judge in 1889; Associate Justice of Supreme Court of Montana, 1900–1904.

Osborne, William H.—At East Bridgewater, Mass., June 5, aged 70. Civil War veteran; representative in legislature; pension agent; judge of the district court of Plymouth.

Portlock, William N.—At Portlock, Va., June 17, aged 56. For many years judge of the Norfolk County (Va.) Court; took a prominent part in drafting present constitution of Virginia, in 1901–2.

Rohr, R. H.—At Humboldt, Ia., June 4. Served two terms as county judge at Beaver City, Nebraska, where he resided.

Royle, Jonathan C.—At Salt Lake City, June 6, aged 82. Authority on mining law; Confederate Judge Advocate during the Civil War.

Necrology—The Bar

Daniel, John W.—At Lynchburg, Va., June 29, aged 68. United States Senator from Virginia since March 4, 1887; Adjutant on Gen. Early's staff in Civil War; a Democratic leader in the Senate; author of "Daniel on Attachments" and "Daniel on Negotiable Instruments"; was several times seriously considered as Democratic candidate for Presidency.

Dodd, John L.—At Louisville, Ky., June 24, aged 60. Prominent and esteemed lawyer of Louisville; director of the Louisville Bridge Company and other corporations.

Easly, James C.—At Pittsburgh, June 27,

aged 71. One of the oldest members of the Cambria county bar; resided in Carrollton, Pa.

Farley, Philip J.—At Seattle, Wash., June 10, aged 46. Prominent in Catholic orders; member of the Massachusetts House of Representatives from Lowell in 1893.

Gage, Augustus N.—At Wilmette, Ill., May 29, aged 57. Practised in Chicago nearly thirty-five years; had a profound knowledge of revenue, taxation, and special assessments; probably carried more cases in those lines to the Supreme Court of the United States than any other lawyer in Chicago for the last thirty years.

Hallahan, John William, 3d.—At Cape May, N. J., July 1, aged 30. Was graduated from Georgetown University with highest honors; admitted to the bar in 1902; became member of Philadelphia Common Councils; of ability as a public speaker, and believed to have a brilliant and honorable career before him at the bar.

Hitchcock, Thomas.—At New York City, June 20, aged 79. Financier and writer; practised in New York City, 1863–1868; became financial editor of the *Sun*, patron of music and art, and social leader.

Holden, Joshua B.—At Boston, June 23, aged 60. Served several years in Massachusetts legislature; a large holder of real estate.

Hoyt, Lucius W.—At Colorado Springs, July 1, aged 50. Was graduated from Columbia Law School in 1889; professor in University of Denver Law School 1892–3, and dean, 1902–1910; secretary of Colorado Bar Association 1897–1909, and president, 1909–10; member of the General Council of the American Bar Association; an earnest worker for honest elections in Colorado.

Leventritt, George.—At New York City, June 14, aged 38. Counsel for a number of theatrical managers; son of former Justice Leventritt.

Loveland, George.—At Atlantic City, June 14, aged 86. Resident of Wilkes-Barre, Pa.; oldest member of Luzerne county (Pa.) bar.

Matthews, Samuel W.—At New Haven, Conn., June 20, aged 78. Practised in Hampden, Me.; for ten years assistant assessor of internal revenue; representative in Maine legislature; Commissioner of the Bureau of Industrial and Labor Statistics of the State of Maine 1887–1896.

McGraw, John H.—At Seattle, Wash., June 24, aged 60. Former Governor of Washington; formerly law partner of Roger S. Greene, former Chief Justice of Washington Territory, and C. H. Hanford, later United States district judge; elected Governor in 1892.

O'Hanly, Robert E.—At Council Bluffs, Neb., June 11, aged 45. Associated with law department of the Union Pacific for years.

Robinson, Thomas W.—At Providence, R. I., June 10, aged 54. Formerly member of the General Assembly from Pawtucket.

Terrell, Edwin H.—At San Antonio, Tex., July 1, aged 62. Graduated from De Pauw University in 1871, and began practice at Indianapolis, but later removed to San Antonio, Tex.; American Minister to Belgium, 1889–1893; conducted negotiations for the United States with the six Powers holding possessions in the Congo Basin; in 1891 a member of the Commission Technique to revise the Berlin treaty of 1885; also performed other important diplomatic services in behalf of the United States.

Thomas, George W.—At Richmond, Va., July 1, aged 103[?]. Son claims that he was born in Henrico county, Va., early in 1807; attended to his duties as Justice of the Peace till four days before his death; Commonwealth Attorney of Henrico county, 1873–1893.

Thompson, J. Ross.—At Erie, Pa. Colonel in the Civil War; dean of the Erie County Bar Association; one of the leaders of the Pennsylvania bar.

Turley, Thomas B.—At Memphis, Tenn., July 1, aged 65. Confederate veteran; graduated from law department of University of Virginia, 1867; was associated with Judge Archibald Wright and with W. B. Turley, the latter for many years Justice of the Supreme Court of Tennessee; first entered public life when he became United States Senator from Tennessee in 1897, serving until 1901, and then declining a second nomination.

Tyler, Justin H.—At Napoleon, O., June 2, aged 95. Oldest member of Ohio Bar Association; practised until two years ago.

BOOKS RECEIVED

RECEIPT of the following books, is acknowledged:—

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.*)

The Law of Landlord and Tenant. By Herbert Thorndike Tiffany, author of the Law of Real Property, Lecturer on Real Property in the University of Maryland. Keefe-Davidson Co., St Paul. 2 v. Pp. xxiv, xxiii + 2136 & 145 (table of cases) + 61 (index). ($13 delivered.)

History of Reconstruction in Louisiana (through 1868). By John Rose Ficklen, 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.)

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.)

LORD CHIEF BARON CHRISTOPHER PALLES

IRELAND'S "GRAND OLD MAN"

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The Right Hon. Christopher Palles, Lord Chief Baron of Exchequer in Ireland

SOME years ago Mr. Justice Grantham was on circuit in Liverpool, and happening to have some leisure crossed to Dublin and visited the Four Courts there. This English judge might have learned something from Irish wit and wisdom. He however wrote a letter to the *Times*, not to express his admiration for his learned brethren, but his surprise at their having so little to do. Comment is unnecessary. Ireland is not a commercial country, and the legal business of all Ireland is small in amount when compared with the legal business of London alone. It is not the amount of Irish litigation, but the intellectual output of bench and bar in Ireland, which is so remarkable. Great as have been the services of Ireland to the British Army, those services have been excelled by her services to English law as administered both in England and Ireland. Lord Russell of Killowen, the late Lord Chief Justice of England, began his career as a solicitor in Belfast.

The late Lord FitzGibbon (the friend of Lord Randolph Churchill), an Irish judge, was one of the wisest and wittest of men. The House of Lords (as final court of appeal) is composed of the Lord High Chancellor (Lord Loreburn) and of four Lords of Appeal in Ordinary, — Lords Macnaghten, Atkinson, Collins and Shaw. Three of them are Irishmen, and if Lord Loreburn is a Scotchman, as Lord Shaw undoubtedly is, England is unrepresented in its final court of appeal.

Lord Collins, late Master of the Rolls in England, is the son of an Irish K. C. Lord Macnaghten is generally recognized as the judge whose law and whose language are equally sound and clear. Although Lord Macnaghten is descended from Sir Alexander Macnaghten, who fell fighting for James IV of Scotland on the field of Flodden, his family has since become Irish, and he is an Antrim man.

Lord Atkinson was a member of the Irish bar, and an Irish M. P. before he became a Lord of Appeal. It is not, however, with these eminent Irishmen that the present article deals, but with another Irish lawyer, who is the greatest judge that has ever sat in an Irish court of justice.

Where two or three Irish lawyers are gathered together, and any question arises as to who is the greatest living Irish legal luminary, there can be no doubt as to the name that will unanimously be given. It will that of the Right Hon. Christopher Palles, Lord Chief Baron of Exchequer in Ireland since 1874. Prior to his appointment

he had filled the posts of Solicitor and Attorney General for Ireland in Mr. Gladstone's government (1872–74). This appointment was therefore a political appointment. If you had searched over the British Empire, you could not have found a man better fitted than he is for the highest judicial office. He is a man worthy in all respects to have sat, as the third member of an ideal court of justice, with Mansfield and with Marshall. The most critical would have found it difficult to decide which of these three men was *primus inter pares*.

Chief Baron Palles is a Catholic, and was a Liberal. He was never a Home Ruler. It is not fitting for a British or Irish judge to have any politics. Only poor lawyers remain politicians on the bench. When the Chief Baron mounted the bench, his politics (sane and sensible as they were for a practising barrister) dropped off him, like the mantle of the prophet. We believe that the well-known moderation and reasonableness of the Chief Baron's views had something to do with his being selected for the honorary degree of D.C.L. by the University of Cambridge. Palles, although a Catholic, is a loyal Trinity College (Dublin) man. As the title of Chief Baron has been abolished by statute, he is "the last of the Barons." With one possible exception, he is the most distinguished judge on the British bench. When at Trinity College, he took the degree equal to that of Senior Wrangler at Cambridge. He is *par excellence* a mathematician, like those ex-Lord Justices Romer and Stirling (whom we have lost from the English Court of Appeal), and Lord Justice Fletcher Moulton (whom we happily have still with us, in the Court of Appeal), all of whom were Senior Wranglers. How has Chief Baron Palles acquired his gift of eloquent English? If an Englishman is judicially eloquent, he has probably acquired his aptitude by years devoted to translating Latin at sight into idiomatic English. It was thus that the first William Pitt taught the second William Pitt how to address the House of Commons. The explanation for the Chief Baron's mastery of English is that he is an Irishman. It is natural for him to express his argument in luminous and forcible English.

It is one of life's little ironies that the less deserving are so often promoted to the higher place. Mr. Justice Buller served under Lord Chief Justice Kenyon. It is commonly reported that before Lord Salisbury's government in 1889 rewarded their then Irish Attorney General by making him the permanent head of the Irish judicial system, they consulted the Chief Baron as to whether he objected to the appointment, and, with that forgetfulness of his own merits which some great men possess, the Chief Baron did not demur. As a consequence of his modesty, Sir Peter O'Brien became the Lord Chief Justice of Ireland.

Not that the redoubtable "Peter the Packer" (a nickname Sir Peter acquired from his alleged skill in "packing" juries, when he was a law officer of the Crown) is an ordinary man. Far from it. He is a nephew of the late Mr. Justice O'Brien, who tried the Phœnix Park assassins of Mr. Burke and Lord Frederick Cavendish with bursts of eloquence that would have been called extraordinary in any country but Ireland. Lord O'Brien has no small share of his late uncle's wit and fire, but his merits are intellectual and personal, rather than judicial. The Chief Justice and the Chief Baron rarely sit together in the same court, though they are both *ex-officio* members of the Irish Court of

Appeal. Sir Peter has become Lord O'Brien of Kilfenora, while Christopher Palles has received no further honor from the Crown, save that he has been sworn in a member of the Privy Council both of England and Ireland (a coveted distinction). We have called him a great man, and would apply to him the words spoken of another great English lawyer, who never reached the bench: "If a lawyer can be a great man, Christopher Palles is a great man; for we do not know anything that a lawyer can do which he cannot do."

The Arrangement of the Law

By Henry T. Terry

Formerly of the New York Bar, and now Professor of English Law in the University of Tokyo, Japan

[Professor Terry has prepared this paper as his initial contribution to the *Corpus Juris* project outlined in the *Green Bag* for February, 1910, v. 22, pp. 59–118, in which quotations from Professor Terry appear at pp. 64 and 97, 98.

The present article sets forth Professor Terry's system of classification and should not be assumed to represent the views of the sponsors of the *Corpus Juris* undertaking, as they have not expressed their opinion upon it. Professor Terry was the first to urge upon the attention of the American Bar Association the importance of a scientific classification of the law, and as a result of his efforts in 1888 a committee on that subject was appointed, of which Dr. James DeWitt Andrews subsequently became the chairman.

We shall print in our next issue a paper by Dr. Andrews, expressive of his views upon the classification of the law.—*Editor.*]

IF there is any such thing as a natural arrangement of the law, *i.e.*, an arrangement which would naturally reveal itself as the result of an adequate analysis of legal conceptions, such an arrangement is the one that would be most likely to be generally accepted, practically useful and permanent. The first step toward an arrangement, therefore, is to determine what are the fundamental conceptions on which the law is based and which must furnish the main frame of its arrangement, and to ascertain by analysis their exact contents.

The object of law is to protect human living. To live his life well, a man must have a certain power to act. Also his own physical and mental condition and his relations to certain other persons and to things, and their conditions, must be protected. Those conditions and relations are states of fact. The ultimate objects with which law concerns itself are therefore two: power to act, and the protection of certain states of fact. These two things, acts and states of fact, stand in the last analysis as the contents of those legal entities or conceptions which we call rights. "Rights" is simply a generic name for those things which the law attempts to secure to men. There must be, therefore, at least two kinds of right,—one kind having acts for its content, and the other having states of fact. It is true that the two are connected, and the former depends upon the latter. If the condition of my body, which is a state of fact, is impaired, *e.g.*, if I am sick or

lose a limb, my power to act is diminished. But my bodily condition is in itself a matter of importance wholly apart from its relation to my power to act. Pain and mutilation are evils *per se*. As to things the case is different; their condition is, at least generally, important only in relation to acts. If my property is taken away or damaged, it is an injury to me only because I am thereby prevented from using it, from doing acts with or upon it. Nevertheless even in the case of things, the acts that may be done and the condition of the thing that makes such acts possible are distinguishable, and it is more convenient to describe them separately. In fact, besides the two kinds of rights above mentioned there are two other kinds; the word "right" has in law four distinct meanings. The other two, however, are of much less importance. I have explained them, under the names of correspondent and facultative rights, in my books, the "Common Law" and "Leading Principles of Anglo-American Law," the latter published by Johnson & Co., Philadelphia, in 1884. As I have there said, correspondent rights would not need any separate place in a system of law, all that is necessary to say about them falling under the discussion of duties; and facultative rights are all classed as rights of property and would form a subdivision of the law of property.

The two kinds of rights first above mentioned I have called permissive and protected rights. To define them shortly and therefore somewhat roughly: *a permissive right* is one which results from the legal situation of a person whom the law permits to do or abstain from an act. The act is the content of the right. The rights of free speech and religious liberty are of this kind. Most property rights include permissive rights. The owner of a thing is permitted to possess and use it; a tenant for life may possess the thing and use it in some ways but not in all ways,—he may not commit waste; the holder of an easement may use the servient tenement in certain ways but is not permitted to possess it. If the act is defined by its effect upon a specific person or thing, it is a right in that thing, and the thing may be called its subject, or as the German lawyers prefer to say, its object. A permissive right can be exercised by doing the act which forms its content or abstaining from that act, as the case may be. If the right has a subject, an act is an exercise of the right only so far as it affects the subject; so far as it affects other things, it is not an exercise of the right and may be wrongful. If A sets fire to his own house, his act, so far as it results in the destruction of the house, is an exercise of his own right. If the fire spreads and burns B's house, the same act, as to its effect on B's house, is not an exercise of his right. A permissive right cannot be violated. Violation of a right must be by the conduct of some other person than the holder of it, and no conduct of others is embraced or referred to in the definition of the right. For the same reason, no duties correspond to the right. It is true, a person may be wrongfully prevented from exercising his right; but the wrong consists in some interference with his person or with the subject of the right which is a violation of some protected right. If no protected right is violated, the interference is not wrongful, even though the holder of the permissive right is thereby prevented from exercising it.

A protected right is one which results from the legal situation of a person for whom the law protects a state of fact by imposing duties upon others enforceable by him. This too is only a

short and approximate definition. The state of fact, not any act, is the content of the right. It may be a state of fact which already exists which the law seeks to preserve, such as a person's existing bodily condition or his possession of his property; or it may be a state of fact which the law seeks to bring into existence, such as the possession by a creditor of the money due him. If the protected state of fact includes the condition of a specific person or thing, such person or thing is its subject. Rights of property include protected as well as permissive rights. The contents of protected rights of property are mentioned below. A protected right cannot be exercised; there is no act to be done or omitted by the holder of it. But it can be violated. The violation of a right, as the word is here used, means any impairment of the protected state of fact by the conduct of any other person than the holder of the right. In this sense the violation of a right is not necessarily wrongful. It is wrongful only when the conduct of another which causes it is a breach of some one of the duties which are imposed to protect the right, which duties are said to correspond to the right. If A handling carefully a loaded gun shoots B by pure accident, B's right of bodily security is violated just as if A had shot him intentionally; the physical condition of his body, which is the protected state of fact, is impaired in the same way; but in the latter case the violation is wrongful and in the former it is not. There is no general rule to determine what duties correspond to any particular right, what commands or prohibitions the law lays upon others to protect a particular state of fact, or to what rights a particular duty corresponds. Some rights have many duties corresponding to them, some but few; some duties respond to many rights, some to few.

There are certain rights of a general nature whose contents are defined by the law, duties corresponding to which rest upon others generally. Such are rights of personal security and property. Every one owes to me certain duties not to injure my person or property. These rights are said to avail against persons generally or against all the world, and are called rights *in rem*,—an inappropriate name, because they are not necessarily rights in or respecting things. But although some duties corresponding to a right *in rem* will rest upon all other persons, it is not true, as some writers have erroneously supposed, that exactly the same duties rest upon every other person, or that the duties are necessarily negative duties,—duties to abstain from acts. There are some general duties which do rest upon all persons, and these are negative duties; there are no kinds of acts which every one is bound to do for others. But a person may put himself into a particular situation where he will come to owe duties to others different from what are owed by persons who are not in such a situation, which duties may correspond to such general rights *in rem* as personal security or property, and these more special duties may be or include duties to do acts. Such are the duties of a person who keeps a dangerous thing in his possession to use care to prevent it from doing harm.

Persons may by agreement, or in some cases in other ways, create special rights between themselves different from the above-mentioned general sort of rights. A particular state of fact is then protected for one of them, which is not protected for persons generally, by the other being required to act or forbear in certain ways different from

what is required of persons generally. The relation between such specific parties is called an obligation, the word "obligation" in this sense—the original sense in the Roman law—denoting not simply the duty but the entire legal relation, *juris vinculum*, between the parties, consisting in a right on one side and a corresponding duty on the other. The right is called a right *in personam*,—also an inappropriate name, because all rights are against persons,—or in our law a chose in action. The distinction between rights *in rem* and *in personam* has been considered by some writers to be unimportant. But it is very important for purposes of arrangement, because rights *in rem* can be, and are most conveniently, defined separately from their corresponding duties by defining the states of fact that make up their contents, which are few in number; whereas rights *in personam* are mostly so intimately connected with their duties that they cannot be separated for definition, and their contents are so infinitely various, being in many cases whatever the parties choose to specify, that they are more conveniently classified by the facts from which they arise than by their contents.

The states of fact which the law protects generally, which form the contents of rights *in rem*, are (1) a person's own life and bodily and mental condition, (2) the life bodily and mental condition of some other person in whom he has an interest, *e.g.* his wife or child, (3) the condition of a thing, (4) a person's pecuniary condition. On this basis an exhaustive list of rights *in rem* can be made. as follows: (1) Rights of personal security, divided into the following sub-rights: (*a*) the right of life, (*b*) the right of bodily security, (*c*) rights of mental security (there is no general right of mental security, but there are certain limited rights), (*d*) the right of liberty, whose violation is called imprisonment, (*e*) the right of reputation. (2) Potestative rights. These are absolute, such as a husband has in his wife's *consortium* and services, or relative, such as he has in her personal security relative to her services. When rights of personal security are spoken of hereafter, these relative potestative rights in the security of the subject of the right, who, not being a thing but in a situation like that of a thing, may be called a subject person, will generally be included. The same duties correspond to them as to rights of personal security. (3) Property rights. In a loose sense almost any valuable or transferable right is called property, *e.g.*, a chose in action. Here, however, the name will be confined to such rights as are rights *in rem*. A normal property right is a right in a corporeal thing; an abnormal property right is a right in an incorporeal thing, such as a patent right, which is a right in an invention, or the ownership of shares of stock. Perhaps in some cases it is unnecessary to posit any incorporeal thing. Easements and rents, which in our law are classed, quite unnecessarily, as incorporeal things, should go with normal property rights, being rights in land. To a large extent the duties that correspond to normal and abnormal property rights are different. Property rights are generally complex groups of rights comprising both permissive and protected rights. Ownership is the largest of those groups, comprising the full extent of all the rights in a thing which the law recognizes. Other property rights, as an estate for life, a special property in a chattel or a lien, are inferior property rights comprising only a part of the rights which go to make up

ownership. The part of the law that deals with property must consider both permissive and protected rights.

The permissive rights of normal property are the right to possess (*jus possidendi*) and the right to use. The latter is capable of subdivision into rights to use in various ways, including rights to take fruits and commit waste. The right to possess is indivisible, but two persons may have it at the same time, when the right of one is precarious, as in case of most gratuitous bailments. The protected rights are the right of possession (*jus possessionis*), which is violated by any physical contact with the thing or by any one else having possession, and the right in the physical condition of the thing, which is violated by any change in that condition. The value of a thing is not a part of the content of the property right in it, but of a different right, as will be explained hereafter. The protected rights exist only for the purpose of making the permissive ones available; therefore, though the owner of a thing has all the protected rights, a person having an inferior property right has only so much of the protected right as is necessary for his use. The holder of an easement, for instance, having no permissive right to possess, has no protected right of possession, and his right in the physical condition of the land is only in its condition so far as that will affect his use. The same is true of an owner who is a mere reversioner; he may sue only for a permanent injury which will affect his future use.

(4) The right of pecuniary condition. The content of this right is the total value of all a person's belongings, including certain chances of making acquisitions. There is some confusion in our law as to what chances of this kind are protected. Any pecuniary loss, or loss of a protected chance, violates the right.

This right has not obtained clear recognition in our law, having been generally confounded with the right of property. It is important to distinguish it as a separate right, because the duties that correspond to it are fewer than those that correspond to property rights; in other words, there are many kinds of conduct which are breaches of duty, which if they cause injury to property will be torts but will not be if they merely cause pecuniary loss. Some confusion has come into the law from overlooking this distinction. A person's right of pecuniary condition is a single right of a general nature; but he has a separate property right in each separate thing that he owns. The right of property in a thing relates to its possession and physical condition, not to its value; this right to its value only. The right comprises no permissive rights.

The law protects a person's rights by imposing duties on others. A duty is the legal situation of a person whom the law commands or forbids to do an act. The act is the content of the duty. A permissive right is the absence of a duty. Now since what the law does not command or forbid it permits, it would seem at first sight as if it were not necessary to take any account of permissive rights separately, that when duties had been all defined the permissive rights would appear as the result. In strictness of theory that is so; and indeed the greater number of permissive rights would not in a systematic arrangement of the law call for any separate mention. But in the case of property rights it is practically much more convenient to define the permissive rights directly, to say what an owner, a tenant for years, a bailee or the holder of an easement may do with the thing,

than to get at the same result indirectly under the form of exceptions to duties. The same is true in a few other cases.

In the above definition of a duty the word "act" is used in its strict and narrow sense, Austin's sense, to denote a volitional bodily movement and no more. In ordinary use, and often in legal use, there is a wider sense in which the word covers some of the more immediate consequences of the bodily movement, what are called in the law of trespass its direct consequences. The act of shooting a man, *latiori sensu*, includes not merely the bodily movements by which the gun is sighted and the trigger pulled, but also the resulting movements of the parts of the gun, the explosion of the powder, the flight of the bullet and its impact on the body of the person shot.

But an act in the strict sense, a mere bodily movement, is never as such commanded or forbidden by law. The law defines the acts which may or may not be done by reference to their actual or possible consequences. It is in fact only the consequences that are of any importance. These may be called the definitional consequences of the act or of the duty whose content the act is. Hence a threefold division of duties: (1) Duties of actuality, which I have elsewhere called peremptory duties, where the definitional consequences are actual. The duty is to act or abstain from acting so as actually to produce or not to produce the consequences. It is not enough that the person uses due care to produce the required result, or does his best; he must produce it at his peril. The duty to pay a debt, to prevent a fierce dog which one knowingly keeps from biting any one, not to take possession of another's property, or not to commit a battery, is of this sort. (2) Duties of probability or reasonableness; since probability in law means reasonable probability, either name is appropriate. Here the definitional consequences are probable. The duty is to act or abstain from acting when certain consequences will probably follow. Duties to use due care are of this sort. Negligence is conduct that is unreasonably likely to produce a certain harmful result. The essence of negligence is unreasonableness in view of probable harm. Negligent conduct is one species of unreasonable conduct. Unreasonable conduct is usually due to some bad state of mind, most often carelessness. But it is the conduct, not the bad state of mind, which is its cause, that legally constitutes the negligence. A person may act negligently by a mere error of judgment after having given the most careful consideration. (3) Duties of intention, where the definitional consequences are intended consequences. The duty is not to act with the intention to produce the consequences, *e.g.*, not to make a false representation with an intent thereby to deceive and defraud another. In this class of duties only is the actor's state of mind *per se* important. Intention is either simple intention to produce a certain result, or culpable intention, which is simple intention plus knowledge of the facts—not of the law—that make the act wrongful. For example, if A, cutting timber on his own land, by mistake cuts over on to B's land, does he intend to cut B's trees? If simple intention is meant, yes. He intends to cut certain trees, which are B's. If culpable intention is meant, no. He does not know the fact that makes his conduct wrongful, the position of the boundary line. Much confusion has arisen from not distinguishing between these two kinds of intention. Malice, actual malice, means for most purposes

—though it has other meanings—an intention to cause loss or damage as such, because it is loss or damage. If a person does an act which he knows will cause loss or damage to another, but does not desire that, he does not act maliciously. Duties of intention can, therefore, be subdivided into duties of simple intention, duties of culpable intention, and duties of malice.

A duty may be so defined that it cannot be broken without at the same time violating the corresponding right. This is often the case with duties of actuality, especially when they are contract duties. But in many duties, especially duties of reasonableness or intention, the duty may be broken without any violation of right ensuing, or the violation may happen after an interval of time. If A lays poison to poison B's cattle, he breaks a duty of intention. If the cattle never eat it, there is no violation of right; or they may find it and eat it some time later.

It is not possible to define the various kinds of legal duties as succinctly and neatly as rights *in rem*. The acts which people can do are infinitely various, and cannot be collected into obvious and mutually exclusive groups like the facts which make up the contents of those rights. Any division and arrangement of duties must be somewhat arbitrary, and there is room for difference of opinion. Also duties can hardly be defined so as not to overlap upon each other, the same conduct being at the same time a breach of several different duties. This overlapping is now recognized by the law, as where the plaintiff may sue either in trespass or in case. Legal duties are subject to exceptions, some to many and some to few. Some of those exceptions are special to particular duties. Those in an arrangement of the law should be stated in connection with the particular duties to which they relate. Others are of a more general character, applying to all duties or to many different duties. Those would more properly fall to be treated in a division by themselves, probably following after duties. Here would belong such subjects as defense of persons or property, authority as a justification or excuse for acts which would otherwise be wrongful, license and the voluntary assumption of risks, impossibility, the act of God, and sundry other grounds of exceptions.

I cannot attempt here to give even an enumeration of legal duties, as I did of rights *in rem*. But at the same time it does not seem to me that I can make the meaning of this paper and the true character and foundation of the plan of arrangement of the law to be presented intelligible without a brief mention of some of the more important of the duties that correspond to rights *in rem*. I shall not give full definitions, but only short descriptions indicating their general nature and scope.

DUTIES OF ACTUALITY

A person must not do any act the actual direct consequence of which is to cause physical contact with a person or thing. This is the duty which is usually broken in a trespass, assuming that neither intention nor negligence is necessary for a trespass, as to which there is doubt. This duty corresponds to rights of life, bodily security, liberty and normal property.

A person must not take possession of a thing in violation of another's right of possession in it.

GENERAL DUTIES OF REASONABLENESS

A person must not do an act that is negligent from its tendency to cause,

i.e., is unreasonably likely to cause, an effect upon a person or thing that would be in fact a violation of another's right of life, bodily security or normal property.

A person who has done or is doing an act that may cause such an effect must take such precautions as reasonableness requires—*i.e.*, must use due care—to prevent it. In many cases no precautions would reasonably be required.

Persons who deliver dangerous things to others, furnish things for others' use, or invite or entice others or their property into situations of danger, owe certain duties to use care for their protection, the exact nature of which duties has been a subject for much difference of opinion.

DUTIES AS TO HARMFUL THINGS

The possessor or keeper of a dangerous thing owes duties to use due care to prevent it from doing harm; if the thing is actively dangerous, the duty may be peremptory, or if it is an animal. Taking the word "nuisance" to denote a thing having certain harmful qualities, a person must not by his act cause the existence of a nuisance, or at least must not do so intentionally or negligently. The possessor of a thing must use due care to prevent it from becoming a nuisance; if it is a nuisance, he may be under a duty to abate it, or to use due care to prevent it from doing harm. These duties as to harmful things correspond to normal property rights, and some of them to rights of life and bodily security.

GENERAL DUTIES OF INTENTION

A person must not do any act with an intention to cause thereby an effect that will be in fact a violation of another's right of life, bodily or mental security or liberty, or of a normal property right. How far this duty corresponds to abnormal property rights I have not been able fully to satisfy myself. Intention here means simple intention. A person is guilty of a breach of this duty who plows his neighbor's land or uses his neighbor's tools mistaking them for his own, or who uses force in supposed self-defense when the occasion does not justify it.

There is a duty not to do acts with a culpable intention that undoubtedly corresponds to abnormal property rights and to absolute potestative rights. It is a breach of this willfully to use another's trade-mark or to entice his wife to leave him knowing her to be a wife.

There is also a duty not with culpable intention to interfere in certain ways with another's trade, and also—as I think, though it has been denied by very high authority—not to do malicious acts. I have discussed this duty in an article on Malicious Wrongs in the *Law Quarterly Review*, January, 1904. These last two duties correspond to all rights *in rem* except that of reputation, including the right of pecuniary condition. Their exact contents are not yet well settled, and they are subject to so many and important exceptions that more actual cases fall under the exceptions than under the duties.

The duty not to make fraudulent misrepresentations corresponds to all rights except that of reputation, including the right of pecuniary condition. Nearly the same is true of the duty not to begin or carry on a malicious prosecution.

Duties not to publish libels and slanders correspond to the right of reputation; perhaps the duty as to malicious prosecutions does also.

DUTIES OF HOLDERS AND UNDERTAKERS

A person who holds a thing of another's, *e.g.*, a tenant or bailee, owes various duties to other persons who have rights in it, corresponding to their rights, as to the care and use of the thing and its restoration to its owner.

A person who undertakes to do something for another and actually enters upon the performance owes certain duties to use care to do it properly, about which the authorities are not entirely harmonious. This duty corresponds to various rights according to the nature of the undertaking, sometimes to the right of pecuniary condition.

The difference and the relation between rights and duties can be otherwise expressed as follows. Law is a system of rules for conduct; it commands or forbids acts. The acts are defined by reference to their consequences, the consequences being the only things of intrinsic mportance. Those consequences consist in alterations in states of fact. To define the acts, the states of fact which may be affected and the alterations which may be made in them must be described. That is the only way in which it is possible to define acts for legal purposes. There are certain states of fact and certain alterations in them which have to be described in the definitions of various different kinds of acts, various duties. Therefore it is more convenient to describe them once for all in a separate place and merely to refer to them in defining the duties. The definition of a protected right is, therefore, merely a part of the definition of a duty, or of several duties, of acts commanded or forbidden, separated from the rest of the definition for convenience to avoid the necessity of repetition. Actually the states of fact are the things that are ultimately and intrinsically important; but for formal legal purposes conduct, duties, is the ultimate conception, and states of fact, rights, are defined only as an aid in defining conduct or duties.

From the foregoing analysis the nature of a legal wrong—*i.e.*, a civil injury, crimes follow somewhat different rules—can be made apparent. The elements of a wrong are as follows; unless they are all present there is no wrong:—

(1) There must be a breach of duty. A violation of right without any breach of duty is *damnum absque injuria*. (2) There must be a violation of right. No one can treat a breach of duty as a wrong against him unless some right of his is thereby violated. (3) The breach of duty must be the actual and the proximate cause of the violation of right. Occasionally a plaintiff fails in his suit because he cannot prove this necessary relation of actual causation; often he fails because the injury is only a legally remote, though an actual, consequence of the defendant's conduct. (4) The duty and the right must correspond with each other. The want of this correspondence is generally expressed by saying that the violation of the right is not a proximate consequence of the breach of duty.

In *Anthony* v. *Slaid*, 11 Metc. 290, the plaintiff had contracted with a town to support a pauper for a year for a fixed price. The defendant beat the pauper and made him sick, whereby the plaintiff was put to expense in curing him. It was held that the plaintiff could not recover, because the damage to him was remote. It is submitted that it was proximate enough; it was a natural and probable consequence. The true reason, it is submitted, is that, the plaintiff having no

potestative right in the pauper such as a master would have in his servant, the only right of his which was violated was the right of pecuniary condition, to which the duty broken, the above-mentioned duty as to direct acts, does not correspond. If the defendant had beaten the pauper with a malicious intent to cause the plaintiff expense, it is believed that he would have been liable; he would have broken the duty as to malicious acts, which does correspond to that right.

Correspondence *in genere*, the duty's being of a kind that corresponds to the kind of right violated, is a very simple matter. In a system of law the definition of each duty should be accompanied by a statement of what rights it corresponds to. But a much more difficult question arises of what may be called correspondence *in specie*. Definitions of duties are necessarily in general terms, *e.g.*, the above-mentioned duty not to do negligent acts. But when a person comes to act in the circumstances of a particular case, that general duty takes the form of a duty not to do some specific act because of the probability of causing some specific harm. To what specific right or rights, belonging to the class of rights to which it corresponds *in genere*, does the duty in that specific case and form correspond? If A is practising rifle shooting, and B is standing in front of the target, the duty not to do negligent acts actualizes itself as a duty not to shoot in that direction, and undoubtedly corresponds *in specie* to B's right of bodily security and is owed *in specie* to B. But if C is lying in the long grass behind the target where A will probably hit him if he shoots, A not knowing that any one is there, does A's duty, in its specific form as a duty not to shoot, correspond to C's right? If B was not there, A would owe no duty at all not to shoot at the target, because what is reasonable, and therefore what is negligent, depends upon the facts of the situation as known to the party. But B's being there, as A knows, does raise a duty not to shoot. If A does shoot, misses B but hits C, does he commit any breach of duty as against C? There are many decisions that, as it seems to me, really should turn on this point of correspondence *in specie*, and the rules which can be deduced from them by analysis and comparison are somewhat complicated. *Smith* v. *London & S. W. Ry. Co.*, L. R. 5 C. P. 98, 30 L. J. C. P. 68, L. R. 6 C. P. 14, 40 L. J. C. P. 21, is a good example of a case which ought to have been decided on this ground; but in fact the court was confused over it, not clearly perceiving the point.

When a complete wrong has been committed, further violations of right, dehors the wrong and additional to it, may occur. These are consequential damages, which must be distinguished from the wrong itself. A recovery may be had for consequential damage in an action for the wrong; but no action lies for consequential damage only. The rule of actuality and proximateness causation applies to consequential damage, but not the rule of the correspondence between the duty and the right. In an action for an assault and battery, for example, the expenses of getting cured may be recovered for, though the duty broken does not correspond to the right of pecuniary condition.

Those three conceptions, right, duty and wrong, seem to me to be the foundation on which any scientific and durable arrangement of the law must rest. Descriptions of the states of fact which the law protects and the acts which

it permits, commands or forbids must form the centre and core of a system of law. But they are not the whole of it. In describing rights, duties and wrongs, various other conceptions and terms, and certain general principles, have to be employed, whose content and meaning require explanation. Such explanations would naturally occupy the first part of a logically arranged system. Remedial rights and remedies for wrongs, as distinguished from the procedure by which those remedies are obtained, fall within the private substantive law. Also there are certain classes of persons who have various juristic peculiarities, the peculiar rules relating to whom it is more convenient to state in a place by themselves. These may conveniently be called abnormal persons. I think there is no general test for determining what persons should be classed as abnormal for this purpose. So far as I can see, it is a mere question of convenience where the peculiar rules that apply to certain classes of persons shall be placed. There appear to me, therefore, to be five main divisions into which the private substantive law falls, namely: (1) Definitions and General Principles, (2) Rights and Duties, (3) Wrongs, (4) Remedial Rights and Remedies, (5) Abnormal Persons. I now submit a brief sketch of an arrangement under those five divisions, mentioning briefly some of the more important subdivisions and the more important subjects under each subdivision, but omitting for want of space many things which would have to find place in a full and complete arrangement.

OUTLINE OF AN ARRANGEMENT OF THE PRIVATE SUBSTANTIVE LAW

PART FIRST

Definitions and General Principles

1. *Persons.* Definitions of natural and artificial persons; presumptions as to life and death; names; legitimacy; kinship; domicile and residence.

2. *Things.* Corporeal and incorporeal things; accessory things; the identity of things, whether a given mass of matter is one thing or more; things considered *in genere* and *in specie.* Certain particular kinds of things: land, its extension upward and downward; things attached to land, *e.g.*, fixtures; definitions of chattel, goods, wares and merchandise; money and documents, how far chattels; definition of a fund (a certain value in one person's hands in which another may have rights, regarded for some purposes as an incorporeal thing); animals, which are *feræ naturæ.*

3. *Facts.* Actual and constructive; principal and probative; meaning of relevancy, actual and legal; nature and kinds of presumptions (presumptions as to particular facts fall under various heads): estoppel; legal meaning of probability, possibility, necessity; questions of fact and of law; the establishment of facts for legal purposes.

4. *Conduct and its Consequences.* Meaning of act, omission, forbearance; definitional consequences of acts; voluntary and involuntary acts; continuing acts; direct consequences; proximate and remote consequences.

5. *Duties and Rights in General.* Definition of duty; duties of actuality, of probability and of intention; positive and negative duties; duties regarded

in genere and *in specie:* correspondent, permissive, protected and facultative rights; rights *in rem* and *in personam:* absolute and relative rights; joint, common and several duties and rights; conditional duties and rights (unless the whole subject of conditions goes under Juristic Acts); certain legal states resembling rights, *i.e.*, capacities, inchoate rights and possibilities (the name "jurality" might be used to include duties, rights and these states); perfect and imperfect duties and rights.

The disposition of juralities (creation, transfer, modification and extinction); meaning of assignment, conveyance, succession, universal succession; privity; dispositive facts; title, *titulus* and *modus acquirendi.*

6. *States of Mind.* Intention; presumptions as to intention; carelessness, recklessness, bad faith, willfulness; malice (the nature of malice as a state of mind; duties not to act maliciously fall elsewhere); knowledge and notice, actual and constructive; presumptions as to knowledge.

7. *Reasonableness and Negligence.* The general test of reasonableness (the conduct or judgment of a reasonable and prudent man in the party's situation); special rules; whether a question of fact or law; presumptions as to. Negligence (*i.e.* what negligence is *per se:* duties not to act negligently fall elsewhere; it is wrong to define negligence as a breach of duty, because the duty itself must be defined as a duty not to act negligently, which would be defining in a circle; negligence is a *precognoscendum* for the definition of duties); due care; skill; degrees of care and negligence; negligence as a question of fact or law; presumptions as to negligence. Special rules as to particular kinds of conduct being negligent or not as law, *e.g.*, the rule of looking and listening at a railroad crossing.

8. *Possession.* Actual; constructive; area of in case of land; presumptions as to; seisin and ouster. Adverse possession. The *quasi* possession of rights and incorporeal things.

9. *Juristic Acts.* (Acts done to dispose a jurality.) In general; intent to dispose; validity; unilateral or multilateral; formal or formless.

Agreements (the word "agreement" denotes the genus, of which contract is a species); offer; acceptance; meeting of minds; pact; form; writing and the statute of frauds; deeds; consideration; effect of fraud, duress, undue influence and illegality; everything that relates to agreements generally as distinguished from contracts.

Contracts (where the agreement takes the form of a promise and creates an obligation); everything that relates to contracts generally as distinguished from other agreements and from particular kinds of contracts. Here should be discussed only the contract as a juristic act; obligations created by contracts fall elsewhere.

Particular kinds of agreements and contracts, *e.g.*, sale, gift, bailment, and perhaps negotiable instruments, insurance, etc.— but see below.

Delivery, tender, attornment.

10. *Fraud.* I think fraud has three meanings: (1) misrepresentation, (2) breach of trust, (3) entering into a juristic act with an intent to use it to injure another, *e.g.*, a conveyance to defraud creditors. Duties not to commit fraud fall elsewhere.

11. *The Computation of Time.*

12. *Responsibility of One Person for Another's Conduct.* There are four grounds for such responsibility: (1) causation, as where A's conduct is a consequence of B's, (2) delegation, as

where A delegates to B the performance of some duty of his, (3) direction, as where A commands or directs B to do an act, (4) relation, where A is responsible for B's conduct on the ground of some relation between them, *e.g.*, of master and servant. The ground of relation might be merely mentioned here, and reference made to the various relations.

PART SECOND

Rights and Duties

I. *Rights in Rem.* Personal security; potestative rights; property; pecuniary condition. Under property abnormal property should be discussed so far as the rights are rights *in rem*, with references to such rights *in personam* as are for any purpose classed as property. Equitable property rights are rights *in personam*, and fall elsewhere. Titles to property should be discussed here, including succession at death, wills and the administration of assets.

II. *Duties Corresponding to Rights in Rem.* Each duty should be defined with such exceptions as are special to it. General exceptions, such as defense and protection, authority, license, etc., should come after duties. Under each duty the rights to which it corresponds should be specified.

III. *Rights in Personam and Their Corresponding Duties.*

1. *Obligations.* Rules applicable to obligations generally.

Particular kinds of obligations, classified according to their origin, omitting equitable obligations; obligations created by direct act of the state, by statute and judgment (a judgment should not be called a contract); contract obligations; obligations created by gift, *e.g.*, by a grant of a fund (see Langdell, Summary of Contracts, Debt); obligations from the reception of benefits; obligations from holding something of another's; obligations from *quasi* wrongful acts, *e.g.*, to pay a penalty. Debts. Obligations from the reception of benefits and some from holding something of another's are generally said to arise from *quasi* or implied contracts. That fiction was devised to bring them within the scope of the action of *indebitatus assumpsit*. Now that forms of action are abolished, that fiction is useless and should be dropped. They are really non-contractual obligations, though the parties in some cases may make a contract covering the same ground, in which case there are two concurrent obligations, one contractual and one non-contractual. Special *assumpsit* was the proper form of action on the actual contract. In such cases of overlapping obligations, the plaintiff could choose between the two forms of *assumpsit* or join counts in both.

The Roman doctrine of obligations *ex delicto*, *i.e.*, that the commission of a tort gave rise to an obligation to make compensation, so that an action for a tort was really one for specific performance, and the civilians treat of torts under the head of obligations, seems not to have been adopted in our law, except perhaps in equity or admiralty. It seems to me useless. Rights of action for wrongs are remedial rights, and should go in Part Fourth.

2. *Equities.* The classification of the jurisdiction of equity into exclusive, concurrent and remedial is useless. A better classification is into (1) primary or antecedent equitable rights and duties, and (2) secondary or remedial rights and remedies. The former belong here, the latter in Part Fourth.

An equity, roughly defined, is a claim in favor of one person on a right held by another. The right on which the claim exists may be called the basis

right, the holder of it the basis right holder, and the person having the claim the equitable claimant. The words "trust," "trustee" and "*cestui que trust*" should be reserved for a special class of equities. All trusts are equities, but not all equities are trusts.

The rules relating to equities in general should be first stated, then those relating specially to trusts and to particular kinds of equities and of trusts.

All equities are rights *in personam*, availing only *inter partes*, though in certain cases a successor to the basis right holder may take right subject to the equity. This applies even to those equities that are called equitable property, which should be discussed here.

Equities are either obligations, where the basis right holder has corresponding duties, or equitable liens, where there is no corresponding duty, though the lien may have been given to secure the performance of some collateral duty. An equitable obligation differs from a legal one in being not only a personal claim against the obligor but also a claim on a specific basis right. An equity, however, is not directly a claim on a thing, like a legal property right, but on the right of which the thing is the subject and so only indirectly on the thing.

IV. There are certain subjects, such as agency, partnership, negotiable instruments, insurance, shipping, carriers, etc., which include matters that belong in various places in an arrangement of the law. Sometimes there are peculiar juristic acts to be considered, sometimes peculiar obligations, sometimes rights *in rem* and corresponding duties, sometimes special kinds of things or special rules of responsibility for others' conduct. If a rigidly theoretical arrangement were followed, those subjects would have to be cut up, and their separate parts discussed in various places. For practical convenience it might be better to have a fourth subdivision of Part Second, and treat each of those subjects here in its entirety. Commercial Law would be a nearly appropriate heading for such a subdivision.

PART THIRD

Wrongs

1. *Wrongs in General.* The duties and rights whose violations make up wrongs, which constitute the greater part of what is now called the law of torts, will have been discussed in the preceding parts. Here should fall such matters as the following: definition of wrong; necessity of both a breach of duty and a violation of right; when a wrong is complete; necessity that consequences should be actual and proximate; correspondence of duties and rights (what duties correspond *in genere* to each right will have been shown under Duties, but the rules as to the necessity of correspondence, and as to correspondence *in specie*, fall here); the identity of wrongs, whether a given group of conduct and consequences make one wrong or more than one; the consolidation of wrongs, in what cases several distinct wrongs can for the purpose of an action be consolidated and treated as one, which sometimes may and even sometimes must be done; the place of wrongs, where a wrong is deemed to have been committed.

Torts. Our law has divided wrongs which are cognizable in courts of law into torts and breaches of contract. If the fiction of implied or *quasi* contracts is abandoned, that division is not exhaustive. The distinction between torts and other wrongs is not based on any clear principle. It grew out of the

forms of action, which were largely accidental, and the classification of those into actions *ex delicto* and *ex contractu*, which classification is unsatisfactory and has never been free of dispute. Debt and detinue certainly were not always based on anything that could be properly called a breach of a contract. I think the underlying principle, not always clearly seen or strictly adhered to, was that a wrong was a tort if the right violated was a right *in rem*. If so, the division should be into torts and breaches of obligations, which latter name would cover also wrongs cognizable in equity.

2. *Particular Wrongs.* Some combinations of breach of duty and violation of right, though not all, have received special names, which are convenient for reference, such as trespass, conversion, disturbance. Each of these should be defined by specifying what duty must be broken (not describing the duty but simply referring to it), and if it must be broken in any particular way, specifying how, and what right must be violated, and describing any other facts or circumstances essential to that particular kind of wrong. Some wrongs, for instance trespass or conversion, can be committed by the breach of various different duties and the violation of various different rights.

PART FOURTH

Remedial Rights and Remedies

1. *In general.* The nature of remedial rights; the rule *ubi jus, ibi remedium;* who may have a remedy and against whom; everything that relates to remedies in general. Statute of limitations. Limitation should be distinguished from usucaption and prescription. By the last two primary rights are extinguished and others created in their place. Those subjects belong in Part First under Duties and Rights, or in Part Second under Titles to Property. Limitation creates no rights; as applied to primary obligations it reduces them to the status of imperfect duties and rights, as when a debt is outlawed. Limitation also extinguishes rights of action, and as to that effect belongs here.

2. *Cases where there is no remedy:* public wrongs without special damage to the plaintiff; contributory wrong or negligence.

3. *Particular remedies:* damages and the measure of damages; injunction; specific performance; *habeas corpus; mandamus*, etc., rules peculiar to equitable remedies.

PART FIFTH

Abnormal Persons

Only rules which are peculiar to such persons should be treated of here. The subject of the Domestic Relations falls here. Many potestative rights might be appropriately placed here; but perhaps they would more conveniently be discussed in Part Second. Corporations are abnormal persons. So are public officers.

A Critique of the Austinian Theory of Sovereignty

By W. B. Bizzell, D.C.L.

I. AUSTIN'S VIEWS STATED

AUSTIN'S theory of sovereignty is found in his "Jurisprudence," which is the substance of a course of lectures delivered during the brief period of his professorship at the University of London (1826–1832). His legal scholarship was of a high order. In addition to his training in the common law of England, he spent some time in Germany in the study of jurisprudence. His views, which he later expressed in his lectures, were doubtless largely influenced by his training in the philosophy of the law while in Germany.

Austin begins his sixth lecture (the one which contains his ideas of sovereignty) by asserting that *subjection* is the correlative of sovereignty and that sovereignty is inseparably connected with the expression "independent political society." He then asserts that there are *four* marks of sovereignty, as follows: (1) the bulk of the society must obey; (2) this obedience must come from a *common* superior; (3) this obedience must be to a determinate superior; and (4) the obedience must be *habitual* and not occasional.

He divides political sovereignty into two portions: namely, the portion which is sovereign and the portion of its members which are subject. Austin contends that, in order to merge the latter class into the former, it would be necessary to find a political sovereignty in which all the members were adults and of sound mind, which he considers impossible.

With this twofold classification, he seeks the source of sovereignty in the state. He says: "When the sovereign portion consists of a single member, the supreme sovereignty is properly a monarchy, or the sovereign is a monarch." Austin contends that there is a contradiction of terms in the phrase "limited monarch." "He is not sovereign, but is one of a sovereign number," says he, with reference to the ruler in a limited monarchy.

Austin then, in a concrete way, applies his idea of sovereignty to a few types of states. In his own country, he locates sovereignty in (1) the King; (2) the peers; and (3) the electorate. He says: "But, speaking accurately, the members of the commons' house are merely *trustees* for the body by which they are elected and appointed; and, consequently, the sovereign always resides in the *King*, and the *peers* with the *electoral* body of the commons."

In the consideration of such types of relations as that of Indian princes to the English government, or that of Frederick of Prussia to Brandenburg, which many had termed "half sovereign states," Austin said such relations as these may be classed as follows: (1) those states which are wholly subject; (2) those which are perfectly independent; and (3) those which are jointly sovereign. These comprised all the possible relations. This classification removed all doubt as to the first two. In the third class, he gave the name of composite state or supreme federal government. He concluded by denying the existence of a half sovereign state. "I believe no government is sovereign and subject at once; nor can be properly styled *half* or imperfectly supreme."

Austin saw in the supreme government of the United States the typical federal state. He traced sovereignty, in this form of government, back of the ruling and law-making functions, to the electorate. "I believe that the sovereignty of each of the states, and also of the larger state arising from the federal union, resides in the states' governments as forming one aggregate body; meaning by a state's government, *not its ordinary legislature*, but the *body* of *its citizens which appoints its ordinary legislature*, and which (the union apart) is properly sovereign therein."

There is one other phase of Austin's discussion which is necessary to indicate fairly his theory of sovereignty; that is, his views of the *limits* of sovereign power. He begins this phase of his discussion by the assertion that "the power of a monarch properly so called, or the power of a sovereign number in its collegiate and sovereign capacity, is incapable of *legal* limitation," with emphasis on *legal*. He then proceeds to show that an unconstitutional act of the sovereign is not *illegal*, but merely immoral. His view of what constitutes constitutional law is interesting. He regards constitutional law as those maxims or principles, which have been adopted, either from utility, or belief in their conformity to divine will, which are tacitly observed by the most influential part of the community. Constitutional law is, therefore, "the positive *morality*, or the compound of positive morality and positive law." Since its violation is not illegal, it is not a limitation on sovereignty, or, using Austin's exact words: "Consequently, although an act of the sovereign which violates constitutional law may be styled with propriety *unconstitutional*, it is *not* an infringement of law simply and strictly so-called, and cannot be styled with propriety *illegal*."

AUSTIN AND HIS SCHOOL

John Austin is usually regarded as the principal member of what is called the analytical school of political scientists. By some he has been regarded as the founder of this school. (See footnote in Leacock's "Elements of Political Science," page 54.) This view can hardly be correct. The analytical school dates from the latter half of the sixteenth century. Long before Austin's time, the importance of the doctrine of sovereignty was realized and the analytical school was largely responsible for this realization.

It would be more nearly correct to say that Hobbes was the real founder of this school. Many of the ideas of Austin, in fact, can be found in the conception of sovereignty held by Hobbes. There were at least two views in common between them: (1) both conceived of sovereignty as territorial in character, and (2) both regarded sovereignty as indivisible. On this second point, both resorted to the same concrete illustration—division of sovereignty in a limited monarchy. Hobbes also held that constitutional law did not limit the sovereignty of the prince.

Professor Burgess also approaches the conception from the same point of view as does Austin. The conception of sovereignty held by Austin and Burgess will illustrate the similarity of these views. Austin says: "If a determinate human superior *not* in the habit of obedience to a like superior receive habitual obedience from the bulk of a given society, that determinate superior is sovereign in that society, and that society (including the superior) is a society political and independent." Burgess expresses this idea in this way: "I understand by it (sovereignty) the original, absolute, unlimited, universal power over the individual subject and

all associations of subjects." The point of view is largely that of the lawyer, in which sovereignty is regarded as an entity and the power that exercises sovereignty is assumed to possess it.

CRITIQUE

The objections to the Austinian theory of sovereignty have proceeded along two rather distinct lines. The first regards Austin's theory as abstract in nature and that it gives an erroneous conception of the state. The second admits that this theory correctly indicates the person or persons who are legally competent to issue commands, but that it falls short in that it does not really trace out the ultimate repository of political power. The latter view is the one that has produced the most argument in recent years, but the former objection was the one raised by Sir Henry Maine and his criticism will now be revived.

Sir Henry Maine's views grew out of observations which he made during seven years spent as a legal member of the council for India. His critique was formulated and presented in a course of lectures on the "Early History of Institutions" which were delivered at Oxford. His criticism was the result of the study of a type of institutions which had little in common with those of England, which furnished the basis for Austin's views. The basal difference was that in which formal and definite statute law furnished the evidence of sovereign authority in contrast with a country in which *custom* was the basis of sovereignty. The oriental mind knows nothing of statute and the oriental despot relies completely on "ancient usage and religious awe." In the light of his observation of this fact, Maine began to question whether there "is in every independent political community some single person or combination of persons which has the power of compelling the other members of the community to do exactly as it pleases." Maine cites an instance of a despot in India "the smallest disobedience to whose commands would have been followed by death or mutilation." But in spite of this power, he never issued a command that Austin would call a law. Therefore, *historically*, Austin's theory of sovereignty was not broad enough; his conceptions of law, state and sovereignty did not contemplate such a community as here described.

But Maine went further. He contended that Austin's conception was contrary to fact when applied to Western civilization. He contended that on final analysis this theory must finally locate sovereignty in every state in the *possession of force*. He thought this view disregarded "all the characteristics and attributes of government and society except one," which left out of account such mighty influences as "the entire history of the community, the mass of its historic precedents, which in each community determines how the sovereign shall exercise, or forbear from exercising his irresistible coercive power."

It would be an injustice to Austin's theory, however, to say that he did not, in any sense, contemplate this idea of custom. One of his maxims was: "What the sovereign permits, he commands." Austin was most familiar, as a lawyer, with a system of custom as remarkable, if not so absolute, as that in the contemplation of Sir Henry Maine. The English common law was well developed in Austin's day. Even the principles and doctrines of equity were being given effect and force daily in the chancery courts. The difference in the two systems—those of England and India—was in the relative absoluteness of the two systems. In England Austin knew

that Parliament could set aside or modify any common law custom it saw fit. The principal defect in Austin's theory, at this point, was in not seeing that there was a dormant sovereignty in the state which would have become active had they set aside custom to such a revolutionary extent as to have aroused the people to opposition.

The main objection to Austin's theory, in this connection, is in his interchangeable use of the terms law and sovereignty. Obviously, this confusion makes his theory inapplicable to a large extent to half organized states and completely inapplicable to primitive communities, because in such communities as these positive law is non-existent and custom is the only source of power. Legally considered with reference to communities completely organized, in which there is a definite source of statute law, his theory is substantially correct.

It is obviously true that, by extending the meaning of *law* to include the force of custom, Austin's analysis can be made substantially true. Some recent authors have preferred to extend the meaning of law to meet the criticism of Maine. Woodrow Wilson has done this in his "The State" (Chapter XIV, page 587). "Law," says he, "is the will of the state concerning the civic conduct of those under its authority. This will may be more or less formally expressed: it may speak either in custom or in specific enactment. Law may, moreover, be the will either of a primitive family-community such as we see in the earliest periods of history, or of a highly organized, fully self-conscious state such as those of our own day." In the same chapter, Dr. Wilson finds the source of law in *custom*, religion, adjudication, equity, scientific discussion and legislation. This view, however, is much wider than the conception of law as conceived by Austin.

But the most successful attack that has been made on the Austinian theory has grown out of the criticism that Austin's analysis is correct as far as it goes, but that it does not go far enough. While it does indicate the source from whence commands issue, it does not really determine the ultimate repository of political power. The result of this criticism has resulted in a twofold classification of sovereignty; viz., *legal* sovereignty and *political* sovereignty. Austin would not be subject to criticism here if there was not evidence that he confused the two conceptions. The confusion came in applying his doctrine. In attempting to locate sovereignty in England and the United States, it is clearly evident that his conception of political sovereignty was both too superficial and too simple.

Just as it was the tendency of earlier writers to emphasize legal sovereignty, in the present time the tendency has been to emphasize political sovereignty. This change has resulted from the growth of the idea of democracy. The tendency toward democracy has resulted in calling into question legal sovereignty, and, out of the conflict of opinion, clearer notions of the concepts have resulted. Dicey says: "Behind the sovereign which the lawyer recognizes, there is another sovereign to whom the legal sovereign must bow." This statement gives evidence of two facts: first, it draws the line between the two conceptions of sovereignty, and, secondly, it gives emphasis to the more fundamental nature of political sovereignty. Willoughby lays great stress on distinguishing between potentiality of power as a juristic conception, and the state's actual competency. "Sovereignty belongs to the state as a per-

son," says Willoughby, "and represents the supremacy of its will. Sovereignty is thus independent of its particular powers."

In the larger political relations, Austin was almost completely in accord with present political scientists. For instance, he refused to class as positive law the rules that grow out of international relations. Willoughby states that this is "logically and scientifically correct." He quotes Jellinek as also being in accord with this view. It is contended that these rules "rest upon no other coercive force than that of morality and public expediency." Maine, however, did not accept this view. His supreme respect for custom caused him to disagree. But he represents about the only leading exception to the consensus of opinion in accord with the view of Austin.

Austin's first clash with those who are emphasizing political sovereignty comes with reference to the power of constitutional law. Austin denied that constitutional law limited the power of the state. He regarded constitutional provisions moral in nature rather than legal. Austin's greatest fault here was due to the fact that he generalized from too small a number of types. In fact, his conclusion was based almost entirely upon the English government. As Willoughby points out: "Constitutional provisions do not purport to control the state, but the government." Austin did not grasp this distinction. The constitution *does* voice the supreme will of the state regardless of its source. The fact that the constitution has the power to bestow rights or to take them away is evidence that it represents more than moral power. In most constitutions, there are reserved powers, such as the power to amend, which may be seldom, if ever, exercised, but nevertheless it represents a very high type of positive power.

Austin's conception was not even true when applied to his own country. He seems to have regarded lightly the effect of the violation of constitutional law. He seemed to see in the violation of constitutional law only displeasure and unpopularity. If this were the only effect that was to follow, he would have been correct, but the violation of many constitutional provisions would always result in England in the exercise of the reserve power in the people. Austin's error was in a failure to recognize this fact. "All law is a limitation on sovereignty." Constitutional rules are laws in the strictest sense; hence, they attract our attention to the fact that there is a source of sovereignty deeper and outside of the exercising functions of government.

When we trace out the source of legal relations more minutely, the divergence of Austin and other political scientists becomes greater. He seemed to think that, on final analysis, sovereignty could go no further back than the electorate. This was his concrete view of it. It has been seen in his definition that he thought sovereignty could always be located in some *definite* person or body of persons. The whole line of argument in refuting this theory is based on the fact that no monarch, no matter how absolute, ever possessed all the power by which his subjects were governed. Austin, in fact, practically acknowledged this fact in asserting that the ruler was largely controlled by the wishes of the community when he respected the constitution.

Evidently, Austin is wrong in merely locating sovereignty in an electorate. As some one has pointed out, the electorate is only a small proportion of the mass of the people who compose the

state. Sovereignty may, or may not, therefore, reside in the electorate. Some, in attempting to avoid Austin's difficulty, have located sovereignty in the people. This has been questioned on the ground that the people possess no organ through which they can stamp their authority. Willoughby has pointed out that the "Sovereignty of the People" can only mean the "right" or "might" of revolution. But this power lies outside of law, and is not a normal sovereignty. Others find this ultimate sovereignty in "Public Opinion." Professor Richie has drawn the distinction between public opinion, as ultimate political sovereignty, and the political power of the state as exercised through established organs.

It is clearly to be seen that, after all, the attempt to trace sovereignty back of the electorate leads to confusion and uncertainty. The criticism of Austin's theory along this line has no practical value other than to direct attention to the fact that there is an ultimate power which all governmental agents must reckon with in the final analysis. Of course, this force is indefinite and difficult to determine. It may be a different element in different countries or it may change from time to time in the same country. It may, or may not, be a majority of the citizens. It may be commercial, religious, or political in nature. More than likely, it will be the element that is suffering some hardship through the oppressive measures of the functions of government. Certainly, that element which is being oppressed is likely to attempt to assert sovereign power.

Austin's view is clearly wrong when he regards the location of sovereignty as a simple matter. It is readily seen from the previous paragraph that it is a very difficult matter in a normal state. Sidgwick, in Chapter XXXI of his "Elements of Politics," in denying the simplicity of Austin's analysis, says: "My view, on the contrary, is that a simple answer must almost always be incorrect in the case of modern constitutional governments, unless a peculiar and carefully limited meaning is given to the question; and, even if it is saved from incorrectness by careful definition of the question, a simple answer is still liable to be misleading, because it unduly concentrates attention on an arbitrarily selected portion of the facts to which it relates. I hold that, in a modern constitutional state, political power that is not merely exercised at the discretion of a political superior,—or that must, therefore, be regarded as superior or ultimate,—is usually distributed in a rather *complex* way among different bodies and individuals." Sidgwick has done more than all others to show the real complexity and difficulty that attends any effort to really trace sovereignty to its fundamental social stratum.

This difficulty causes Willoughby to acknowledge, after a careful consideration and criticism of Austin's analysis, that he *almost* came back to Austin's view on final consideration. Willoughby then says: "The position taken in this treatise is that those persons or bodies are the sovereigns who have the legal power of expressing the will of the state. Behind these persons we do not need to look. When we have located these authoritative, volitional organs of the state, we, *qua* lawyers, do not need to search further."

CONCLUSION

A study of Austin's views in the light of his critics has a tendency to increase respect for the views of this great English lawyer. His doctrine of legal sovereignty

is almost invulnerable. While it may be defective at points, it is more nearly perfect than that submitted by any of his critics. His greatest defect was in his conception of the sovereignty of constitutional law. But, as has been seen, his ideas were taken from the English system, and his mistake was only in the degree of recognition given to the force of custom. On the side of political sovereignty, he did not see the real limits of his problem or the nature of its complexity. But, practically considered, he traced the sovereign power as far as its practical importance would justify.

Where are the Law Books?

By Frederick C. Hicks

SUPPOSE that a lawyer, unhampered by lack of time and money, wishes to make exhaustive researches in any field of legal investigation,—where, in the United States, can he find the books necessary for his quest? He cannot find them in any one library, or in any group of libraries, if indeed he can find them anywhere in America. Unless he be possessed of more information concerning the contents of law libraries than has appeared in print, he will waste much time, energy and money, before he learns where he can best begin his task. In other words, the legal literature contained in American libraries is widely scattered, and there is no comprehensive guide to the contents of these libraries.

According to "Statistics of public, society and school libraries having 5,000 volumes and over in 1908" (U. S. Bureau of Education Bulletin, whole no. 405), there are 109 law libraries and 54 state libraries in the United States. The latter contain many law books, but the number has not been ascertained. Of the law libraries, 46 are in the North Atlantic states, 34 in the North Central states, 14 in the Western states, 8 in the South Atlantic states, and 7 in the South Central states. Each state except Delaware, Florida, Arkansas, New Mexico and Arizona had a state library of over 5,000 volumes; while New York, Georgia, Alabama, Ohio, Wisconsin, Minnesota, Iowa, Nebraska, Kansas, Idaho and California are each reported as having two state libraries. The 109 law libraries contained, in 1908, a total of 1,975,014 bound volumes and 62,125 pamphlets. Of these libraries 28 had over 25,000 volumes, and 5, more than 50,000 volumes. The largest law libraries in the United States are, according to published reports, Harvard, with 102,826 volumes; New York State Law Library, 83,554 volumes; Association of the Bar of the City of New York, 75,722 volumes; N. Y. Law Institute, 67,398 volumes; and Law Association of Philadelphia, 50,223 volumes. (1908 figures.)

In volumes, the law libraries of the country are large enough to contain untold treasures, and, for the most part, their treasures are untold. It is true that many catalogues have been issued, and that it would be possible with much labor to bring these catalogues together and compile something like a union list of legal literature. But the result would be unsatisfactory, because printed cata-

logues are out of date in growing libraries, almost before they are printed. A union list of books in the whole field of law would, moreover, be an unnecessary compilation, since it may be taken for granted that each law library duplicates every other law library along certain well-known lines. The nucleus of every law library is American court reports, and federal and state statutes. It would be a waste of energy to specify every library which contains the U. S. Revised Statutes. But to bring out in relief notable collections contained in law libraries is quite another matter. The wave of specialization in the library world is just beginning to gather force, and "special" libraries are springing up all over the country. They have been a prominent subject of discussion at recent library conventions, and are acquiring a literature of their own.

In harmony with this development, the U. S. Bureau of Education is compiling the statistics of "special collections in libraries in the United States." This publication will cover all special collections, no matter to what class they belong, and prominent among them should be special collections of law. A circular letter containing schedules of subjects under which information was especially desired, including "law," and "international law," was sent out in November, 1908, to 2,298 libraries each supposed to contain more than 5,000 volumes. In December, 1909, a second circular letter was sent to those which did not answer the first. In addition many personal letters were written to librarians. In relation to law a large response was not anticipated except from state and law libraries; nevertheless, a number of interesting collections were reported as contained in public libraries and historical society libraries. Of the law libraries only 2 responded to the first circular, and 57 to the second. Personal letters brought more answers. There is authority for the statement that, as compared with other special libraries, such as those in theology, medicine, education and the social and physical sciences, the response from law libraries was poor indeed, indicating apparently a lack of interest. Law librarians have until recently held themselves aloof from the general library movement, and many still fail to see wherein their libraries can be benefited by association with other libraries. The formation of the American Association of Law Libraries, which holds its annual meeting in conjunction with that of the American Library Association, has done much to dissipate this insular spirit.

Having had access to the reports of special law collections already sent in, the writer thought it unfair to the legal profession, to general scholarship, and to the law libraries themselves that the latter should not have a better representation in the forthcoming report. The facts are therefore presented in a legal periodical in the hope that a more general interest may be aroused.

The circular letters sent out by the Bureau of Education contained the following statement: "In the case of libraries devoted to medicine, law, theology, etc., to which this circular may be sent, the inquiry is directed not so much to their collections taken as a whole as to the separate parts in which they may be exceptionally strong, and so in all cases, the more precise and limited the subjects mentioned, the more valuable will be the information to the special student." In the schedule of suggested subjects, legal literature contains only the general headings "law" and "international law," while "medicine" has seventeen sub-headings. This may account for the fact that law librarians

construed the statement quoted more narrowly than did other librarians.

Nevertheless, the nucleus for a valuable report on special collections of legal literature has been received. The information sent in was classified by the librarians themselves under the following headings: Civil and Canon Law, Jurisprudence and Philosophy of Law, International Law, Ancient Law, Roman Law, Foreign Law, Latin-American Law, Mohammedan Law, American Colonial and Early Territorial Laws, American, English and British Colonial Reports and Statutes, Cases and Briefs, Criminal Law, Trials, Treatises, Periodicals, Bar Association Reports, and Railroad Law. The value of these reports is lessened somewhat by the facts that terms are not used synonymously by all librarians, and that the information is often given with meager details. The combined report thus far compiled is therefore very fragmentary.

Completeness in a given field of legal literature may make a collection of special note, even though other libraries have many volumes in the same class. Therefore it is suggested that a re-estimate of the resources of the several law libraries be made by their librarians along lines exemplified by the following sample headings. Of course, further headings and subdivisions will be suggested to each librarian by the wealth of his own library.

International Law.
1. General.
2. Maritime.
3. Sources, *i. e.*, documents, treaties, proclamations, correspondence, arbitrations, etc.
4. Periodicals.

Law.
1. Reports (in English language).
   a. American.
      Federal. State.
   b. English.
   c. Scottish.
   d. Irish.
   e. British Colonial.
2. Statutes, Session Laws, etc. (in English language).
   a. American.
   b. English.
   c. Scottish.
   d. British Colonial.
3. Foreign Law (non-English), Europe, Asia, Africa.
   a. Codes and Compilations.
   b. Laws.
   c. Court Reports.
4. Latin-America.
   a. Codes.
   b. Laws.
   c. Reports.
5. Periodicals.
   a. In English language.
   b. In other languages.
6. Various fields of law, such as Insurance Law, Corporation Law, Railroad Law, Negligence Cases, etc.
7. Treatises.
   a. American.
   b. English.
   c. Other Countries.

There is no class of libraries in which a greater amount of money, as reckoned by cost per volume, is invested, than in law libraries, and no books exceed law books in practical utility as working tools. Moreover, the historian, the sociologist and the political scientist would lose their most reliable source material if the records of civilization, contained in published laws, were denied to them. There is every incentive, therefore, to make known to scholars the resources of our law libraries. The opportunity offered by the forthcoming report on special libraries is not merely to present an array of statistics, but to describe in words those legal collections which for any reason are notable. If the suggestions contained in this article call forth any further information, it should be sent to Mr. W. Dawson Johnston, Librarian of Columbia University, and editor of the report to be published by the United States Bureau of Education.

The Lawyer's Seven Ages

By K. EKAMBARAYYA

[The Vakils, or native Hindu counselors, practising in the High Court at Madras, India, held their annual meeting in April of this year, the program being not unlike that of one of our own bar association meetings. The following verses were read by a member, for which we are indebted to the *Madras Law Journal*.—*Ed.*]

THE legal world is also a stage,
And the lawyers are but actors—for others.
They have their minor and their major roles,
And one lawyer in his time plays many parts,
His acts being seven ages. At first, the devil,
Toiling and moiling in his master's chambers;
Then the briefless junior with his tattered gown
And helpless, hopeless face, creeping unwilling
From court to court. And then the senior,
Paying measured compliments, with soured abuse
And scorn for the devilish work. Then the leader,
Full of strange schemes to cleanse the profession,
Jealous of its honor and quick to crush for a fault,
Seeking of title and place but what is thrust
To spite the crowd. And then the acting Judge,
Silver stick in front and four thousands a month,
Courteous and kind and pleasing high and low,
Awaiting confirmed bliss and judicial rest:
And so he plays his part. The sixth age shifts
And finds him firmly set, a mighty mass
Of experience with wrinkled wisdom grave,
A hundred thousand disposals to his credit,
Accustomed now to hear without exertion,
With fingers' ends dispensing Justice
And counting the years and months. Last scene of all
That ends this strange and splendid history
Is titled ease in dark oblivion,
Sans work, *sans* rest, *sans* golden links to life.

Personal Reminiscences of the Walhalla Bar

I. HOT AIR EARNS A FEE

By R. T. JAYNES, ATTORNEY-AT-LAW, WALHALLA, S. C.

"LEST we forget," I seize the present moment for recording a few personal recollections of incidents in the practice of some of the members of the

Walhalla bar, since my admission in 1885. These recitals are based on fact. Whether they be stranger than fiction, it is left for the reader to say.

A few years ago, a small estate was in course of administration in the probate court of Oconee county. At that time the office of probate judge was filled by Richard Lewis, a valiant Confederate soldier, who fought four years for the cause that was lost. He faced shot and shell without flinching, and left on the field of battle around Richmond his left leg, which was severed from his body, near the hip, by a cannon ball. He was the soul of honor, and combined in an eminent degree the qualities which rendered him at once *fortiter in re, suaviter in modo*.

A small claim was presented against an estate by a widow, who was represented by N. Boone Cary, while the estate in course of administration was represented by Robert A. Thompson. Objections were filed against allowing the claim, and testimony taken. After hearing argument of counsel, Judge Lewis modestly intimated that he thought the claim should be disallowed. Mr. Cary became insistent, and repeatedly presented the cause of his client in various aspects, urging in different forms his reason for asking that the claim be allowed. As he was representing a widow, who had several small children, he took the license accredited to the importunate widow mentioned in the parable by Him who spake as never man spake.

As last the judge became weary and faint, and rather positive in his ruling disallowing the claim. As a final remark and parting shot, Mr. Cary said:—

"May it please your Honor: we have come into this Court pleading the cause of the widow and the orphan; we come asking even, simple-handed justice for the widow and the orphan; and, if we can't get justice here, we'll appeal to the Circuit Court of Oconee county; if we can't get justice there, we'll appeal to the Supreme Court of the State of South Carolina; if we can't get justice there, we'll appeal to the Supreme Court of the United States of America, the most august tribunal on the face of the earth; and if, forsooth, we can't get justice there, we'll appeal to the Supreme Court of High Heaven itself."

The widow, clapping her hands, exclaims: "Yes, glory to God, we will." (*Laughter.*)

As soon as order could be restored court adjourns. The lawyer retires and graciously accepts a fee of five dollars from his delighted client.

The Merits of Blackstone's Commentaries

A NOTEWORTHY paper on Blackstone—noteworthy alike for its erudition and for its literary charm—was read at the annual meeting of the Pennsylvania Bar Association in June by Hon. Hampton L. Carson of Philadelphia, the historian of the United States Supreme Court. Mr. Carson's topic was "The Genesis of Blackstone's Commentaries, and Their Place in Legal Literature." The strength of the paper was at once recognized, and it certainly ranks with Professor Dicey's article published in the *National Review* last December (see 22 *Green Bag* 183), as one of the most notable of the critical estimates of Blackstone which have appeared in recent years.

Mr. Carson takes pains to defend Blackstone

from various charges leveled at him by modern critics. Thus he has been accused of having been unduly optimistic, and of having been "a blind defender, if not a rank apologist, of the most palpable absurdities and enormities." But on the best of authority, it can be stated that this optimism was the "natural tone of the age," and Blackstone merely reflected the spirit of his time. The following quotation will show Mr. Carson's attitude toward another charge:—

"Again, Blackstone's definition of law has been assailed, most forcibly by Austin, who was the disciple of Bentham. But Blackstone's definition is substantially that of Hobbes, one branch of which Pollock thinks profound. Austin, who commented on Blackstone so severely, although sustained by Markby, was himself commented on in sixteen chapters by Professor Clark of Cambridge University. Professor Holland, in his work on Jurisprudence, and Judge Dillon, in his recent Yale Lectures, dissent from both Blackstone and Austin, while the late James C. Carter, Esq., before the American Bar Association in 1890, stated with clearness and force the argument against the Austinian conception and definition. I refer to this conflict of views to emphasize the point that Blackstone's definition is not so easily disposed of as Austin in his self-sufficiency seemed to think."

Moreover, the author of this paper evidently doubts Austin's competence to criticize Blackstone. "Austin, it must be remembered, was a civilian with no adequate conception of the history or character of the common law. He aimed at reducing every branch of the law to the scientific precision of a code, and, enamored of Roman models, he ignored the pregnant truth so well stated by Pollock and Maitland: that 'the matter of legal science is not an ideal result of ethical or political analysis; it is the actual result of facts of human nature and history.' Austin and his school never gave sufficient weight to the historical facts that English law, while largely Teutonic in its origin, became insular in its scope; that it grew irregularly during many centuries, resting largely in custom, partly in legislation, partly in treatises such as Bracton, Littleton, Coke and others, but mainly in the decisions of courts, and had never been reduced to formulated rules or scientific arrangement."

This is a paper which to be fully enjoyed and appreciated needs to be read in its entirety, but lack of space prevents us from doing more than culling a few choice extracts. This is how Mr. Carson sums up the merits of the Commentaries, and we doubt if it has ever been done before by any writer with such a combination of succinctness and eloquence:—

"We all have often asked ourselves, What are the merits of Blackstone's Commentaries, and what is the real service to the profession which the author performed? The answer may be secured in two ways—first by reading and studying his work, and next by examining his raw materials. . . . The first impression, I take it, will be—especially if you first examine, as you should do, the Table of Contents and Chapter Headings, aided by his own analysis—that here you have a comprehensive and General Chart of Public and Private Law, civil and criminal; a general map in outline, so to speak, of the domain of English law, and exhibiting the relationship to each other of the main divisions. Next you will be impressed by his unusual analytical power and skill. He divides and subdivides and redivides a subject with logical exactness, and his chapters and their sections are like the working drawings of an architect. Then you will be impressed with the brevity, the precision and the clearness of his definitions, supported by well-chosen illustrations, and concise expositions of principles, and finally, you will close the work with the assertion, This was not a hard book to read, on the contrary it was delightful—the style is superior to that of any other law book ever written. You sum up then by saying, Here is a master-draughtsman of a legal chart—who knows the sweep and indentations of the coast lines their latitude and longitude; who has marked off the various divisions and subdivisions with relative accuracy; who has a due sense of proportion; who has filled up the central spaces with accurate and striking descriptions of what is peculiar to each zone; whose illustrations are well selected, and whose method of presentation is pictorial. The work leaves a definite and well-rounded picture in the mind. It is not a digest, it is not an abridgment, it is not a series of special essays, it is not a chain of quotations, it is not a discussion of cases; it is an original work, well planned, well executed, with the materials thoroughly fused and welded into a compact, harmonious whole, as a Statement of General Principles. . . .

"To judge of Columbus as a mariner, or Galileo as an astronomer, you must contrast them with their predecessors, and measure them by the standards of their contemporaries. Pile up on fifty tables in a long hall the books from which Blackstone drew his materials: The *Treatises* of Glanvil, Bracton, Britton, Fleta—the Mirror of Justices, Fortescue's *De Laudibus Legum Angliæ*, Hengham's Summa Magna and Summa Parva, Littleton's Tenures, Wright's Tenures, Doctor and Student, Perkins' Profitable Booke, *et id omne genus*; the *Abridgments* of Fitzherbert, Brooke, Staunforde, Statham, Rolle, Viner, Comyn and Bacon; the *Entries* of Lilly, Rastall, Levinz and Brown; the *Reports* in folio from Aleyn and Dyer all through the alphabet, to Vaughan and Vernon, more than two hundred in number, 'stout, honest old fellows in their leathern jackets,' accompanied by 'a flying squadron of thin reports'; the Year Books, Coke's Institutes, Plowden's Commentaries, Finch's Law and Wood's Institutes; the *Histories* of Sir Matthew Hale and Madox's Exchequer; the *Works* of the antiquaries—Dugdale, Selden, Spelman and Camden; the *Statutes* at large, edited by Rastall, Pelton, Sergeant Hawkins, Ruffhead and Runnington; the *Dictionaries* of Blount, Cowell, Jacob, Kelham, Spelman's Glossary and *Les Termes de la Ley*; the *Special Readings* and Moots on Statutes—such as those of Magna Charta, Westminster, Uses, Habeas Corpus and the Act of Settlement; the *Special Aids to Practice* in the Natura Brevium, Novæ Narrationes and Regula Placitandi—*State Trials* in stately folios—these, and many others, constituted the mass—*ingens moles*—with which Blackstone, while still in his thirties, labored for years. Of course he had guides through the wilderness, . . . But he did not content himself with these; he sought the fountains and explored tributaries, and from the roaring and turbid mass tumbling through the centuries, carrying down Teutonic customs, Saxon dooms, Norman grafts, Plantagenet statutes, Roman philosophy, canon and ecclesiastical influences worked into the final stream of the Common Law as diked and dammed by hard-headed and resolute English judges, he distilled a limpid fluid which could be quaffed without disgust. The skill with which he precipitated the sediment, and got rid of the nauseating filth, was only equaled by the mental power with which he compressed so huge a bulk into four small quartos. This, then, was his work—transcendent in its results as well as marvelous in its beauty."

Judge Putnam's Recollections of Chief Justice Fuller

IT is certain that no one in Portland, Me., the late Chief Justice Fuller's own city, knew him as well as did Judge William L. Putnam of the United States Circuit Court. He knew him in Bowdoin College, and maintained relations with him when the Chief Justice entered upon the practice of law in Augusta, and corresponded with him when he moved to Chicago; and during his long life of activity in Chicago, before his elevation to the highest position in the gift of the President of the United States, Chief Justice Fuller and Judge Putnam were intimate friends. Consequently, the following reminiscences of Judge Putnam, from a recent interview published in the *Portland Daily Press*, give a peculiarly intimate portrayal of the late lamented Chief Justice.

"Melville W. Fuller loved Maine," said Judge Putnam, "and particularly Bowdoin College, from which he was graduated in the class of 1853. He was especially fond of his classmates, maintaining a close intimacy with them throughout his life, always seeking them out whenever opportunity offered, and extending his love and affection for them even to their children and their friends.

"My friendship for Melville W. Fuller dates back to the beginning of my course in Bowdoin College. He was in the class of 1853, a notable class. I was graduated in 1855, and being a member of the same secret society as the Chief Justice I saw a great deal of him. He was a youth of quiet tastes, reserved of manner, but withal genial and companionable. He was fond of literature and had marked literary tastes, inherited, I may say, from two literary families; for on his mother's side he was a Weston, a grandson of Chief Justice Weston of the Maine Supreme Court, for whom he was named. His father's family were people of great refinement and with marked literary abilities, so that Melville

W. Fuller's fondness for literature was truly inherited.

"After leaving college he entered into the practice of the law at Augusta. Early in his career he distinguished himself, as I well remember, by a speech he made as the presiding officer of a great Democratic mass meeting which was held on the grounds of the state house at Augusta. Had he remained in Maine he would early have attained prominence, but the West called strongly to him, as it did at that time to many Bowdoin men.

"He went to the new city of Chicago, where he entered on the practice of law. Outside of those who knew him at Bowdoin and those at Augusta who were intimate with him, and his family, he was for many years lost sight of by Maine people; but there were others who appreciated his worth and who followed his career in Chicago with interest. At the Illinois bar Melville W. Fuller soon won for himself a position of respect and influence. He was a good advocate and a good lawyer. There were some lawyers in Chicago who might have been regarded as his superiors both as advocates and as learned in the law, but there were none who enjoyed the respect and confidence of men of all political beliefs more than he.

"He was diligent, painstaking and reliable, with great fidelity to the truth, a clearness of style and vision, and a keen sense of justice; and he possessed in a remarkable degree the quality which won for him as Chief Justice of the United States the respect and appreciation of his associates on the bench; and that was executive ability.

"His appointment as Chief Justice of the United States by President Cleveland was not a surprise to me at the time it was made; though, no doubt, earlier the President leaned to Mr. Phelps.

"Being frequently in Washington, Mr. Fuller came in contact with President Cleveland. He was a friend of Vice-President Hendricks, whom he nominated in 1886. Grover Cleveland especially desired to have about him men of refinement; and Mr. Fuller possessed this characteristic. I sent him newspaper clippings and comments on the subject of his possible appointment, and, as I now recall it, a letter. I received from him a characteristic reply, which I have preserved."

This letter was as follows:—

LAW OFFICE OF MELVILLE W. FULLER.
152 Dearborn street.
Chicago, April 19, 1888.

Dear Putnam: Thanks for the newspaper and complimentary notice. I have not thought and do not think that the President would tender me the appointment, and have been greatly surprised at the expressions out here of a belief of that kind. I assume that his choice would fall upon somebody already in the public eye through present or recent public service. I did think you might get it, and the President knows my opinion of you; but still I could not tell, of course. —— told me last week at Fortress Monroe that you would probably receive it if it went East, and that I should if it came West, but I am sure he was mistaken as to myself. Of course, I will be glad of whatever comes to you. The world is not so very large, is it? We rub up against each other occasionally

Very truly,
M. W. FULLER.

"This is an illustration of his true simplicity and unaffectedness of character," said Judge Putnam. I knew the reference to myself was not based upon good authority. When the appointment was made there was much discussion concerning it, and no little opposition to the confirmation of the President's choice. But Mr. Fuller was confirmed, and by a very good majority, as I remember it. Among the Republican Senators who voted for him were Senator Hale and Senator William P. Frye of Maine. The Republican Senators from Illinois were among his most stanch supporters and advocates. Senators Farwell and Cullom told President Cleveland that if Melville W. Fuller were named he would be confirmed, and he was. Not only these Senators, but the people generally throughout Illinois, where he had lived for many years, entertained great respect for his character and ability; and the years which have passed since then and his service as Chief Justice have gone to show that their estimation of him was correct. We who knew him well were not surprised at his subsequent record in this high office.

"He won the respect of all the Senators and the entire country by his superb address on Washington in the House of Representatives soon after his appointment as Chief Justice. For literary style, clearness of thought and simple eloquence I know of few addresses which could be said to be superior to this.

"As Chief Justice, Melville W. Fuller ranks well among the great men who have held this position. I do not claim that he was the peer of the great Marshall, but he ranks with Waite, and with others. His clearness of

expression, and his able administration of the affairs of the position he occupied, have never been excelled. I do not believe that there ever has been a Justice of the Supreme Court of the United States who was more loved than Melville W. Fuller. His associates entertained for him great affection. The lawyers who came before this high tribunal all subscribed to the same sentiments. He was always courteous, painstaking and thoughtful. His keen sense of justice was never at fault, and above all and better than all, as Chief Justice, Melville W. Fuller had the confidence of the people of the United States.

"I think that one of the most lovable things about him was the affection he had for his old home, his old friends and his native state. Twice a year, almost without fail, he visited his old friends at Augusta. He called upon all of those who were left whom he knew, and took delight in it. In Augusta these visits were looked forward to by many people with pleasurable anticipations.

"No less did he cease to remember his classmates, and his youthful friends. I might mention instances where the Chief Justice took great pleasure in exerting his influence in the interest of these classmates and friends of his youth. In Washington he lived simply, but maintained the dignity of his high office. As a lawyer he had acquired a modest competence. Those he entertained were always charmed by his delightful manner, and having once come to meet the Chief Justice on the social plane they never ceased to admire the man afterwards.

"Among other things, he possessed those qualities which are never found wanting in men who are truly great,—a thorough sense of humor and deep religious conviction. I recall especially one incident which well worked out his sense of humor. We were members of the same secret society and it happened that we had admitted to membership a man whom we later found a little off color. I was one of the most active in bringing about his expulsion from our society. A little later, when names of our class came to be presented for election to the Phi Beta Society, my name was the first, and it was black-balled. It required but one black ball to prevent admission; and, as we afterward ascertained, this black-ball was thrown by the father of the young man whom I had been instrumental in expelling from our society. There was a great hubbub, and the excitement increased when other members of the class, as their names were presented, were in turn black-balled. In the midst of this excitement up jumped the future Chief Justice, then barely out of college himself, and said that if his friend Putnam were not admitted he should persistently attend every meeting and black-ball every name presented until Putnam was elected. Thereupon they had another ballot and I and the entire list was elected. The Chief Justice regarded this as a great joke on me, and delighted in telling the story. He said: 'Putnam, that's the best piece of work I ever did.'

"I have not attempted in this rambling talk to give expression to a just and fitting eulogy of Melville W. Fuller. I do not know that I could do him justice if I should try, but I have talked of him as I knew him and loved him. In life he met every requirement of a good citizen,—an able lawyer, a patriotic and conscientious official and a kind, considerate and faithful friend. He did much for Bowdoin College, for his native state and city. During his lifetime he reflected great honor upon this state, and his memory will long endure."

To the foregoing portrayal, on the intimate side, of the personality of the late Chief Justice, we are pleased to add that given in a private letter written by Mr. Justice Holmes to Judge Putnam shortly after the funeral. This letter is published with Justice Holmes' permission on request, with the omission of such parts as are purely personal. It may be well to explain, for the benefit of some readers, that Mrs. Francis is the daughter of Chief Justice Fuller:—

Beverly Farms, July 12, 1910.

My dear Judge Putnam:—

Many thanks for your letter and the newspaper which (both of which) I read with much pleasure. . . .

Poor Mrs. Francis was alone when the Chief died. . . . I think she showed all the Chief's courage, and also a cool head and executive capacity under the most trying circumstances.

The services at Sorrento moved me through and through. It was a beautiful day, and there was no false note. The coffin, spread with a coverlet of flowers, was put on a buckboard to go from the house to the church; the birds were singing; the clergyman, a fine fellow whom I dare say you know, read extremely well; a little choir of four young men sang touchingly. The church, built by

Richardson, was the right thing for the place. It is rare indeed for me to find everything so conspire with the natural feeling of the moment. . . .

I think the public will not realize what a great man it has lost. Of course, the position of the Chief Justice differs from that of the other judges only on the administrative side; but on that I think he was extraordinary. He had the business of the court at his fingers' ends; he was perfectly courageous, prompt, decided. He turned off the matters that daily call for action easily, swiftly, with the least possible friction, with imperturbable good-humor, and with a humor that relieved any tension with a laugh. I never thought the time had come when it would be well for him to resign until this last term, when he seemed less rapid and certain than heretofore. I was beginning to worry when the solution came at the ideal moment. I think no one should repine, although to his children, to his friends, and certainly to me, the loss will be great.

Very truly yours,

O. W. HOLMES.

What Can Be Done to Improve the Conditions of Medical Expert Testimony?

"THERE is no place in the common law scheme of trial," writes Judge William Schofield of the Massachusetts Superior Court, in *Journal of Criminal Law and Criminology*, where the medical expert can be put, "except among the witnesses. He cannot be a judge or a juror." Moreover, when the practice of calling expert witnesses, who are now so often summoned to testify in actions for personal injuries, homicide cases, and will cases, was first introduced, they soon came to be treated by the courts just like any other witnesses. They were selected and called by the parties, the production of evidence and witnesses being not the duty of the court but the right of the litigants. The trial judge may in special circumstances order a person to be called as a witness who is shown to have knowledge of material facts; but, continues Justice Schofield, "this right of the judge is exceptional, and rarely exercised, and nowhere clearly defined." The custom, therefore, of calling medical expert witnesses *ad libitum* is fully established by custom, so fully established that it cannot be changed except by legislation.

Indeed there are some lawyers who affirm that even legislation cannot change the custom, on the ground that it is a fundamental constitutional right. From this proposition, however, Justice Schofield very emphatically dissents, in the following words:—

"In 1905 a committee of the State Bar Association of Michigan, in reporting a draft of a bill which has been enacted by the Michigan legislature, said:—

> "The radical reformers say that the courts should select and fix the compensation of all expert witnesses. Your committee believes that there are constitutional objections to the court making such selection. Parties have a right, under the law, to select their own witnesses.

"In January of this year a committee of the Bar Association of the State of New York reported:—

> "That every party to an action, civil or criminal, has the constitutional right to call such witnesses as he may deem important to the maintenance of his cause, and the right to cross-examine those who may be called against him.

"I do not assent to those opinions. There is no provision of the federal Constitution or of any state constitution, so far as my knowledge extends, which secures to a party the right to select his witnesses. The federal Constitution protects the right of trial by jury, of confrontation in criminal cases, and grants to the accused the right to compulsory process to summon witnesses in his defense, and secures in all cases due process of law. The constitutions of many of the

states contain similar provisions. Neither the federal nor any state constitution, so far as I have examined the state constitutions, expressly provides that a party may select his witnesses. On the contrary, the rules of evidence and the qualifications of witnesses are wholly under the control of the legislature. I believe that the legislature has full control over the subject of expert testimony, saving only to the defendant the right of confrontation in criminal cases."

How, then, shall the state exercise its control over the subject of expert testimony? To begin with, the Continental plan which it is proposed partly to adapt to this country, whereby the selection of expert witnesses would be committed not to the parties but to the state, by means of proposed official designation by the court of a list of eligible experts, would certainly be abortive in its operation. For every bill or statute which Justice Schofield has seen, he says, "contains the express provision that nothing in the act shall preclude either party from summoning and using other expert witnesses at the trial . . . Until public opinion or legislative opinion shall be so changed as to make it possible to prohibit the selection of medical expert witnesses by the parties, there is no practical advantage in enacting statutes which provide for the appointment of experts by the court. The parties will go on selecting their own experts, and medical expert testimony will go on as it was before. If authority should be given to the court, as is given in the Michigan statute of 1905, and in proposed statutes in other states, to appoint experts on its own motion, and to call them as witnesses subject to cross-examination, the result will be merely to add a third class of experts to those selected by the parties, and to increase the number and possibly also the variety of medical expert opinions. The fact that the official board or list of medical experts cannot be made exclusive is a strong and practical reason against adopting the system of official medical expert witnesses in the United States."

Justice Schofield, it will be noticed, assumes that the list of medical experts will not be made exclusive, even though he denies that the parties have any constitutional right to call such witnesses as they choose. Yet he clearly considers the belief in the right so firmly established that the practice cannot be so radically changed as to make the official board of experts exclusive. He is opposed, however, to the plan of officially designated experts under any circumstances, for the following reasons:—

"(1) It is not probable that the most eminent physicians could be induced to accept appointment on a board or list of official medical experts. It would be as unreasonable to expect the leading physicians to serve for the compensation which the court could award as to expect the leaders of the bar to sit as auditors or masters for the usual legal compensation of $15 per day. The result of establishing an official list of experts probably would be that they would not be equal in quality, on the whole, to those selected by the parties. (2) If a permanent board or list of medical experts should be established, the power of appointment ought not to be vested in the courts. The number of experts required would be considerable, the appointments would be valuable to some physicians, and the system would expose the judges to a kind of solicitation which would bode no good to the courts. (3) Neither the judges nor the officers of any branch of the government can be assumed to have special knowledge of the qualifications of physicians to serve as medical experts.

"Finally, to my mind, the grand reason why we should not adopt the Continental system is that it would be giving up, in an important matter, the time-honored principle of individual freedom which pervades and animates the old common law, and the Anglo-American law as well. If an eminent physician should be sued for malpractice, he would surely deem it a great hardship if he could not select and present to the court in his defense the best medical experts whom he could obtain who would give testimony in his behalf."

So the control of medical expert testimony is not so much to be sought by regulating the mode of their selection, concludes Justice Schofield, as by regulating their compensation:—

"The compensation of medical expert witnesses is probably of more importance than the method of their selection. Large fees, and especially large contingent fees, depending upon the result of the litigation, cannot fail to have an influence upon the testimony of medical experts. Such fees are likely to

cause them to forget their obligations as witnesses, and to feel that they are employed and paid as advocates. This is a subject which legislation can regulate, and, as it seems to me, ought to regulate. . . . The law, as it seems to me, ought to put medical experts thoroughly and unmistakably in the class of witnesses by fixing their compensation for attendance at court at a reasonable sum, and taxing the amount in the costs, as in the case of ordinary witnesses, and also by providing that the compensation to be paid to them for services in preparing to give expert evidence shall be such reasonable sum as may be approved by the court in each case, and that any contract for a larger sum or a contingent fee shall be invalid."

Justice Schofield goes on to say, however, that no single remedy will cure all existing evils. In fact, he declares the evil of prejudiced, partisan testimony to be fundamentally a moral evil, requiring for its treatment the creation of a deeper conviction, in the mind of the expert, that it is his duty to testify always in a judicial and impartial manner, without overvaluing the success of either party to the suit. And we are informed that "legislation is not the sole, nor even the principal remedy."

But when Justice Schofield denies the likelihood of legislation offering much in the way of remedies, he does not mean to imply that the common law itself may not afford a large share of its solution. For he says:—

"A committee of the Bar Association of the State of New York, in its report, submitted this year, summarized the evils of medical expert testimony in six propositions, three of which were as follows, *vis.*:—

"First. Want of satisfactory standards of expertness, with its result of inviting the testimony of charlatans.

"Second. The prolongation of trials and the consequent increase of expense on account of the number of witnesses.

"Sixth. An unfortunate tendency upon the part of some trial judges to permit incompetent so-called medical experts to testify to opinions predicated upon widely unrelated fact, and under oath to express views which are but the speculative vagaries of ill-informed minds.

"Of course this report was made with reference to conditions existing in New York. It is manifest that the evils above stated are all within the common law powers of the trial courts, without the aid of statutes. The trial judge determines the competency and qualification of all expert witnesses, subject to very slight control by appellate courts. At common law he can limit the number of medical expert witnesses, prevent the abuse of the right of cross-examination and the abuse of the right to put hypothetical questions to experts. If these powers were fully exerted, much good would result. Judge Garrison, of the Supreme Court of New Jersey, in a published address, has said that it is useless to look to the courts for a remedy because these evils have grown up in the courts. The blame does not rest wholly upon the trial judges, for in many states they have been deprived by the legislatures of much of the power which they had by the common law."

The Knock at the Door

By Edgar White

"It was not very long, hardly more than a quarter of an hour, before the knock which told that the jury had come to their decision fell as a signal for silence on every ear. It is sublime—that sudden pause of a great multitude, which tells that one soul moves them all."—"Adam Bede," by George Eliot.

THE evidence is all in. Analytical pyrotechnics by the lawyers have closed. Now, we're waiting—waiting with furtive looks towards a certain door to one side of the big room.

Near the judge's stand is a group of barristers, telling of trials in the long ago, relating jokes and laughing. They're waiting, too.

Back the other side the bar rail, in the place reserved for spectators, are several men and women, remnants of the eager crowd that listened last evening till the watchman called the turn of the night. Waiting, too, these morbidly curious stragglers.

Three or four reporters, among them a woman who does the "human interest" work

for a yellow journal, sit about a long table, mentally arranging pictures of the climax. Waiting—just waiting for the—

Inside the bar, his arm resting on a round table, sits a fair-haired boy of twenty or thereabouts, his weak blue eyes shifting about from face to face, as if afraid to linger long anywhere. Right close to him sits a woman in black with a handsome but anxious face. She might pass for middle age, but for her gray hair. It was dark six months back. People glanced indifferently at the boy, but when they looked at her, their faces softened. She was undergoing one of the crosses of motherhood. Through it all she had been brave, encouraging by a pressure of the soft hand, or a reassuring look from the kind, gray eyes. Yesterday and the day before, and the day before that, and other days, she had worn an attractive white waist, but today she was attired in solemn black, as if she were going to a funeral.

The gray-haired woman and the boy with the shifting blue eyes were also waiting.

But what a desolate wait is theirs! The laughter comes to them from across the room, and though they know they are not the subjects of it, it pierces to the quick. Did these men not know that on the day when souls are arraigned to give an account for deeds done in the flesh there is no laughter?

The door to the corridor is opened frequently by lawyers and others passing in and out. Every time it groans upon its oilless hinges a chill sweeps over these two who watch and wait, for they know that by and by a signal will come, another door will creak, and twelve solemn men will enter, stepping softly one after the other, like at a funeral.

They remember the looks of these men as they went out to that room, and recall, with an icy sensation around the heart, that every one of them averted his face as he silently filed by the accused and his mother.

They try to borrow some hope from the ringing speech of the lawyer who spoke last for the defense. He was an old man with a halo of silver-white hair crowning his broad forehead, and he had deep blue eyes that sparkled and flashed as he told the jury the boy prisoner was no murderer, and should not be hanged. And then they remembered with what fine courage he had shaken his clenched fist at the cruel men on the state's side and challenged them to reconcile their evidence with any hypothesis of guilt. Not only that, he took the state's witnesses one by one, tore their testimony into shreds and stamped it under his righteously indignant feet.

It was finely done, and the dear old mother just ached to throw her arms around the good man and tell him of her grateful heart.

But then, following the sequence, she recalled that a big fat man, with a red head and still redder mustache, got up and turned upside down everything the white-haired gentleman had said, and actually tried to make the jury believe that it would be doing a lawful and highly praiseworthy act to tear from her arms that boy of hers—that boy she adored as she did her God—and string him up to some black, ugly-looking gallows tree like a common felon! How could he talk so in the presence of a mother? She wondered how *his* mother would feel had he been in the place of her boy, and she longed to tell him.

And as he went along in his merciless, incisive way she remembered how the jurymen had straightened up and showed more interest than when the old man talked. She sought to catch their eyes, and to plead in her way with them, but as the red-headed man went on the jurymen seemed to resolutely avoid her.

A knock on the door! Now, they are coming! Your hand! Be strong, my boy—God and mother are here!

With solemn tramp the twelve filed by and took their seats in the box, just to one side of the judge's stand.

The judge, being summoned from his private room, entered and took his place at the desk. Then he rapped for order. From the corridors the crowd poured eagerly in. The reporters at the long table picked up their pencils and were alert for every move. Sheriff and bailiffs stood about importantly. In the tense silence the judge's voice sounded sharp and clear:—

"Have you a verdict, Mr. Foreman?"

"We have."

"Pass it up."

"Courage, son! *He* will guard the right! Listen!"

"We, the jury, find the defendant *not guilty*!"

"Thank God! My child is saved! My child is saved!"

Macon, Mo.

Reviews of Books

SOCIAL PSYCHOLOGY

Psychological Interpretations of Society. By Michael M. Davis, Jr., Ph.D. Columbia University Studies in History, Economics and Public Law, v. 33, no. 2. Columbia University, New York. Pp. 260. ($2.50.)

DR. DAVIS'S work derives its chief interest for the lawyer from its extended study of the sociological views of the distinguished criminologist Gabriel Tarde. Scattered through the large number of writings issued between 1880 and 1904 and nowhere collected in a succinct form are the fragments of Tarde's interesting theory of society, which Dr. Davis has also made the subject of an earlier monograph ("Gabriel Tarde: An Essay in Sociological Theory," 1906). In the present work we have a valuable criticism of Tarde's three principles of invention, imitation, and opposition. The artificial character of Tarde's philosophy is clearly brought out without detracting from the soundness and value of the greater part of his conclusions. The point of view of the author is favorable to the formation of a sane judicious estimate of Tarde's merits and shortcomings. Such a full discussion is fruitful and welcome. The author has also added a complete bibliography of Tarde's sociological writings, most of which have not been issued in English translations. It is interesting to note in this connection that Tarde's "Penal Philosophy" is one of the works chosen by the American Institute of Criminal Law and Criminology for publication in its series of criminological classics. It can scarcely be doubted that Tarde will receive steadily growing attention from students of social and legal science in the next few years. Dr. Davis considers that with the exception of Marks and Herbert Spencer, "no social thinker of his generation has put forth a thought which has a greater clarifying power over so large a mass of human facts."

The present work aims to formulate principles of social psychology. The subject considered is not that of the individual consciousness, but the phenomena of interaction between individual minds and wills. The author considers that he is not treating of "*self*-consciousness" but of what he calls "inter-consciousness," and he does not seem entirely to avoid some pitfalls of terminology which mar an otherwise clear presentation of his ideas. He devotes four of the opening chapters to "The Social Mind," a concept which is found in much of the sociological literature of the day. As in dealing with social forces we are concerned with a multitude of minds and their action upon one another, and the phenomena of public opinion and social action are comprehensible only when studied in terms of the individual, it is difficult to see what warrant there is for the notion of a social mind. Such a concept appears to involve the reduction of a plurality of intelligences to a fictitious unity, and the social mind would seem to be little more than a metaphysical entity not simply of no help to scientific investigation, but decidedly a hindrance. Dr. Davis, however, expresses his satisfaction with Professor Giddings's analysis. Professor Giddings has called the social mind "a phenomenon of individual minds acting simultaneously, and especially of individual minds in communication with one another acting concurrently." The writings of such writers as Giddings, Baldwin, Ellwood, Ross, and Durkheim have apparently influenced Dr. Davis in his theory of a social mind. His position is therefore sustained by ample authority. But like most of the other writers, he has to insert qualifications in his definition of the social mind to avoid falsifying the facts, and he might have saved himself and his readers some trouble by starting from the postulate of a multiple social consciousness, instead of a social unity which merely to mention is to make absolute.

This defect, however, will be found, on close inspection of the materials of the work, for the most part to be a fault of terminology rather than of subject-matter. The mistake does not seem to be made of over-emphasizing the collective at the expense of the individual aspect of human life, nor does the fiction of a social mind entrap the writer in the syllogisms of a chimerical realism. In the course which he takes doubtless may be found a partial justification for a term the use of which is shared with other sociologists. It may be misleading and of doubtful propriety to speak

of the "social mind," but the term may be sometimes convenient to apply, rather impressionistically, to the important group of complex phenomena which supply the subject-matter of social psychology.

A review of sociological theory with appended criticisms is what is here attempted, rather than an independent exposition of the author's own views. Consequently Dr. Davis reaches his own doctrines by a roundabout path, and does not devote so much space to them as to those of other writers. His treatise yields a number of broad generalizations with regard to the inter-action of social forces. Because of their breadth and generality these principles are not very striking, nor are they likely to prove of much practical use except as a starting-point for supplementary investigation. A partial application of some of these principles to problems of personal and social life is attempted, but within too restricted a space to yield noteworthy results. The treatise is of considerable literary merit.

CASTE IN INDIA

The History of Caste in India. With an appendix on Radical Defects of Ethnology. By Shirdhar V. Ketkar, A. M. (Cornell). V. 1. Taylor & Carpenter, Ithaca, N. Y. Pp. xv, 170 + index 22. ($1.50.)

THIS is a book which should help to bridge the gulf between the East and the West. Hardly ever before has a Hindu written so intelligently in the English language of the institutions of his own land. Caste in India is very difficult for an American to understand, and he can grasp something of its *raison d'etre* in these pages and thank the author for being sufficiently heterodox, from the Brahminical point of view, to be in a position to interpret Indian civilization in terms which we can understand.

He points out that caste may become a world problem, for wherever the Hindu emigrates he carries with him his own institutions. He aims at reaching at least a partial solution of this problem. The absurdities of the caste system frequently arouse him to vigorous denunciation. He does not propound a complete answer to the problem, and seems to consider that it is not feasible nor wise to destroy the caste system root and branch. In one place he intimates that this system might have better results if the privileges of the higher castes received fuller recognition under British rule, so that their strength would be enlisted on the side of social order and progress.

Three purposes predominate throughout the work, and they are commingled in such a way as to interfere with an orderly arrangement of material. The historical purpose is by no means paramount. The writer finds the beginnings of Indian institutions vague and obscure, and he takes up the reader's time to study and appraise a mass of evidence derived from the legendary and religious lore of the race. The historical purpose thus becomes subordinated to a critical purpose. Furthermore, the author's rambling observations on the philosophy of caste are interspersed in such a manner as to introduce some irregularity into his treatment. But his pages are by no means free from penetrating analysis of Hindu customs.

Mr. Ketkar rejects the ethnological theory of caste because he believes that ethnological evidence is of value only when races are classified with reference to the degree of permanence of their physical characteristics. He thinks that our present knowledge does not warrant deductions from racial characteristics observed in India at the present time regarding the ancestry of the people of today. The racial differences between Aryans and Dravidians are not so great, he declares, as ethnologists have tried to make out. He does think that a conquering race will tend to form a new caste cleavage, but he does not believe that the caste cleavage directly follows the line of race cleavage. On the contrary, he is of the opinion that other factors enter very largely into the formation of castes. Among these he attributes importance to economic factors, and he also strongly emphasizes the influence of religion. Brahminism has closely connected the sentiment of purity of blood with that of moral sanctity. Marriage to a woman of lower caste is not only retrogression but sacrilege. The Hindu believes that the Brahmin who marries a Shūdra will suffer everlasting torments after death. The doctrine of *karma* makes all the castes shrink from marriages for which they would have to pay the penalty of reincarnation on a lower plane. Thus Brahminism tends to perpetuate and strengthen the endogamous spirit of caste, just as Christianity, by laying emphasis upon the brotherhood of man, promotes the opposite tendency. The author intimates that if the Southerners of our own country had not taught the negro Christianity there might

have been no negro problem. His comments on the interrelation between the religion and the customs of India are most illuminating. His analysis of the origin of caste, however, is not searching enough to explore the mysteries of that racial spirit of which religion is merely the expression. To what would such an inquiry lead? Is it not possible that the peculiarly speculative and elaborately ceremonial character of the Brahmin religion sprang originally from the superstitious veneration of an ignorant inferior race for an enlightened conquering one? If so, the ethnological factor may have more ultimate importance than the religious factor.

The laws of Manu receive so great an amount of attention because the author looks to them for light on social conditions in the third century. The document examined is the Manava-dharma-shāstra. In the interpretation of this document Manu is portrayed as a humane legislator, and we are informed that the most drastic penalties directed to be imposed for infractions of the moral code are not penalties which were actually exacted, as the crimes were too rarely committed, but were merely picturesque threats inserted to give rhetorical emphasis to the heinousness of various forms of sacrilege. Mr. Ketkar thinks that a like purpose animated some of the Old Testament lawgivers, and that their code of laws was not so cruel as one naturally infers. At all events, Manu is held up before our eyes as one too benign to sympathize with the caste system in its more extreme phases. While he pictures a society in which there are four leading castes he does not preach the doctrine of a multitude of subcastes, and Mr. Ketkar does not hold him responsible for that growth of caste in its more pernicious forms which has come largely since the promulgation of the laws of Manu.

The author shows his familiarity with the history and literature of India, and his work exhibits careful research in fields inaccessible to Western scholarship. He shows himself, however, without a profound knowledge of the Western literature of comparative social science, neither is he always sufficiently cautious in advancing original opinions or in criticising the views of others on subjects which have received ripe scholarly discussion. His intellectual keenness and painstaking industry afford basis for the hope that he may yet learn more accurately to measure his own powers, which are considerable but not fully disciplined. If he can do this, notable paths of achievement await his exploration.

THE MASSACHUSETTS LEGACY TAX

The Legacy and Succession Tax of Massachusetts. By Elisha H. Brewster. Little, Brown & Company, Boston. ($2 *net*.)

THIS book contains the text of the Massachusetts direct inheritance tax and a discussion of the questions of constitutional law and interpretation which have arisen under it. It contains an appendix of forms and an excellent index. The taxation of inheritances on any considerable scale in Massachusetts is comparatively recent. The decisions under our statute are few. The author has accurately analyzed those decisions and has given an illuminating statement of the questions that have so far arisen. In addition, he suggests questions which have arisen in other jurisdictions and cites their decisions. He is apparently not as familiar with the practice of the office of the Tax Commissioner as with the decisions of the courts or he would have mentioned the fact that it has not been his practice to tax shares in foreign corporations owned by resident decedents, although our courts have held that the certificates are properly taxable within the jurisdiction under the direct property tax. This, however, probably is a result of political considerations which a lawyer would not anticipate. The book will be needed by all who deal with inheritances until more decisions of our court justify a fuller treatment.

NOTES

Sturgis & Walton Co. announce that they will publish this autumn a book to be entitled "Famous Impostors." It is written by Bram Stoker, the well-known novelist and biographer of Sir Henry Irving. Mr. Stoker will present various types of swindlers, pretenders and humbugs of international reputation. The book promises to be a very diverting and dramatic study in human gullibility.

One of the recent publications of the New York State Library is "Bibliography 47" (Bulletin 464) which contains a revised list of medical serial publications, compiled by Ada Bunnell, and also a bibliography of medical jurisprudence, by W. Burt Cook, Jr. The former is an up-to-date revision of a list first printed in 1905. The latter is a classified index, arranged under leading topics, of books and periodical articles in the State Library, relating to medical jurisprudence and related topics.

The late C. H. Monro's translation of the Digest of Justinian is a scholarly piece of work which will

form a useful addition to the library of every student of Roman law. The second volume, containing books vii to xv, is now published in this country by G. P. Putnam's Sons. At the time of Mr. Monro's lamented death 336 pages of this volume had been printed, and the rest was in manuscript, which had not received his final revision, but which it was thought proper to print substantially as it stood. The value of this version of the text of the Digest can hardly be overestimated.

BOOK RECEIVED

RECEIPT of the following books is acknowledged:—

Administration of Justice in the United States. Annals of the American Academy of Political and Social Science, v. 36, no. 1 (July, 1910). Philadelphia. Pp. 217. ($1.)

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.)

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.)

Jewett's Manual for Election Officers and Voters in the State of New York; containing the new consolidated election law, as amended to date, with annotations, forms and instructions. By F. G. Jewett. 18th edition, revised and enlarged by Melvin Bender and Harold J. Hinman, of the Albany bar. Matthew Bender & Co., Albany. Pp. xxii + 288 (election law) + 271 (constitutional and statutory provisions, forms, etc.) + 83 (index). (Cloth, $4; paper, $3.50.)

Index to Periodicals

Articles on Topics of Legal Science and Related Subjects

Aerial Navigation. "The Air—A Realm of Law, II." By G. D. Valentine. 22 *Juridical Review* 85 (July).

Alien Protection. "The Basis of Protection to Citizens Residing Abroad." By Senator Elihu Root. 4 *American Journal of International Law* 517 (July).

The opening address at the fourth annual meeting of the American Society of International Law, Washington, D. C., April 28, 1910.

Anarchy. See Government.

Bench and Bar. "The Sheriff in Scotland." By James Ferguson. 22 *Juridical Review* 105 (July).

Blockade. "The Legal Basis of the Rules of Blockade in the Declaration of London." By Denys P. Meyers. 4 *American Journal of International Law* 571 (July).

Taking up the articles of the Declaration of London, the writer considers them with reference to British and American decisions involving blockade, closing with an expression of his admiration for the work of the framers of the Declaration.

Conflict of Laws. "*Locus Regit Actum.*" By Prof. A. V. Dicey. 26 *Law Quarterly Review* 277 (July).

Approving the decision of the French Court of Cassation in *Gesling* v. *Vidits* (1909), Clunet, xxxvi, p. 1097, sustaining the validity of a will made in France by a British subject in accordance with the formalities required by English law, but not those required by French law.

Conservation of Natural Resources. "'Home Rule' for the Public Land States." By Clarence T. Johnson, State Engineer of Wyoming, in collaboration with James Stephenson, Jr., State Engineer of Idaho. *Editorial Review*, v. 3, p. 701 (July).

The writers indicate many of the grave objections to the administration of natural resources from the seat of the federal government at Washington.

Conveyancing. See Real Property.

Corporations. "What is a Company?" By Frank Evans. 26 *Law Quarterly Review* 259 (July).

The author's lucid definitions of a company are probably applicable in the United States as well as in England.

"The Return of a Company's Capital to Its Shareholders." By W. Strachan. 26 *Law Quarterly Review* 231 (July).

See Public Service Corporations.

Defamation. "'Want of Probable Cause' in Judicial Slander." By John Bartholomew. 22 *Juridical Review* 132 (July).

Ethics. "Retribution and Deterrence in the Moral Judgments of Common Sense." By F. C. Sharp and M. C. Otto. *International Journal of Ethics*, v. 20, p. 438 (July).

The widespread popular prevalence of the idea of retributive punishment formed the subject of a previous paper by these authors (see 22 *Green Bag* 340). The account of the same inquiry is here extended.

"The Classification of Ethical Theories." By Jay William Hudson. *International Journal of Ethics*, v. 20, p. 408 (July).

The writer finds no classification of ethical theories in existence which is satisfactory as regards completeness, and outlines his own plan for a classification to which those of Seth, Mackenzie and Muirhead approach more closely than do those of any other writers.

"Spencer as an Ethical Teacher." By H. S. Shelton. *International Journal of Ethics*, v. 20, p. 424 (July).

The author considers that the "Principles of Ethics" is not without faults both of commission and of omission, yet it contains much that is both original and true.

Eugenics. "The Scope of Eugenics." By H. J. Laski. *Westminster Review*, v. 174, p. 25 (July).

The author quotes Heine, "A man cannot be too careful in the selection of his parents," and adds, "that may seem paradoxical, but it is a profound biological truth." He believes that legislation should not be so framed as to tend to the production of weaklings.

"National Eugenics in Relation to Immigration." By Robert De C. Ward. *North American Review*, v. 192, p. 56 (July).

A sensible and persuasive appeal for the proper selection of our alien immigrants.

Government. "The Co-operative Nature of English Sovereignty, II." By W. W. Lucas. 26 *Law Quarterly Review* 247 (July).

Continued from 26 *Law Quarterly Review* 54 (see 22 *Green Bag* 182). The powers of the Crown are here discussed, as powers exercised by the King in his official capacity as agent of the realm, and as totally distinct from the will of the monarch, which is a different matter. "Constitutionally the executive is subrogate, because it carries out instructions; legally it is prerogative because it is the legal entity of the nation."

"The Message of Anarchy." By Prof. Jethro Brown, LL.D., Litt.D., Professor of Law in the University of Adelaide, Australia. *Hibbert Journal*, v. 8, p. 760 (July).

The writer endeavors to set forth with sympathetic clearness some of the arguments put forward by typical anarchists of the pacific type. While he does not profess to accept these doctrines, he thinks there are some underlying truths in the gospel of anarchism which the world would do well to heed. Defining anarchy as government resting on consent rather than on force, he strangely overlooks the obvious truth that a literal application of the term "anarchy" would mean the repudiation even of that authority which is based on free consent.

"The History of the Department of State. VI, Subdivisions of the Department." By Gaillard Hunt. 4 *American Journal of International Law* 596 (July).

"A Congressman's Letters." By a Member of the House of Representatives. *World's Work*, v. 20, p. 13273 (Aug.).

Recollections of the solicitations to which the writer was subjected by constituents desiring special favors from the government; the author has the reputation of "getting things" for his constituency.

"Ask Your Congressman." By Frederic C. Howe. *Everybody's*, v. 23, p. 158 (Aug.).

The author urges the "heckling" of Congressmen by their constituents. Believing as he does in direct legislation, he proposes that the voter shall make sure that his Congressman does in fact register his own voice in all matters of government.

"The Crime of 'The Pork-Barrel.'" By Hubert Bruce Fuller. *World's Work*, v. 20, p. 13259 (Aug.).

Showing where the waste of river and harbor appropriations comes in.

Australia. "The Australian Federal Election." By A. St. Ledger. *Contemporary Review*, v. 98, p. 12 (July).

Canada. "Disallowance of Provincial Statutes." By McGregor Young, K. C. 30 *Canadian Law Times* 585 (Aug.).

Concerned with the limits and nature of the power granted the federal government at Ottawa by the British North America Act, 1867, secs. 56 and 90.

"The Coming of Canadian Nationalism." By Ernest Cawcroft. *Editorial Review*, v. 3, p. 667 (July).

The author considers that forces are powerfully at work for the creation of another independent nation this side of the Atlantic, the industrial development of which will not be marked by the sectional jealousies and constitutional conflicts which preceded our own Civil War.

But this interpretation of the signs of the times may not be correct, if it be true that western Canada, thanks to American immigration, is likely to become radically unlike

eastern Canada, as the following writer supposes:—

"The Strength of American Enterprise in Canada." By Arthur Hawkes. *Nineteenth Century and After*, v. 68, p. 78 (July).

Great Britain. "The New Judiciary." By W. J. L. Ambrose. 26 *Law Quarterly Review* 203 (July).

The bestowal of broad discretionary powers on administrative boards is viewed by this author with some misgivings; he fears that England may be drifting toward the position of *Droit administratif* in France, by the evolution of a new judiciary composed of quasi-judicial officers not amenable to the control of the regular law courts.

"Political Sovereignty and a Reformed Second Chamber." By Prof. E. C. Clark, LL.D. *Nineteenth Century and After*, v. 68, p. 31 (July).

The Regius Professor of Civil Law in the University of Cambridge here advocates "a reconstituted House of Lords which, while abandoning the hereditary principle or subordinating it to that of personal qualification, should, on the one hand, retain the permanence and continuity of the present body, and should, on the other, be primarily, though not exclusively, representative of other classes or interests than that of Labor."

"Two Chambers or One." *Quarterly Review*, v. 213, no. 424, p. 234 (July).

Defending a Parliament of two houses and dealing with the proposed reform of the House of Lords in a conservative spirit.

India. "British Rule in India—I." By Lord Curzon of Kedleston. *North American Review*, v. 192, p. 1 (July).

Lord Curzon in this first installment states what India gives to Great Britain and the Empire,—not only what it does for imperial prosperity and *prestige*, but for the British national character as well.

See Conservation of Natural Resources, Local Government, Socialism.

Immigration. See Eugenics.

International Arbitration. "President's Address on Opening the *North Atlantic Fisheries* Arbitration at The Hague, June 1, 1910." By Henri Lammasch. 4 *American Journal of International Law* 567 (July).

"Two Hindrances to Peace." By President Emeritus Charles W. Eliot. *World's Work*, v. 20, p. 13318 (Aug.).

In this paper, read at the last Lake Mohonk Peace Conference, Dr. Eliot proposes that the peril of cutting off the supply of food and raw materials be removed by immunizing all merchant vessels, and that the danger of sudden invasion be met by the making of arbitration treaties which contain no exceptions and by the establishment of a permanent court of arbitration.

International Law. See under special topics, *e.g.*, Aërial Navigation, Alien Protection, Blockade, Conflict of Laws, World Politics.

Juries. "Suggestions for the Improvement of the Jury Service." By Henry M. Earle. 22 *Bench and Bar* 13 (July).

An excellent article.

Legal Education. "Correspondence Instruction in the Law." By Clarence B. Kelland. 18 *Law Student's Helper* 200 (July).

An intelligent defense of this method of instruction. The writer says:—

"No honest advocate of correspondence instruction will claim that his system is the full equal of the college course, but he may with integrity claim that it is by far the superior of the law-office method. This is demonstrable. Furthermore, as to thoroughness, the correspondence method need apologize to no other method or institution, as is conclusively proven by the almost absolutely unbroken line of successes by its graduates when taking bar examinations."

Legal History. "Burgage Tenure in Mediæval England—I." By M. de W. Hemmeon. 26 *Law Quarterly Review* 215 (July).

A very illuminating study of a subject which has been neglected by writers on feudal tenures, the common definition of burgage tenure as a species of socage tenure peculiar to cities and boroughs being utterly inadequate.

See Government.

Legal Philology. "*'Cestui que use': 'Cestui que Trust.'*" Editorial. 26 *Law Quarterly Review* 196 (July).

The plural form, *cestuis que trust*, is preferred. There are some informing passages from a letter of the late Professor Maitland on the evolution of the old law French forms. The subject considered in 22 *Green Bag* 367 is here conclusively treated.

Local Government. "Senator Platt's Autobiography; 3, New York City: Its Reforms and Reformers." *McClure's*, v. 35, p. 427 (Aug.).

This third installment gives an interesting account of the fifteen-year fight of the Republican machine against Tammany, in which Senator Platt indicates his dislike for municipal non-partisanship and for the part played by the Citizens' Union in the years from 1896 to 1900.

"What Are You Going to Do About It? II, Graft as an Expert Trade in Pittsburg." By Charles Edward Russell. *Cosmopolitan*, v. 49, p. 283 (Aug.).

Having treated in the previous article of

"graft" in the legislature of New York State. Mr. Russell here writes, in his usual graphic manner, of the corruption revealed in the Pittsburg city council.

Penology. "Is Punishment a Crime?" By C. J. Whitby, M. D. *Hibbert Journal*, v. 8, p. 850 (July)

A vigorous plea by an English physician for the reformative as opposed to the retributive or deterrent idea of punishment.

Public Service Corporations. "How New York Deals with Her Public Service Companies." By Lyman Beecher Stowe. *American Review of Reviews*, v. 42, p. 211 (Aug.).

"The Public Service Companies and the People." By Lyman Beecher Stowe. *Outlook*, v. 95, p. 515 (July 9).

The two foregoing articles describe the manner in which the New York Public Service Commissions have administered the Public Service Commissions law, and have dealt with important problems of corporate regulation. A parallel subject is treated in—

"How Wisconsin Regulates Her Public Utilities." By John R. Commons, Professor of Political Economy in the University of Wisconsin. *American Review of Reviews*, v. 42, p. 215 (Aug.).

See Rate Regulation.

Rate Regulation. "The Remedy of the Law." By Charles Edward Russell. *Hampton's*, v. 25, p. 217 (Aug.).

Real Property. "The Rule in *Re Cobbold*." By J. Brook Richardson. 26 *Law Quarterly Review* 239 (July).

Re Cobbold (2 Ch., p. 299), decided in 1903, lays down a rule which is difficult to reconcile with the doctrine of other English cases as to the proper form for a conveyance divesting the vested interests of unborn heirs.

See Legal History.

"Conveyances by Reference to a Plan." By A. E. Randall. 26 *Law Quarterly Review* 268 (July).

Socialism. "Socialism. II, Its Present Position and Future Prospects." *Quarterly Review*, v. 213, no. 424, p. 160 (July).

Second and final installment, following that in the April number of the same review (see 22 *Green Bag* 348). The author is of the opinion that recent socialism is characterized by the following features: (1) its wide international range; (2) the effective participation of the working classes; and (3) with certain exceptions, a growing reliance on political action, accompanied by the growth of political strength. He sanely and minutely discusses the various programs of the movement in different countries, points out the evil fate which has befallen many of its leading doctrines, and remorselessly lays bare the hidden weaknesses of a social philosophy which "rests wholly upon a materialistic view of life."

See Government.

Wills and Administration. "Probate of Will without Attestation Clause where Witnesses are Dead or Absent." By Francis X. Carmody. 22 *Bench and Bar* 19 (July).

Treated from the point of view of New York law.

World Politics. "Armaments and Peace." By Excubitor. *Fortnightly Review*, v. 88, p. 46 (July).

To an American, the interminableness of all the discussion of a possible *rapport* between Germany and Great Britain as to naval policy is truly wonderful.

"The Foreign Policy of the United States." By Charles Johnston. *North American Review*, v. 192, p. 34 (July).

Miscellaneous Articles of Interest to the Legal Profession

Biography. "King George the Fifth." By Sydney Brooks. *McClure's*, v. 35, p. 447 (Aug.).

This brilliant account, written in Sydney Brooks' most able style, brings out a number of interesting facts about the personal character of England's King.

Liberia. "The United States and Liberia." By Roland P. Falkner. 4 *American Journal of International Law* 529 (July).

A sketch of our past relations with Liberia and an outline of a program likely to be helpful to that country, by the chairman of last year's American Commission to Liberia.

Militarism. "The Moral Equivalent of War." By William James. *McClure's*, v. 35, p. 463 (Aug.).

Professor James proposes, in place of military conscription, a conscription for the battle against the forces of nature, which would "preserve in the midst of a pacific civilization the manly virtues which the military party is so afraid of seeing disappear in peace."

Red Cross. "The Sanitary Commission—The Red Cross." By George W. Davis. 4 *American Journal of International Law* 546 (July).

A history of the organizations going by the name of the Red Cross.

Slave Trade. "The Slave Trade in the Spanish Colonies of America: The *Assiento*."

By Prof. G. Scelle. 4 *American Journal of International Law* 612 (July).

A full historical sketch of that institution, of the nature of a public contract for the supply and distribution of labor, known as the *Assiento*, and of its share in the up-building of the Spanish-American colonies.

Tariff. "Great Britain, Canada and the United States." By Compatriot. *National Review*, v. 55, p. 786 (July).

While it is considered that at the present moment neither Canada nor the United States is in a position to conclude any far-reaching reciprocity treaty, within the next few months this question, upon the solution of which the whole fiscal future of the British Empire depends, will have to be decided at Washington.

"Schedule 1—The Cotton Tariff." By Samuel M. Evans. *World's Work*, v. 20, p. 13276 (Aug.).

Aiming to show how the cotton schedules were manipulated for the benefit of private interests.

Latest Important Cases

Carriers. See Public Service Corporations.

Corporations. See Practice of Law.

Eminent Domain. *Taking more Land than Necessary Permissible, in the Interest of Economy.* Mass.

The city of Boston brought suit against George N. Talbot to get possession of premises needed in part for a subway station. The defendant claimed that the tunnel statute authorizing the taking of fee in land when it was not all necessary for the public work was unconstitutional and that the taking of the whole estate in this case was invalid also, because more land was taken than was needed for the public improvement.

The Supreme Judicial Court of Massachusetts, in a decision rendered May 19, upheld the constitutionality of the statute. It declared that the legislature may take a fee even though the use of the fee may not be permanent. This is justified in the interest of economy.

If the construction of the tunnel or a station would necessarily have a directly injurious effect upon land outside of the tunnel so as to subject the city to a substantial claim for damages on that account, the Court declared it might be reasonable and proper for the Transit Commissioners to take the land in fee and pay for it and when the work was ended to dispose of that part which was no longer needed. *City of Boston* v. *Talbot*, 91 N. E. Rep. 1014.

Indians. *Government Can Bring Suit on Behalf of Indians Though They Have Ceased to be its Wards—Titles in Oklahoma Lands.* U. S.

Late in August of last year, Judge Ralph E. Campbell of the United States Circuit Court for the eastern district of Oklahoma rendered a decision to the effect that where titles to valuable lands had been acquired from the Indians before the act removing the restrictions of the apportioning act went into effect, the government could not sue for such lands on behalf of the Indians, whose guardianship it had relinquished in granting them citizenship (see 21 *Green Bag* 532).

Lately the United States Circuit Court of Appeals, in a decision handed down at St. Paul, June 6, by Judge Charles F. Amidon, reversed the foregoing decision, and held that the cases brought for the purpose of regaining titles for the Indians of the Five Civilized Tribes will have to go to trial.

Learned Professions. See Practice of Law.

Practice of Law. *Business Corporation Law—Corporation not Authorized by Statute to Carry on Work of Learned Professions.* N. Y.

Said the New York Court of Appeals in *Matter of Co-operative Law Co.*, decided May 17:—

"The practice of law is not a business open to all, but a personal right, limited to a few persons of good moral character, with special qualifications ascertained and certified after a long course of study, both general and professional, and a thorough examination by a state board appointed for the purpose. The right to practise law is in the nature of a franchise from the state conferred only for

merit. It cannot be assigned or inherited, but must be earned by hard study and good conduct. It is attested by a certificate of the Supreme Court and is protected by registration. No one can practise law unless he has taken an oath of office, and has become an officer of the court, subject to its discipline, liable to punishment for contempt in violating his duties as such and to suspension or removal. It is not a lawful business except for members of the bar who have complied with all the conditions required by statute and the rules of the courts. As these conditions cannot be performed by a corporation, it follows that the practice of law is not a lawful business for a corporation to engage in. As it cannot practise law directly, it cannot indirectly by employing competent lawyers to practise for it, as that would be an evasion which the law will not tolerate. *Quando aliquid prohibetur ex directo, prohibetur et per obliquium* (Co. Lit., 223)."

The opinion in this case was written by Judge Vann, who affirmed the order of the Appellate Division of the Supreme Court in the second judicial department vacating a certificate of approval previously granted by it under chapter 483 of the Laws of 1909.

Public Service Corporations. *Liability for Error in Transmission of Telegram—Wagering Contracts of Cotton Speculators may Bar an Action.* N. Y.

The New York Court of Appeals rendered an important decision bearing on speculation in *Postal Telegraph Co.* v. *Weld*, decided June 9. Stephen M. Weld and others, New York brokers and members of the New York and New Orleans cotton exchanges, gave the Postal Telegraph Company a telegram to New Orleans brokers to sell 20,000 bales of cotton at 12.70 cents a pound. When received the message read 12.07. Damages aggregating $27,565 were claimed because of the error, and the lower court gave judgment in favor of $10,000 against the telegraph company. The company appealed, and a new trial has now been ordered. Judge Werner said in his opinion:—

"One of the plaintiff's New Orleans correspondents testified that there was no delivery of cotton and the transaction consisted entirely of a settlement of differences. This testimony was supplemented by an account of sales from which the jury might have drawn the inference that it was not the intention of the parties to the contracts to sell and deliver actual cotton, but simply to record the market fluctuations upon the basis of which settlements were to be made between the parties. This testimony, though meagre and perhaps inconclusive, was hostile to the legal presumption that the transactions were lawful and was sufficient to create an issue of fact upon which the defendant had the right to a charge embodying the substance of the requests above quoted. If the transactions between the plaintiffs and their clients or customers were mere wagers they are void under the statutes of this state and the general law of the land."

Res Adjudicata. *Result of Acquittal of the charge of Fraudulent Entry on Title in Coal Lands—Action for Recovery of Lands not Barred.* U. S.

In 1908 indictments were found against certain persons in Colorado for obtaining 30,000 acres of valuable coal lands in the state through dummy entrymen, and Federal Judge Lewis at that time sustained demurrers to the indictments, declining to be bound by civil case rulings in a criminal prosecution. Judge Lewis, however, was overruled by the Supreme Court and the prosecutions continued. In some of the cases the defendants were acquitted, and in one of these, the *Yampa Anthracite Lands* case, the government attempted to recover the lands through equity suits. Judge Lewis, in a decision rendered at Denver June 7, has now decided that although the lands were once involved in criminal cases in which the defendants were discharged the results of these trials do not enter into the present proceedings.

Speculation. See Public Service Corporations.

Wagers. See Public Service Corporations.

Wills and Administration. *Insolvent Estates—Overpayment made under Mistake as to Fact of Solvency of Estate Removable by Action Against Creditor.* N. Y.

In *Woodruff* v. *H. B. Claflin Co*, decided by the New York Court of Appeals May 17 (N. Y. Law Jour. June 2), it was held that an executor who under a mistake of fact as to the solvency of an estate pays to a creditor an amount greater than he was entitled to as subsequently disclosed by its insolvency, may maintain an action against the creditor to recover for the overpayment.

The Editor's Bag

SUPREME COURT CHANGES

THERE will be general regret at the circumstances which have led Mr. Justice Moody to announce his determination to retire under the enabling act recently passed by Congress. He is only fifty-seven years of age, and the prospects of his eventual complete recovery appear to be good, so that Mr. Justice Moody's act of patriotic self-renunciation means that the Court will lose the services of an able jurist whose work in time to come would have been likely to prove invaluable. Mr. Justice Moody, however, can leave the bench with the feeling that his retirement has been well earned by conspicuous public services, and that his judicial labors have already earned him an honored name which will go down in history linked with some important decisions.

Rumors that Mr. Justice Hughes will be designated for the Chief Justiceship have been persistent. There have been some sporadic symtoms of an inclination to criticize such a step, but we believe that the appointment would be supported by the weight of opinion in the profession. It is true that Mr. Hughes' experience has been mainly in the field of public administration, and there are doubtless those who differ with him in his views on constitutional questions and on electoral reform. But no one can deny that his marked executive ability, together with the vigor of his comparative youth, will make him a most admirable presiding officer for the Court, and on this score alone, in our judgment, Mr. Hughes' services can be more profitably utilized by the American people by giving him the Chief Justiceship than by making him Associate Justice. As for the question of his judicial ability, time alone can supply the answer. Mr. Hughes is hardly the inferior, in intellectual vigor, of any present member of the Court. It is still too early to declare, with confidence, that there is no possibility of his intellect being able to dominate the Court, as in the case of some notable predecessors. Time alone will assign him his place in the judicial history of the United States.

In filling the two vacancies which remain, we are inclined to hazard the opinion that the President will do best to make his selections from the higher ranks of the state and federal judiciary. Eligible candidates outside the judiciary, of the cast of Governor Hughes, are the exception and not the rule, and the most efficient kind of service on the bench does not command that reward of popular fame which leads to the reiterated mention of candidates less worthy. If the Senate is soon convened in extraordinary session to fill these vacancies, as we hope it will be, the promotion of two of the ablest judges the President is able to pick from the American bench would certainly be received with marked favor by the bar.

WHERE ARE THE LAW BOOKS?

THE suggestion elsewhere made in these pages—that law librarians in the United States supply information regarding the contents of their libraries for insertion in a report to be published by the United States Bureau of Education—is a good one, which deserves to be followed. While it is the ambition of every progressive law librarian to build up as complete, well-balanced a collection as possible, every library is necessarily the outgrowth to some extent of special conditions, and no two libraries are alike. There are few librarians who, scanning their collections, will not find them especially strong in some particular respects. Exceptional strength in some one feature may not seem highly significant to the librarian, yet the information may be found valuable in some unlooked-for quarter, and librarians ought certainly to co-operate heartily in any movement which seeks to tabulate such information and make it accessible.

The literature of the law differs from that of other professions, for the lawyer is forced to make constant use of a far greater number of books than either the physician or the clergyman, and the practical requirements of his profession define pretty clearly the proper policy to be followed in gathering a large law library. There is doubtless less room for specialization in such libraries than in other libraries. Nevertheless, where the working requirements of the practising lawyers using the library have been met, there is always the opportunity to expand in purely scientific directions, or to swell the historical and critical literature; and many a library has scholarly volumes not elsewhere accessible, not to speak of unnumbered rows of rare reports and public documents. The movement to scatter broadcast the knowledge of any such special collections may be regarded as favorable to the advancement of legal learning, as well as in line with latest developments in library science.

AN INTERNATIONAL *CORPUS JURIS* NEEDED

THE expense of maintaining increased armaments is a momentous problem for the United States, and one even more momentous for England and Germany. It can hardly be doubted that the necessity for prudent governmental finance will enlist steadily growing public support for the international arbitration movement. The earlier agitation for international arbitration proceeded from what might be called a moral source, and an ethical impetus was given to the movement which is likely to persist; and if it is now to be enforced by an economic impetus, as seems inevitable, the twentieth century will witness notable strides, if not toward absolute disarmament, certainly toward the international arbitration of all save the most extraordinary disputes.

Renewed interest in disarmament has lately been aroused by the advocacy of some distinguished statesmen, and one is easily misled into thinking that, under the present conditions of world politics, it can become a reality. Ex-President Roosevelt and Senator Root have both strongly urged the importance of concluding international agreements respecting the size of navies. Such agitation may doubtless serve a good purpose, in that it stimulates the agitation of those other momentous problems upon which that of disarmament depends for its solution. It may

even result, after patient perseverance, in some form of modified disarmament the character of which cannot be foreseen. But the jealousies of the several powers, and their commercial ambitions, will long render complete disarmament, saving the retention of some form of naval police necessary to the preservation of international order, utterly impracticable. There are other forms of agitation which may be more useful. In the judgment of Mr. Andrew Carnegie the establishment of international arbitration is more important than disarmament. It was with the purpose of securing disarmament that the first Peace Conference at The Hague, in 1899, was called, and the effort failed. That is not a reason for not bringing it up at the third Peace Conference. But problems must be faced in their logical order, and there is little to be accomplished by working for remote ends which cannot be attained till the immediate obstacles have been removed. Disarmament is an important ultimate goal of the movement for international peace, but it can come *only when the body of international law has expanded* so as to provide rules whereby all nations may settle their differences, and a permanent international court has been established to administer such law. For this reason Secretary Knox is at present most interested in bringing about the permanent establishment of the proposed Court of Arbitral Justice, and for this reason, we imagine, disarmament is unlikely to have the foremost place in the program of our State Department for years to come.

Peace societies are adopting resolutions in favor of disarmament. They are free from much of the sentimentalism which their very name connotes, and are bending their energies toward strengthening the reign of law among nations rather than toward the establishment of peace as a *summum bonum* under all circumstances. But they seem to have drifted from the position of Elihu Burritt, who asked sixty years ago for a congress *to define and develop international law* and to create an international tribunal to apply it, and from that of Horace Bushnell, who defined the peace movement as the growth of law. They might, perhaps, in many instances do more helpful work by reviving some of the principles formulated two generations ago, suggestive of the measures likely to prove most efficacious in the peace conferences of the future.

President Taft touched upon the crucial issue of the hour, and supplied the peace societies with food for thought when, at the dinner of the American Peace and Arbitration League given in his honor last March in New York City, he professed himself unable to see why questions of national honor should be excluded from the disputes covered by treaties of arbitration. There will be great difficulty in fact in getting the powers to consent to this proposal. The same considerations which render impossible their conversion to the policy of disarmament must necessarily deter nations like Great Britain and Germany from agreeing to submit questions involving "vital interest" or "national honor" to arbitration. These considerations do not in any way detract from the importance of unconditional arbitration as an ultimate goal of international diplomacy. Considered in this light the President's position is sound. And wherever it is possible to negotiate a treaty on this basis let it be hoped that governments will rise to the opportunity. There is, however, no prospect

of a successful attempt to make such treaties the rule rather than the exception, and there is the same objection to making unconditional arbitration of all controversies a leading issue at this time which can be brought up against a disarmament propaganda. Other problems must be faced and disposed of before that problem which depends on them for its solution can be attacked.

Grave doubts, in fact, may be raised as to whether any scheme of international arbitration, under which an international tribunal is to be competent to pass upon all possible causes of dispute between nations, is workable *until there is a complete system of law* to be administered, holding the key to every possible question, regardless of whether or not it be one of "the very rare cases where the nation's honor is vitally concerned," to quote Mr. Roosevelt's Christiania address. This point has been very clearly brought out by a Japanese, Mr. Masujiro Honda, in the *Editorial Review*:—

> Rumors of impending or possible conflict between England and Germany on the one hand, and between America and Japan on the other, seem to have cast a dark shadow over the bright prospects of the noble cause of international arbitration and universal peace. On the other hand, these very dangers, whether real or imaginary, should offer greater opportunity than ever before for demonstrating the potency of our proposed ideals. I venture to think, therefore, that international arbitration is not yet on a working basis of practical politics. Competent and impartial judges may be appointed to constitute an Arbitration Court, and an international police force may be organized to enforce their decisions. But is there a code of international laws and morals sufficient to cover all possible cases? Is there a general consensus of opinion on the standard by which claims of contending nations and races may be dealt with, without offending the sense of justice of any of the parties concerned?

Mr. Honda goes on to give concrete illustrations. He does not think, for example, that there is any accepted criterion for adjusting racial relations between nations, such as those involved in the questions of Japanese immigration and the school problem on the Pacific coast. Another problem which international arbitration must be prepared to meet is that of prescriptive rights of nations in each other's territory. For example, if America and the European powers obtained certain rights in Chinese territory, in consequence of an attempt to expel all foreign influence from Manchuria, would international arbitration restore to China all that had been wrested from her, or would prescriptive rights hold good with nations as well as with individuals, and if so, how should the length of time necessary to the vesting of such rights be determined? Mr. Honda has thus shown that international law is not yet developed to that point at which a solution of the problems of vital interest and national honor becomes possible. The urgent need, in fact, is not for more arbitration but for *more law*. Once we have the law it will not be difficult to administer it.

The remedy which Mr. Honda suggests is *a comprehensive codification of international law* by a committee of statesmen and scholars. There are some obvious difficulties in such a procedure. The weightiest of them is that the desired code cannot be created at one stroke, but must be a gradual evolution. At the same time, whenever a conference has met to formulate the rules of international law, though people may have scoffed at the supposed lack of any binding authority in their handiwork, international law has grown by leaps and bounds. That fact was

proved at the London Maritime Conference held last year, furnishing new definitions of contraband of war. Simply to mention this is to indicate a field for the most fruitful effort of future Hague conferences.

THE MAJESTY OF THE LAW

AS an illustration of some of the absurdities of confiding the administration of police courts to persons ignorant of the law, the following may be nothing more than a burlesque on conditions in England. Such a Justice of the Peace as Robinson, we fancy, would be more typical of the conditions of a couple of generations ago than of today. Yet, doubtless, some of the class survive. We copy from *Punch*:—

When Arthur John Robinson, Esquire, was made a borough J.P., and appointed to sit and dispense judgment in a court of summary jurisdiction, he determined to do the thing properly. So, before his first appearance on the bench, he attended all the accessible assize courts and studied with great attention the methods of the Judges of the High Court. Particularly was he impressed with their manner of sentencing convicted murderers, but not so impressed as to doubt that he could do it as well himself, when occasion arose.

The first matter with which he was called upon to deal was a charge of theft, a first offense and not a very ambitious one at that. Bearing himself with great dignity and decorum, he discussed the sentence with the Magistrates' Clerk, and suggested a longish term of penal servitude. But the Clerk, who knew not only his business but also his limitations, tactfully pointed out that the most that could be done for the prisoner by that court was three months' hard.

The next case was a summons against a father for not sending his child to school, for which offense Robinson, J.P., without consulting anybody, ordered him to be imprisoned in the second division for six months. But the Clerk arose again, and declared in a useful whisper that, though the father deserved every day of his sentence, the law did not permit of his being imprisoned at all. So the sinner was recalled and his sentence commuted by a lenient bench to a mere fine. "I do not know," said Robinson, J.P., to himself, "which I find more tiresome, the interference of magistrates' clerks or the incompetence of the law. Next time I *will* have my go."

The next item was a "drunk and disorderly," and the bench prepared itself to deal with this in its most judicial manner. This time, however, the Clerk was consulted first as to the maximum sentence; which done, the utmost silence was commanded throughout the court and sentence thus delivered:—"Prisoner at the bar, you have committed one of the most serious and most dastardly offenses a man may commit. You have been guilty of one of the worst crimes possible against your country, your borough, your family and yourself. Justice must exert, unremitting, its every effort to suppress you and your abandoned kind, that so the state may be rid of its most dangerous enemy. I sentence you to twenty-one days' imprisonment with hard labor; and may the Lord have mercy on your soul!"

MORE EVIDENCE REQUIRED.

SOLICITOR-General Wooten of the Albany (Ga.) Circuit was vigorously prosecuting a liquor case.

Two quarts of good rye whiskey were introduced in evidence and as such were sent to the jury room for their consideration. After they had retired and remained in their room some time the attention of the court was directed that way by merry laughter and loud guffaws. Some two hours had elapsed and no verdict. The judge instructed the sheriff to see if they could agree.

Their answer was that "The Solicitor-General would have to produce a little more of the same kind of evidence."

SAFELY ANCHORED

A FARMER in Disbrow, Me., recently discovered that a notorious character had hanged himself to a tree by the roadside and hurried to town to inform the authorities.

"Were you not afraid when you saw him hanging there?" asked the sheriff.

"Oh, no," said the old farmer, "I saw that he was safely hitched."

COULDN'T JUST TELL

THE prisoner at the bar was charged with assault and battery in common with two others who had been the chief offenders.

One of the witnesses, an Irishman, had given a rather incoherent account of what had transpired and in an endeavor to straighten him out the judge leaned over his desk and said: "Now, Patrick, tell me just what really did happen during that fight."

Pat hesitated a moment, cleared his throat and then whispering confidentially to the judge, said: "Wull, yer Honor, Oi couldn't raaly tell yer mutch thot raaly happened, becuz, yer Honor, yer see Oi wuz undernaath ther most uv ther toime."

A BOMBARDMENT

Dedicated "with (or without) respect" to Gatling Gunn, K.C., P. Rolix, Esq., and others.

"If yr Hon'r pleases, would yr Hon'r allow me to suggest to m' learn'd friend a few authorities on the point?"

I DREAMED that (sometimes) awful bore, th' Amicus Curiæ
Arose before the Court in Banc, composed of Judges three.
Regardless of the Bench he leaned and plucked me by the gown,
And in a raucous whisper, which I *Curteis* tried to drown,
Forced me to stop my argument and listen while he wheezed.
(The Bench, who'd given their consent, looked anything but pleased.)
He told us with what old Reports my argument to clinch,
From *Adam* down to *Carrington*, with *Jacob*, *Finch*, and *Winch*,
And *Godbolt*, *Dow*, and *Colles*, *Bligh*, and *Wolferstan* & *Dew*,
A *Shower* of Cases all *Select*, *Choyce*, *Modern*, *Strange* and *New*
Then *Notes of Cases*, *Moseley*, *Cruise*,—we saw their Honors *Stair*—
Bingham, *Barnardiston* and *Scott* and *Fountainhall* were there.
From *East* to *West* his fancy ranged, from *Littleton* to *Cooke*,
From *Forest*, *Peake*, to *Bunbury*, to *Eden*, *Lewin*, *Brook*.
I thought it *Best* (& *Smith* agreed) to let him ramble on
To *Hall* & *Twell's*, to *Lloyd* & *Goold*, *Benloe* & *Dalison*
(You can't e*Luder* man like that, he'll *Rolle* off what *he* thinks
And *Cary* on with *Bell*, *Bellewe*, *Kay*, *Swanston*, *Vesey*, *Spinks*).
He *Burrowed* in the *Year Books* next, *Welsh*, *Raymond*, and *Carthew*,
And called in *Jebb* & *Bourke* to aid in driving home his view.
Campbell and *Goldesboro'*, *Espinasse* came tripping from his tongue
Lutwyche and *Gow*, *McClelland*, *Rose*, and *Deacon*, *Vaughan*, and *Younge*,
Deane, *Scott*, *Forbes*, *Bruce*, *Kames*, *Broun*, and *Hume*, *Syme*, *Hailes*, *White*, *Durie*, *Shaw*
Were quoted to throw light upon that *Harcase* of the Law.
"What *Price*?" said I. "A little *Knapp*, I'm *Haggard* and in *Payne*."
He hurried on, *Moore*, *Keen*, with *Lofft*, and *Montagu* and *Lane*.
Then *Leach*, and *Leigh*, and *Buck* and *Hare*, *Peere-Williams*, *Ridgway*, *Lee*—
No *Freeman* I, he simply hurled that catalogue at me.
Then *Pollexfen*, and *Siderfin*, and *Comberbach*, and *Latch*,
Ventris *Fonblanque*, and *Cunningham* he gave me in a batch.
"The *Dickens* ! " Smith said, "I'm done *Brown*" (The Bench had long since gone);
But still he added to the list with *Gale* & *Davison*,
Meeson & *Welsby*, *Bacon*, *Jones*, and *Plowden*, *Menzies*, *Hale*,
Moody & *Malkin*, *Dyer*, *Croke*, *McQueen*, *De Gex* & *Smale*.
He gave us *Ley*, and *Bulstrode*, too. Then *Ambler*, *Holt* and *Coke*
(I really couldn't keep awake) I heard when I awoke.
What more he cited, what Reports he'd added while I slept
I know not (and he's talking still). Across the Court I crept.
We two alone remained. 'Twas dark; I sneaked away at last,
And found the Long Vacation on—a week of which had passed.

F. R. BARLEE.

Perth, Western Australia.

USELESS BUT ENTERTAINING

Ascum—"I see there's some talk upon the question of abolishing capital punishment. Would you vote to abolish it?"

Logic—"No, sir; capital punishment was good enough for my ancestors, and it's good enough for me." —*Presbyterian Standard*

———

Old Lawyer—Young man, it strikes me that you are very much attached to Miss Plainwell.

Young Attorney—She owns three hundred acres of land in Kansas.

Old Lawyer—What has that got to do with the case?

Young Attorney—Why, isn't that sufficient grounds for an attachment?

—*Chicago News.*

———

A group of Scotch lawyers were met convivially at an Ayrshire inn one cold evening last December. The conversation turned upon pronunciations.

"Now, I," said one of the barristers, "always say *neether*, while John, here, says *nyether*. What do you say, Sandy?"

The hot tipple had made Sandy doze, and at the sudden question he aroused and replied, "I? Oh, I say *whuskey*."

—*Lippincott's.*

Two lawyers before a probate judge recently got into a wrangle. At last one of the disputants, losing control over his emotions, exclaimed to his opponent:—

"Sir, you are, I think, the biggest ass I ever had the misfortune to set eyes on."

"Order! Order!" said the judge gravely. "You seem to forget that I am in the room."

———

Apropos of divorce, Judge Simon L. Hughes, of Denver, said at a recent dinner:—

"A marriage likely to end in divorce was celebrated last week in Circleville. A minister told me about it.

"An oldish man—seventy or so—was led rather unwillingly to the altar by a widow of about forty-five.

"He was a slow-witted old fellow, and the minister couldn't get him to repeat the responses properly. Finally in despair, the minister said:—

"'Look here, my friend. I really can't marry you unless you do what you are told.'

"But the aged bridegroom still remained stupid and silent, and the bride, losing all patience with him, shook him roughly by the arm and hissed:—

"'Go on, you old fool. Say it after him just as if you were mocking him!'"

—*Boston Traveler.*

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

The Legal World

Important Litigation

Following the death of J. W. Van Cleave of the Bucks Stove & Range Company, who had so persistently fought the "closed shop" policy of the American Federation of Labor, and had carried on litigation resulting finally in the imposition of sentence of imprisonment on Messrs. Gompers, Morrison and Mitchell by the Court of Appeals of the District of Columbia, his company was put on the market and purchased by a capitalist who decided to adjust the dispute with the labor union, and secured an agreement through which the differences between the two conflicting interests appear to have been patched up. Neither Mr. Van Cleave's death, however, nor the surrender of the Bucks Stove & Range Company, can affect the contempt proceedings, which will be carried to whatever conclusion the dignity of the courts and the requirements of justice may dictate.

———

Important Legislation

The amendments to the national bankruptcy act are generally considered to reflect credit

on the skill of those who drafted the Sherley bill enacted at the last session of Congress. The objects of the bill are three: first, to make the law more just to debtor and to creditor; second, to reconcile certain conflicting decisions of the federal courts of different districts; and, third, to correct certain faults in the administrative features of the present act.

The new Mann-Elkins railroad law enacted by Congress has now become effective. The law establishes a Court of Commerce, and places new duties on the shoulders of the Interstate Commerce Commission, including that of suspending for four months, or even ten, questionable rate increases proposed by the railroad companies, on which is placed the burden of proof of the reasonableness of such increases. Hereafter as common carriers under the law, the telegraph and telephone companies will have to file reports with the Commission concerning their business as the railroads now do.

Preliminary steps are being taken by the Department of Justice to put into effect the law enacted at the last session of Congress for paroling federal prisoners, thus establishing a practice adopted by thirty of the states. The first step has been the establishment of rules for the procedure of the board of parole at each penitentiary. These boards are to be subject to the approval of the Attorney-General. Each board of parole is to be composed of the superintendent of prisons of the Department of Justice, the United States district judge for and a citizen living in the district in which the penitentiary is located. Federal prisoners eligible for parole must be serving a term longer than a year, must have served one-third of the period of sentence, must not have been convicted of murder, nor have served a previous sentence in any penitentiary. Federal prisoners in state prisons may apply to any board of any federal prison. The board is given authority to revoke a parole agreement at any time in its discretion, or to modify it in any way.

Ohio has passed the most advanced employers' liability law of any state of the Union. It provides that the term "employers' negligence" is to be so interpreted as to cover the negligence of his agents, that is, of any person working for him as overseer or director of a department or having charge of repairs, inspection or the transmission of signals. Negligence in the employer shall be assumed to exist, without further proof, if the machinery or plant causing the injury shall be shown to have been in a defective condition which could have been discovered and prevented by the exercise of ordinary care. Fellow-servant's negligence shall not be held responsible where the injury was in any way contributed to by unsafe machinery or plant, by a negligent agent of the employer, by a careless act of a fellow-servant done in obedience to such agent, or by lack of necessary and sufficient rules for safety. Nor can the injured employee be deemed to have met with his injury in consequence of the inevitable risks of his work, if the employer can be shown to have neglected any of the safeguards prescribed by law.

Under the chairmanship of Col. Henry L. Stone of Louisville, as general counsel for the Louisville & Nashville, a conference of railway attorneys representing the great railway systems of the country was held at Portsmouth, N. H., during the first week of August, to discuss the meaning of the provisions of the Mann-Elkins railroad bill amending the interstate commerce law. The outcome of the conference has been satisfactory, as it has served the same purpose as that of the Atlantic City conference in 1906, namely, to bring about common acceptance of the meaning of the more or less ambiguous provisions, and to stimulate a spirit of co-operation with the Interstate Commerce Commission in administering the new law. The most important section discussed was the "long and short haul" clause, to the consideration of which two days were given. The conference seems to have reached the conclusion that this amendment is very far-reaching, and may prove to be more radical than the public supposes. The new law goes much further than the old law, in prohibiting a greater charge for a shorter than for a longer distance without the consent of the Commission; for the old law merely forbade a greater rate for a shorter haul "under substantially similar conditions," the result of which was to continue the old system in force. There was some discussion whether the Commission could constitutionally have conferred on it the discretion to determine whether high short-haul rates should be permitted, but the opinion was expressed that the public would be likely to test the question of the lawfulness of this supposed delegation of legislative power sooner than the railroads. Many counsel were evidently of the opinion that the new act takes away all incentive for the railroads to reduce their rates, on account of the difficulty of increasing them again, and that the public is likely to be the first to demand the modification of the new law on this score. Aside from the short-haul clause, technical questions regarding the filing of tariffs and general administrative matters received much attention. Confidence was freely expressed in the fairness and moderation of the Interstate Commerce Commission in construing the new law.

Personal

Sanford H. E. Freund, for several years a member of the law faculty of Boston University, has resigned, to become eastern counsel of the Chicago, Rock Island & Pacific Railroad, with his office in New York.

Prof. Henry M. Bates, who recently resigned a professorship of law in the University of Michigan, intending to enter a law firm in Detroit, has been appointed dean of the department of law, succeeding former Dean Hutchins.

Prof. Walter Thomas Dunmore has been appointed dean of the law school of Western Reserve University, succeeding Prof. Evan Henry Hopkins, who resigned to devote his entire time to the practice of law. Beginning with the academic year 1911–1912, only graduates of colleges of approved standing may be admitted as regular students in the law school.

Dr. Harry Burns Hutchins, after serving for fifteen years as dean of the law department of the University of Michigan, has been chosen president of the University of Michigan. Dr. Hutchins was born in New Hampshire in 1847. In 1884 he was elected Jay professor of law in the University of Michigan. He organized and built up the law department of Cornell University, and returned to the University of Michigan in 1895 as dean of the law school.

Judge George W. Wheeler of the Supreme Court of Errors of Connecticut was tendered a dinner by the Folland County bar at Rockville, Ct., in July. Speaking in glowing terms of the splendid traditions of the State Supreme Court, he expressed his emphatic dissent from the "sporting theory of justice," according to which the judge is a mere umpire of the game, to see the legal duel fought out according to approved rules and to interfere only when the game is not played by rule.

John G. Carlisle, who was Secretary of the Treasury under Cleveland and one of the most brilliant public men of his generation, died in New York City July 31, in his seventy-fifth year. As Speaker of Congress, member of the Cabinet, and United States Senator, he was equally great in each office. Born in Campbell (now Kenton) county, Ky., September, 1835, the son of Lilbon H. and Mary A. Carlisle, he was educated in common schools, and began to earn his living on his parents' farm at the age of ten. In 1855 he sought position as teacher in Covington, Ky. In 1856 he became a law student in office of John W. Stevenson, afterwards Governor and United States Senator. He married Miss Mary Jane Goodson in 1857. In 1859 he was elected to the Kentucky legislature, opposing the secession idea, and in 1866 to the Kentucky senate. He was chosen lieutenant-governor in 1871, and member of Congress in 1876. He served as Speaker of the House, 1883–1889; United States Senator, 1890–1893; and Secretary of Treasury under President Cleveland, 1893–1897. In 1897 he resigned to engage in business in New York City, associating with the firm of Curtis, Mallet, Prevost & Colt.

Bar Associations

North Dakota.—The North Dakota Bar Association will hold its annual meeting November 10 and 11, instead of in September, as was first planned. Dean Pattee, of the law department of the University of Minnesota, is to be one of the principal speakers.

Alabama.—The thirty-third annual meeting of the Alabama State Bar Association was held at Mobile, Ala., July 13–14. Col. Emmett O'Neal, Democratic nominee for Governor of Alabama, made the president's address. Hon. Peter W. Meldrim of Savannah, Ga., made the annual address, on "Aaron Burr." Papers were offered by Hon. Sam Will John on "The Jury Law," by Hon. John M. Chilton on "Estoppels in Actions of Ejectment," by McLane Tilton, Jr., on "The Law, Lawyers and Law-making to the Business Man," by C. B. Verner on "The Administration of the Criminal Law of Alabama," and by Thomas M. Stevens on "The Alabama Supreme Court Is Overworked and Should Have Relief."

Michigan.—The annual meeting of the Michigan State Bar Association was held at Marquette, Mich., July 26–27. It was decided to recommend to the legislature the enactment of an employers' compulsory liability law. H. M. Oren of Sault Ste. Marie offered a paper on "Some Recent 'Soo' Legislation," giving a review of the litigation regarding the water-power canal at the Soo and the riparian rights in St. Mary's River. Burritt Hamilton of Battle Creek spoke on "Corporation Legislation" and called attention to numerous defects in the present laws. Officers were elected as follows: President, C. W. Perry, Clare; vice-president, A. B. Eldredge, Marquette; secretary, William J. Landman, Grand Rapids; treasurer, William E. Brown, Lapeer.

Oklahoma.—For the annual meeting of the Oklahoma State Bar Association, to be held in Oklahoma City next December, a program has been arranged which will include the following papers: "The Employer's Liability to the Employee," Duke Stone, Ada; "Progress of the Legal Profession," M. D. Owen, Chandler; "Problems of Probate Practice in Eastern Oklahoma," H. A. Ledbetter, Ardmore; "Commission Form of Government for Municipalities," J. H. Everest, Oklahoma City; "Harmless Error," Judge Stillwell H. Russell, Ardmore; "The Corporation Commission and Its Powers," Clifford L. Jackson, Muskogee; "Intra-state Commerce as Affected by Interstate Commerce," Homer B. Low, El Reno; "Juvenile Courts and Their Influence," Judge J. T. Dickerson, Chickasha.

Kentucky.—The president of the Kentucky Bar Association, Hon. Charles W. Metcalfe of Pineville, Ky., delivered the opening address at its annual meeting, which was held

at Middlesboro July 12–14, and other papers read were the following: "Distinguished Jurists the State Has Produced," by Hon. W. A. Berry of Paducah; "The Causes of Popular Dissatisfaction with the Administration of Justice in Criminal Cases and Remedies Therefor," by Judge H. C. Faulkner of Williamsburg; "The Treatment of Criminals," by Eli H. Brown of Frankfort, chairman of the penitentiary commissioners; annual address, on "Our Outlying Possessions," by Hon. Reuben S. Silliman of New York; "Court Costs," by Samuel L. Wilson of Lexington; and "The Jury System and the Jury Panel," by Judge J. M. Benton of Winchester. The Mann bill, increasing the salaries of federal judges, was indorsed.

Washington.—Condemning the initiative and referendum, the power of recall, the insurgency movement in the Republican ranks, the hasty methods of making and unmaking laws in the State of Washington, and declaring that legislation is rapidly approaching socialism, Hon. C. C. Gose of Walla Walla, president of the association, made a remarkable address at the annual meeting of the Washington State Bar Association, held at Bellingham, Wash., July 28–30. The special feature of the program was a paper by United States Senator Heyburn of Idaho on "The Unconstitutionality of the Conservation Scheme as It is Generally Understood." Other papers were: "Federal and State Control of Waters, including Fisheries," by C. W. Dorr, Seattle; "Admiralty Jurisdiction," by Ira Bronson, Seattle; "Some Reasons for the Failure of City Government," by George A. Lee, Spokane.

Indiana.—At the fourteenth annual meeting of the Indiana State Bar Association, held at Indianapolis July 6–7, Frederic J. Stimson of Boston made the annual address on "The Test of Legality in Combinations," the theme of which was that the laws dealing with combinations or great corporations will be the most important branch of the law for the next generation to come. Governor Marshall talked about "The Old-Fashioned Lawyer," and papers were offered by George H. Gifford of Tipton on "Crude Legislation," George A. Cunningham of Evansville on "The Every-day Lawyer," Conrad Wolf of Kokomo on "Indiana Practice," and Charles W. Smith of Indianapolis on "Current Criticisms of Courts and Lawyers." The following officers were elected: President, William A. Ketcham, Indianapolis; vice-president, Thomas E. Davidson, Greensburg; secretary, George H. Batchelor, Indianapolis; treasurer, Frank E. Gavin, Indianapolis.

Texas.—Col. George R. Peck of Chicago, general counsel of the Chicago, Milwaukee & St. Paul Railroad, and former president of the American Bar Association, delivered the annual address at the annual meeting of the Texas State Bar Association, held at San Angelo, Tex., July 5–7. His subject was "The Growth of Institutional Government," in which he outlined the growth of the powers of the federal government. In his annual address President W. H. Burges criticised the legislature for the steadily increasing number of its enactments. Hon. Allen D. Sandford of Waco delivered an address on "The Lawyer in History," Hon. Louis M. Dabney of Dallas read a paper on "Pleading and Practice in the Happy Land of Canaan," and Hon. Charles W. Ogden of San Antonio discussed "The Honorarium." The following officers were elected: President, Hon. Hiram Glass of Texarkana; vice-president, Hon. R. E. L. Saner of Dallas; treasurer, Hon. William D. Williams of Fort Worth (re-elected); secretary, Joe Bob Cave of Austin (re-elected).

Ohio.—Senator Bailey of Texas was to have delivered the annual address before the Ohio State Bar Association, but was unable to be present. At the thirty-first annual meeting, held at Cedar Point July 6–8, Hon. James R. Garfield was a prominent figure, offering an informal report on behalf of the committee appointed a year ago to investigate workmen's compensation. President Jerome B. Burrows of Painesville delivered an able address on "Current Legislation," in which, advocating reforms in procedure, he said, "the bar is too conservative for the business interests of the country, the latter having advanced fifty years beyond the former." There was a discussion of the subject, "Modern Legislation, Its Volume and Methods." The following officers were elected: President, Judge Allen Andrews, Hamilton; secretary, Gilbert H. Stewart, Jr., Columbus; treasurer, C. R. Gilmore, Dayton; vice-presidents, William Dickinson, T. N. Baldwin, H. T. Matcher, John H. Price, Don Sowers, Edwin Mansfield, T. A. Jones, P. A. Hollingsworth, Atlee Pomerene, W. R. Harrington.

Missouri.—The Missouri Bar Association held its twenty-eighth annual meeting at Excelsior Springs, Mo., July 27–28. The president's address was delivered by Hon. J. H. Halliburton of Carthage. United States Senator Charles J. Hughes of Colorado, who was to give the annual address, was prevented by illness from attending. Some discussion was given to the subjects of procedural reform and expert testimony. Papers presented included the following: "The Income Tax Amendment," by Hon. Henry Wade Rogers, dean of Yale Law School; "Some Reasons for the Growing Disrespect for the Law," by Hon. Emmanuel M. Grossman of St. Louis; "Supervision of Legislation," by Hon. Homer Hall of Trenton, Mo.; "Combinations in Restraint of Trade and Commerce," by Hon. Elliot W. Major, attorney-general of Missouri; "Some Defects in Our Criminal Code and How to Remedy Them," by Hon. North T. Gentry of Columbia, Mo. J. J. Vineyard of Kansas City is the new president and Emmanuel M. Grossman of St. Louis treasurer. Lee Montgomery of

Sedalia, who has been secretary for several years, was re-elected.

Minnesota.—The Minnesota State Bar Association, at its annual meeting held at St. Paul August 3–5, went on record in favor of a larger State Supreme Court membership and separate elections for judicial officers, but the Association failed to indorse the proposed increase of pay for federal judges. Congressman John S. Esch of Wisconsin spoke on "Federal Control of Stock and Bond Issues of Interstate Carriers." Mr. Esch suggested as a remedy for stock-watering Congressional enactments forbidding any common carrier to issue stock, bonds or notes payable more than one year from date of issue, except when necessary for the acquisition of property, extension or improvement of its lines and facilities, or the improvement or maintenance of its service. The following officers were elected: President, James D. Shearer, Minneapolis; vice-president, C. A. Severance, St. Paul; treasurer, Royal A. Stone, St. Paul, re-elected; secretary, Charles Farnham, St. Paul, re-elected.

West Virginia.—The twenty-sixth annual meeting of the West Virginia Bar Association was held July 14 and 15 at White Sulphur Springs. The retiring president, William E. Haymond of Sutton, spoke on "Our Laws of Eminent Domain," and addresses were delivered by ex-Governor George Wesley Atkinson on "The United States Court of Claims," by Thomas H. Cornett on "Our Law of Administration," by Luther C. Anderson on "Should West Virginia have a Workmen's Compensation Law?" by Judge J. M. Benton on "The Jury System and the Jury Panel," and by Hon. S. M. Wilson on "Court Costs." The association committed itself in favor of two proposed constitutional amendments, one increasing the Supreme Court of Appeals from a membership of five to one of seven, the other allowing women to be appointed as notaries-public. Officers as follows were elected for the year: President, W. W. Hughes; vice-presidents, Judge Willis of New Martinsville, Senator Fred O. Blue of Philippi, John A. Preston of Ronceverte, Walter Pendleton of Spencer, Hon. F. B. Enslow of Huntington; secretary, Charles McCamic of Moundsville; treasurer, C. A. Kreps of Parkersburg.

Virginia and Maryland.—The Viriginia Bar Association and the Maryland Bar Association met jointly at Hot Springs, Va., July 26–28. The chief feature of the meeting was the annual address, which was delivered by Mr. Justice Lurton of the United States Supreme Court, and dealt with the subject, "What Shall it be,—a Government of Law or a Government of Man?" protesting in no measured terms against the "dangerous notion" that a constitution or statute is to be treated by either the executive or the judiciary as if it were a "nose of wax," to be wisted and molded according to the fancy of the occasion. The Mann bill, increasing the pay of federal judges, was indorsed by the Virginia Association, which also adopted the American Bar Association Canons of Ethics. President R. Walton Moore of the Virginia Association delivered an address on "Grotius, and the Movement for International Peace." "Disarmament and peaceful armament," said Mr. Moore, "were the principles of Grotius, which are becoming stronger as time goes on." Former Governor A. J. Montague of Virginia discussed the question, "How Far the United States Supreme Court May Be Taken as a Model for an International Court of Arbitral Justice," and George Whitelock of Baltimore took for his subject, "The Federal Law of Damages for Death by Negligence at Sea." Other papers were offered by Hon. Alfred P. Thorn, general counsel of the Southern Railway, and by President Edwin A. Alderman of the University of Virginia, among others. Henry St. George Tucker acted as toastmaster at the joint banquet. The following officers were elected: For the Virginia Bar Association: President, Judge George L. Christian, Richmond; vice-presidents, J. S. Barbour, J. Norment Powell, Joseph Stebbins, Jr., Walter S. Taylor and R. Cray Williams; secretary and treasurer, James B. Minor, Richmond. For the Maryland Bar Association: President, W. L. Marburg, Baltimore.

Miscellaneous

The fourth International Conference of American Republics was formally opened at Buenos Ayres July 12 for a session of five or six weeks. The conference met in order to adopt a series of conventions and resolutions framed for the actual good of the various states on the American continent, subject to ratification by the governments concerned.

The suggestions of W. W. Davies of Louisville, as to the best means of stopping the ambulance-chasing evil, should interest the profession. In a report to the Kentucky State Bar Association at its annual meeting in July, he said: "The Kentucky State Bar Association ought to wake up and earnestly agitate the passage of a law by the legislature making all contracts for contingent fees, in damage cases, void, where the attorney has solicited the case and obtained the contract for contingent fees upon such solicitation. The right should be given to the damaged party—the plaintiff—to repudiate the contract at any time. Perhaps such right exists now under the law relative to maintenance and champerty. But a strong, clear statute upon the subject will greatly assist. . . . Again I suggest that there should be a provision of law, operating in conjunction with the above provision, requiring the attorney for plaintiff in a damage action to attach to his petition an affidavit to the effect that the case was in no way solicited by him or any agent or 'runner'

for him. Then let the attorney be subject to the criminal law for false swearing in such affidavit, and let him be disbarred by the single fact of the finding of a jury against him."

The sixteenth annual convention of the Commercial Law League of America was held at Narragansett Pier July 18 to 23. Hon. Amasa M. Eaton of Providence, R. I., welcomed the members in a scholarly address. The annual address of President Henry Deutsch of Minneapolis was most admirable. As a result of the work of President Deutsch through the year, a more friendly relation has been brought about with the Credit Men's Association. Their president, F. H. McAdow, of Chicago delivered an address on the second day, on "The Business Lawyer and the Credit Man." Hon. C. M. Hough, Judge of the U. S. District Court, New York City, delivered an illuminating address on "Bankruptcy in Relation to Commerce," in which he declared the national Bankruptcy Act a check on crazy credit and bald fraud, and described the relation of bankruptcy to commerce as "that of a safety-valve as well as a waste pipe." Addresses were made by Harold Remington, author of "Remington on Bankruptcy," by Hon. Nathan Littlefield, one of the referees for Rhode Island, by Abram Elkus, chairman of the special committee on bankruptcy, by Mr. Edward B. Page of New York and by Henry Rosenberg, manager of the National Association of Clothiers. Franklin A. Wagner of New York, in a paper on "A Draft of a Uniform Corporation Law," expressed his belief that "the time has come when business corporations shall stand out in the open and fight for their rights. When the people have been educated to understand the injurious effect to business interests and to themselves of baiting and harassing corporations, whether good or bad, conservative constructive legislation will become the rule and not the exception." H. T. Newcomb of Washington, D. C., expressed the opinion that certain sections of the latest railroad bill not only impose on the Interstate Commerce Commission what its former chairman, the eminent Judge Cooley, regarded as "superhuman" duties, but that these duties manifestly partake of the character of legislation. A paper by N. W. Littlefield of Providence, on "Commerce and the Bankruptcy Act" was read by Chester W. Barrows, his associate, and "Corporations as Commercial Collection Agencies" was the subject of an address by Frederick H. Denman of New York. The report of the committee on uniform rates was unanimously adopted by the convention, and the schedule of fees suggested by them approved as the minimum scale. The secretary reported the total membership of the League to be 2,300, an increase of 275 over last year. The following officers were elected for the coming year: President, A. V. Cannon, of White, Johnson & Cannon, Cleveland, Ohio; first vice-president, Joseph Madden, Keene, N. H.; second vice-president, E. E. Donnelly, Bloomington, Ill.; third vice-president, Henry C. Schaertzer, San Francisco, Cal.; treasurer, W. O. Hart, New Orleans, La. (re-elected); recording secretary, Henry W. Backus, Cincinnati.

Necrology—The Bench

Allison, John P.—At Sioux City, Ia., July 14, aged 79. Member of Harvard class of '54.

Almy, Bradford.—At Ithaca, N. Y., July 4, aged 65. County judge for twelve years; mayor of Ithaca for two years.

Barker, Albert N.—At Spencerport, N. Y., July 30, aged 71. Justice of the peace for twenty-four years.

Biddle, Craig.—At Andalusia, Pa., July 26, aged 87. Former judge of the Court of Common Pleas of Philadelphia; served in the state legislature in 1849; heard the noted case of Senator Quay on the charge of defrauding the state.

Burns, John M.—At Ashland, Ky., July 20, aged 86. Former circuit judge; city solicitor of Ashland; known as an eloquent orator throughout Kentucky, Ohio and West Virginia.

Cook, John M.—At Steubenville, O., July 10, aged 67. One of the most eminent lawyers of the eastern Ohio bar; former prosecuting attorney; judge of the Circuit Court of the eastern Ohio district for twenty years; a man of excellent character and high principles.

Darling, J. R.—At Groton, Vt., July 15, aged 87. For thirty-eight years town clerk of Groton; served in Vermont legislature; state senator in 1880; assistant judge of Caledonia County.

Desnoyers.—At Montreal, Can., July 4, aged 75. For many years member of the license commission; formerly judge of the Magistrate's Court, and judge of the Sessions in Montreal for thirty-eight years.

Garoutte, Charles H.—At Berkeley, Cal., July 17, aged 56. One of the brightest legal lights of the state; district attorney at the age of twenty-three; in 1885 elected to the Superior Court of California; in 1890 elected to the Supreme Court.

Gregory, George F.—At St. John, N. B., July 23, aged 71. Former judge of the Supreme Court of New Brunswick.

Hillyer, C. V.—At Washington, D. C., July 15. Prominent in Fernandina, Fla.; retired from the bench to enter insurance business.

Hoke, Joseph T. At Kingwood, W. Va., July 26, aged 76. Served in the state senate; congressman for one term; judge of the thirteenth judicial district; United States consul at Windsor, N. S.

Lake, George B.—At Omaha, July 29, aged 64. Practised in the Ohio Supreme Court in 1851; for six years speaker of the

House in the territorial legislature of Nebraska; one of the committee to draft the first state constitution under which Nebraska was admitted to the Union; in 1866 elected Associate Justice of the Supreme Court, serving for seventeen years.

Phelps, Lester D.—At Rockville, Ct., July 3, aged 72. Probate judge for the district of Ellington, had served as associate judge of the city court, and in many other offices.

Roberts, D. M.—At Atlanta, Ga., July 28. Former circuit judge and one of the best known lawyers in Georgia.

Robertson, P. C.—At Globe, Ariz., July 9. Sent to California legislature; took prominent part in drafting of the second constitution for that state; probate judge in Globe, Ariz., for four terms.

Sebring, J. C.—At Boise City, Ida., July 16. Probate judge of Canyon county.

Stone, Charles Francis.—At Laconia, N. H., July 25, aged 66. Judge of the New Hampshire Superior Court; served in the legislature; chairman of the Democratic State Committee; appointed naval officer of the port of Boston by President Cleveland, serving four years.

Vail, James Howell.—At Muscatine, Ia., July 19, aged 82. For several years member of the city council of St. Louis; assistant circuit attorney, judge of the fifteenth judicial district of Missouri and judge of the Court of Appeals; for years district judge in North Dakota.

Necrology—The Bar

Bain, James H.—At Glens Falls, N. Y., July 16, aged 59. Prominent member of Warren county bar.

Bristol, Louis H.—At New Haven, Ct., July 20, aged 71. One of the oldest and best known lawyers in New Haven; was graduated from Yale in 1859.

Carlisle, John G.—At New York City, July 31, aged 75.

Cox, James Richard.—At Auburn, N. Y., aged 90. Former law partner of Secretary Seward; famous as a lawyer in Louisiana and Texas; an Abolitionist and knew Lincoln.

Croze, Lawrence L.—At Houghton, Mich., July 4, aged 37. Justice of the peace of Portage township.

Davies, William G.—Tuxedo, N. Y., July 26, aged 68. Prominent New York lawyer.

Dowley, Hugh.—At Sidney, O., July 18, aged 55. Former county clerk of the Common Pleas court.

East, William H.—At Bloomington, Ind., July 10. Won local fame as counsel for the defense in the Chelsey Chambers Monon Express robbery case and wrote a novel based on the crime.

Hardy, Hon. Henry.—At Defiance, Ohio, July 9, aged 83. Served four years in the legislature; prosecuting attorney; recorder of Defiance county for six years.

Jones, Alfred Mills.—At Waukesha, Wis., aged 73. Popularly known as "Long" Jones; state chairman of the Republican party in Illinois for twelve years; member of the state senate in Wisconsin; made collector of internal revenue by President Hayes; United States marshal.

Johnson, William F.—At Philadelphia, Pa., July 26, aged 73. Philadelphia's oldest active lawyer, highly esteemed by his brethren of the bar.

Moore, Joseph C.—At New York City, July 26, aged 32. Former legislator of Rhode Island; on his admission to the bar before he was twenty-one was the youngest lawyer the state had ever had.

Morse, Col. Daniel S.—At Burlington, Vt., July 8, aged 77. Educated at Dartmouth; personal friend of Lincoln at Springfield, Ill., and employed by him in drawing briefs.

Muzzey, Col. David P.—At Cambridge, Mass., August 3, aged 72. Lawyer and former Unitarian clergyman.

Neill, Alexander, Sr.—At Hagerstown, Md., July 14, aged 66. Of prominent old Maryland family; oldest member of Washington County bar; elected to Maryland legislature in 1869; auditor of the county court.

Ridgeway, James W.—At Paris, Me., July 27. Formerly district attorney of Kings County, N. Y.; defended "Al" Adams, the noted "policy king."

Rodman, Alfred.—At Dedham, Mass., July 5, aged 61. Vice-president of the Bay State Trust Company; admitted to bar but never practised.

Sabine, Hylas.—At Cambridge, Mass., July 25, aged 81. Former state senator, state auditor, and railroad commissioner of Ohio; one of the first men in the country to enforce state supervision of railroads and compulsory railroad returns with regard to public safety and service.

Smith, Alexis C.—At Rochester, N. Y., aged 58. Former commander of the New York Twenty-third Regiment, National Guard.

Tirrell, Charles Q.—At Natick, Mass., July 31, aged 65. Former representative in Massachusetts legislature; in 1880 senator from fourth Middlesex district; in 1890 entered Congress; close friend of President Taft.

Venable, Major Richard Morton.—At Baltimore, Md., July 10, aged 71.

THE LATE LLOYD WHEATON BOWERS

SOLICITOR-GENERAL OF THE UNITED STATES

The Green Bag

Number XXII October, 1910 Number 10

The Late Solicitor-General Bowers

THE bar of the country has lost one of its ablest leaders, and the Supreme Court has been deprived of the services of a judge who would certainly have been eventually appointed to its bench, by the death of Hon. Lloyd Wheaton Bowers, Solicitor-General of the United States, September 9 at a Boston hotel at which he had stopped *en route* from Gloucester, Mass.

President Taft has said of his college friend:—

> His record in the Solicitor-General's office is one that has rarely, if ever, been equaled. He was one of the first half dozen lawyers of the highest ability in this country. It was my purpose to have appointed him a Justice of the Supreme Court if opportunity offered.

Mr. Bowers came to Washington from Chicago. There he was the general counsel of the Chicago & Northwestern Railroad, receiving a salary in excess of $30,000 a year, which he surrendered for $7,000 a year. The President has on sundry occasions remarked that he considered one of the most important things done during the first year of his administration to have been to induce Mr. Bowers to take the office of Solicitor-General, and that Mr. Bowers had the most orderly legal mind of any man he had ever known.

Mr. Bowers attracted national attention last March when he defended the constitutionality of the corporation tax provisions of the Payne-Aldrich tariff act before the Supreme Court. His death will disturb the calendar of the Supreme Court, at least at the beginning of the term. Several of the cases on which Mr. Bowers was working were set for argument October 11, or as soon thereafter as they could be reached.

Mr. Bowers was fifty-one years of age and was in the prime of his career. He was a native of Springfield, Mass., and a descendant of Jonathan Edwards, the theologian. He was graduated from Yale University in 1879 and from Columbia Law School in 1882. He began his professional career in New York City in the office of Chamberlain, Carter & Hornblower, and was subsequently a member of that firm. Removing to Minnesota he formed a partnership with ex-Chief Justice Wilson of that state and practised there until 1893, when he removed to Chicago.

Mr. Bowers was twice married. On Sept. 7, 1887, he married Miss Louise B. Wilson of Winona, Minn., who died ten years later. In August, 1906, he married Miss Charlotte Josephine Lewis, who survives him.

In bearing and manner Mr. Bowers was a cultivated gentleman of the Taft type. His tastes were intellectual, his industry to a peculiar degree unflagging, and his life earnest. Having had twenty-five years' legal experience in Minnesota and Illinois, he was essentially a Western man.

The Classification of Law

By James DeWitt Andrews

"Far the most important, and pretty nearly the whole meaning of every new effort of legal thought, is to make these [rules of law] more precise and to generalize them into a thoroughly connected system. . . . The end of all Classification should be to make the law knowable."
—Holmes.

"The first great need is a system of law, expressed in clear, comprehensible language. This is a code. . . . Of course it is assumed that the code professes to rest on some basis of theoretical Classification of topics at present in use among text-writers." —Amos.

[*Foreword:* In order to avoid misapprehension, it is proper to state that Professor Kirchwey and Mr. Alexander, with whom I am associated in the *Corpus Juris* movement, are not responsible for the views here expressed.]

SCIENCE appeals to common sense for its adoption. Though there are many who have no patience with the name science and love to contrast *theoretical* with *practical*, science is nothing if it is not practical, and theories are no more nor less than the expressions of general doctrines arrived at by the actual examination of all the elements of the field they dominate. In other words, theories and doctrines are inductions drawn from a consideration of all of the facts lying within the orbit of the inquiry, that is: an induction is a conclusion induced by the observation that all the facts lead to this one conclusion. The maxims of the sciences are but the condensed result of the ages of experience, and every true theory accords with the facts.

The master whose logic rules the world of thought required that every principle should be proved by observation, experience and reason. Nothing was to be assumed, nothing taken for granted. Friedländer says:—

The real founder of a systematic encyclopedia was Aristotle, who not only created a new terminology, but sketched in his Logic, in magnificent style, an architectonic system of the sciences. In consequence of the pragmatic dogmatism of the subsequent philosophical schools, the genuine philophical spirit disappeared, and rhapsodical learning took the place of free inquiry, and knowledge became separated from life.[1]

George H. Smith, a scholar whose attainments have brought him recognition in two continents,[2] says:—

It needs but a glance at the works of Aristotle to perceive that the predominant motive with the author was that of *adaptability to use*, or *practical utility;* and that he regarded this end as unattainable otherwise than by the most attentive and persistent attention to the meaning of words.

THE GREAT IMPEDIMENT

The elements of the natural sciences are material objects; the elements of metaphysical, or moral science are ideas or, as the logicians say, notions, concepts, terms. The first great difficulty encountered in communicating ideas is found in the difficulty of using words which will be apprehended by the reader in precisely the same sense intended by the writer, so that it

[1] Outlines of Jurisprudence, Hastie's Translations, p. 232.

[2] Judge Smith is the author of Smith's Right and Law; Smith's Theory of Private Right; The Theory of the State; a treatise on logic entitled "The Analytic of Explicit Reasoning."

frequently happens that the person writing expresses an idea which the reader fails to apprehend because of his different conception of the words used. "Half the disputes of the world" says Cardinal Newman, "are verbal ones, and could they be brought to a plain issue, they would be brought to a prompt determination. . . . We need not dispute, we need not prove; we need but to define."

"Men," says Lord Bacon, "imagine that their reason governs words, while in fact words react upon the understanding and this has rendered philosophy and the sciences sophistical and inactive. Hence the great and solemn disputes of learned men often terminate about words and names in regard to which it would be better to proceed more advisedly in the first instance and to bring such disputes to a regular issue by definitions."[3] Madison observes:—

> Besides the obscurity arising from the complexity of objects and imperfection of the human faculties, the medium through which the conceptions of men are conveyed to each other adds a fresh embarrassment. The use of words is to express ideas. Perspicuity, therefore, requires not only that the ideas should be distinctly formed, but that they should be expressed by words distinctly and exclusively appropriated to them.[4]

CLASSIFICATION: ITS MEANING AND OBJECT

Logic has to do fundamentally with the relation of ideas. It follows then that the first process of logic must necessarily be definition, that is the discrimination of related ideas in such a way that differences in their natures are made plain. In metaphysical subjects the distinction between ideas to become practical must reach the stage of distinct concepts, theories, doctrines, dogmas, principles, rules. The very process of making this discrimination brings about, or compels, arrangement of some sort. It may be mere accidental grouping, as in alphabetical arrangement it may be empirical arrangement of related subjects (*i.e.*, with no dominating principle) as the Pandects was arranged, or it may be *classification*. Arrangement is not classification, although classification is arrangement; the difference being that while arrangement may be empirical, classification must be in accordance with some principle. Hence the latter attains a place in science. Alphabetical arrangement is entirely accidental, depending upon peculiarities of orthography. In this, orthography excludes logic. Classification requires the application of a principle, which passes under the name "dichotomy."

> You have heard much of the celebrated distribution of things into *genera* and *species*. On that distribution Aristotle undertook the arduous task of resolving all reasoning into its primary elements; and he erected, or thought he erected, on a single axiom, a larger system of abstract truths than were before invented or perfected by any other philosopher. The axiom from which he sets out, and in which the whole terminates, is that whatever is predicated of a genus may be predicated of every species contained under that genus, and of every individual contained under every species. On that distribution, likewise, the very essence of scientific definition depends; for a definition, strictly and logically regular, must express the genus of the thing defined, and the specific difference by which that thing is distinguished from every other species belonging to that genus.[5]

That Wilson did not misconceive the fundamental thought of Aristotle's philosophy, namely: the adoption and adherence to *one principle* as dominating each integral exposition, finds confirmation in a treatise on the Principles of

[3] Novum Organum.
[4] Federalist, No. 37.
[5] 1 Wilson's Works, 51.

Juristic Methodology by Dr. Ahrens, translated from the German by Hastie:—

By the keen edge of the dialectic, developed in Hegel's treatment of the Philosophy of Right, there fell, as if cut down with one blow, a whole forest of misunderstandings regarding the relation of Jurisprudence and positive practical Law to Philosophy. And no sooner was this done than the most difficult problem in the sphere was solved, in the classification of juristic Science according to *one leading principle*, and juristic Encyclopedia became what it ought to be, an artistic system construed upon the solid foundation of *one supreme principle*.[6]

Adopting one principle of division does not imply that no other could be made use of for some other purpose, only that for the specific purpose in hand the one adopted is preferable; but it is necessary, if the arrangement is to be complete, consistent and harmonious, that the one adopted be applied throughout—there must be no clashing of subdivisions. Cross-divisions may overlap, but not so subdivisions.

Archbishop Whateley's[7] rules for the logical division of subjects are:—

1. Each of the parts [of a subject] or any of them short of all, must contain less, *i.e.*, have a narrower signification than the thing divided [the subject].

2. All the parts together must be exactly equal to the thing divided [the subject]; therefore, we must be careful to ascertain that the *summum genus* may be predicated of every term placed under it, and of nothing else.

3. The parts or members must be opposed, *i.e.*, must not be contained in one another, *e.g.*, if you were to divide the word [the subject] "book" into poetical, historical, folio, quarto, French, Latin, etc., the members would be contained in each other; for a French book may be a quarto or octavo, and a quarto, French or English, etc. Therefore [continues the Archbishop[8]] you must be careful to keep in mind the principle of division with which you set out, *e.g.* whether you begin dividing books according to their matter, their language or their size, all these being so many *cross-divisions*. And when anything is capable, as in the above instance, of being divided in several different ways, we are not to reckon one of these as the true, or real, or right one, without specifying what the object is which we have in view; for one mode of dividing may be the most suitable for one purpose, as, *e.g.* one of the above modes of dividing books would be the most suitable to a bookbinder, another in a philosophical, and the other in a philological view. . . .

When you have occasion to divide anything in several different ways,—that is on several principles of division,—you should take care to state distinctly how many principles of division you are making, and on what principle each proceeds.

A subject may be treated under as many cross-divisions as there are viewpoints, but *subdivision* is quite different from *cross-division*. For example, Challis says:—

The subjects in which estates may subsist are commonly subdivided into *lands*, *tenements* and *hereditaments:* which is a cross-division, of which the subclasses are by no means mutually exclusive. Lands are treated as a separate class, by reason of their prominent importance and peculiar physical characteristics. Tenements require special mention, because they alone are entailable [being held in tenure]. Hereditaments is a convenient class-name for uniting together everything which may be the subject of estates of inheritance.[9]

The various points of view under which Blackstone and others treat

[6] Outlines of Jurisprudence, Hastie's Translation, p. 270.

[7] Logic, p. 93.

[8] Quoted from Journal of Jurisprudence, Edinburgh, 1864. A further illustration is furnished by the following, from a lecture delivered by Mr. Justice Brewer to the students of Haverford College. He says: "We classify nations in various ways, as for instance, by their form of government. One is a kingdom, another an empire, and still another a republic. Also by race, Great Britain is an Anglo-Saxon nation, France a Gallic, Germany a Teutonic, Russia a Slav. And still again by religion. One is a Mohammedan nation, others are Heathen, and still others are Christian nations."

Here the learned Justice mentions three cross-divisions. Another cross-division of the races is the one used in ethnology.

[9] Challis, Real Property, pp. 32, 24.

estates, *i.e.* (1) quantity of interest, (2) time of enjoyment, (3) number of tenants,[10] are different cross-divisions of the same subject.

The common form of expression that "estates are divided" is not exact—the *rules relating to estates* are divided and arranged under the headings made use of.

THE SUBJECT TO BE CLASSIFIED

Shall we classify the Laws (Rules) or Rights?

In discussing methods of classification it is essential that we keep in view all the elements of the subject matter of our efforts. We must assume or by some process of reasoning reach a common understanding of what we are attempting to do. The goal of our endeavor is plain, namely, a systematic arrangement of the whole *corpus juris;* but the mere statement in this general form is apt to obscure the process of our attempt. Logically speaking, we are not endeavoring to arrange the *body* of our law. We are assuming that the laws are in a more or less confused mass and must be given the symmetrical form of a body. We are therefore attempting to classify the parts of our law and build them into a systematic body. You do not arrange the whole: you arrange the parts.

Two processes are involved: first, the separation and segregation of all of the different elements which together make up the whole. Each part must be clearly distinguished and distinctly separated from all other parts. It is only when we perceive all of the parts as elements that we have the *corpus juris* before us as the anatomist has the parts of the human body when he has dissected it. He then perceives what is hidden from the outward view—the bony skeleton, the muscular system which actuates movement, the system of veins and arteries which distribute vitality, the nervous system which controls and directs the whole.

Our first process is that of dissection; then, and then only, are we able to perceive the elemental parts of the *corpus juris*. Arrangement begins when the parts are drawn together and built up into an "architectonic edifice," to use Dr. Friedländer's expression above quoted.

It is not sufficiently accurate for our purpose to say that we are attempting to classify the law. Such a statement begs or skips over the initial question: Are we attempting to classify the *Rights* secured by law, or the *Laws* by which these rights are defined and protected? The question is answered by determining which is the more comprehensive term, for if a classification of all the parts is involved, the most comprehensive term must be made the capital or paramount heading. We are attempting to classify laws. That is to say: To arrange the specific rules of law so that they shall appear in a natural order according to some principle of classification.[11] The question is answered if it is admitted that the term "Right" or "Rights" does not fully comprehend Duties, Obligations and Remedies, while the law does embrace all these and Rights as well.

Let us now examine the elements which make up the body of the law and, therefore, constitute the material which is to be set in order.

Thibaut says: "A system of law [meaning a book] founded upon logical

[10] 2 Blk. Com. 103.

[11] Sir Frederick Pollock says: "The divisions of law, as we are in the habit of elliptically naming them, are in truth divisions not of facts *but of rules;* or, if we like to say so, of the legal aspects of facts. Legal rules are the lawyer's measures for reducing the world of human action to manageable items." 8 *Harvard Law Review*, p. 187.

principles should consist of two parts, namely, a general part, in which (*a*) the great *leading ideas* and (*b*) *principles* of law are brought together, and a specific part, in which the nature of (*c*) *each law* [rule] is separately examined and its application determined." This indicates that there are three different fundamental elements, viz.: *Leading Ideas*, *Principles* and *Rules*. And under such divisions all the elements of a given body of law can be grouped. Here then is one way of dividing a Book of the Law, and it is the usual modern method of arranging commentaries on general jurisprudence, or on a specific body of law.

Poste, in the introduction to his translation of Gaius, says:—

> The words which denote the instruments and materials of legislation and the subject-matter of jurisprudence are Law, Sanction, Title, Right, Obligation. The definitions of these five terms may, indeed, be regarded as a single definition, for the things denoted by these five words are merely the same thing looked at from different sides; at least they are correlative ideas, indissolubly connected parts of the same indivisible whole. The definitions of these terms which we proceed to give are their definitions, it is to be observed, as used in jurisprudence, that is, in the exposition not of natural or moral laws but of positive or political laws, and are accordingly unconnected with the hypotheses, of any particular school of ethical speculation.
>
> Every Right implies law by which it is created, a Title to which it is annexed, a Sovereign by whom it is enforced, a Sanction by means of which it is enforced, a Person in whom it resides, and a Person upon whom a correlative obligation is incumbent. The same, *mutatis mutandis*, may be said of every relative Obligation.[12]

Leading Ideas. If thought is given to the subject it becomes plain that nearly all of our law clusters around certain leading ideas or concepts, the symbols of which are the great substantive terms of jurisprudence, as "right," "duty," "obligation," "wrong," "injury," "status," "thing," "property," "estate," "title," "possession," "action," "remedy," "justice," "equity," "law," "government," "agreement," "contract," "act," "event," "volition," "will," "intent," etc.

It will be observed that these abstract concepts are not identical with either principles or rules, but that they are the elements, *i.e.*, logically speaking, *primordial* facts which exist and which lie at the basis of all the conceptions of jurisprudence. These words, then, constitute the substantive part of the vocabulary of the law, the weaving together of which with words denoting motion and relation gives expression to vital principles and operative rules. Everything is in some manner relative to the great concepts.[13] As Poste says: —

> If we are asked, what in Jurisprudence are the ideas corresponding to the categories of Substance, Quality, Quantity, Relation, or whatever else Logicians make the immutable framework of their science, we must point to some of the above abstractions—Law, Sovereign, Sanction, Obligation, Title. Without these and similar conceptions no jurisprudence can be imagined. And to this extent the bases of jurisprudence are natural and unchangeable, but to this extent only.[14]

Principles of law are not identical with either leading ideas or with specific rules. Professor Amos says:—

> In every legal system there is to be found a great hierarchy of leading principles, commencing at the central institutions of the Family, the State, Ownership, Contract, and Procedure, and proceeding to the order, next in succession, of Rights and Duties, and Acts and Events giving rise to Rights and Duties as dependent on an indefinite variety of states of fact.[15]

[12] Poste's Gaius, p. 2.

[13] Assuming the enumeration to be complete, which it is not.

[14] Poste's Gaius, p. 23.

[15] Amos' An English Code, p. 68.

The Supreme Court of Maryland says:—

> It must be borne in mind that every law is presumed to have been enacted with reference to certain immutable principles of justice which lie at the foundation of every system of jurisprudence.[16]

The great or fundamental principles are the same as the precepts of the Roman Law, the doctrines and maxims of our law. They are analogous to to axioms in logic, the creeds in theology and constitute, as it were, the creed of the social organism, *e.g.*: "All men are equal before the law," with its corollary, "Consent is the just basis of government," "Liberty is freedom regulated and secured by law," "There is no right without a remedy." All the great maxims are modes of expressing principles. Their application is never specific and to a single object. They are always general and wide in their application and, therefore, they may without tautology be repeated whenever they apply. They are, comparatively speaking (that is as compared with specific rules), very few in number. Legislation, judicial action, and official conduct must not go counter to them, private rights exist in accordance with them and individuals must observe them.

Laws, or, as Thibaut says, "all laws" (speaking here not of "*the law*," that is, the integral body embracing all of the elements, but of rules of law) are definitely expressed specific directions or declarations as to a single subject. Each and every rule is a concrete, definite expression applying to a specified and certain object, indicating how persons must govern their actions in relation thereto. These rules define the rights, duties and obligations of all persons under all conditions of relation to other persons and to things. They do not necessarily create, but they define, permit, command or prohibit.

Before rules of law can be practically applied they must be given definite form and expression, in fact they are not entitled to the name law or rule until they have become fixed and definite. Their origin may be in habitual use and custom, based on reason or policy, and many of them have no other antecedent; but before they can range themselves within the pale of positive law or "due process" they must become so certain and definite as to be knowable and assume a form so understandable that individuals, lawyers and officials may know and observe them.

The above may be illustrated by taking a work such as Broom's Maxims and observing the variety of fields or subjects in which each of the maxims has application and how many rules flow from a single maxim or principle. For example: "No one shall act where his interest or his integrity is in conflict." This applies to every officer of the government, legislative, executive and judicial. It applies to private relations of trust, confidence and employment; and therefore pervades the whole system of law and must be repeated or referred or implied in the treatment of every specific subject to which it applies. A rule, on the contrary, applies directly to but one subject. Right here confusion is likely to arise in speaking of classifying statute law, for a single section in a statute may relate to several subjects and involve several rules.[17] Almost every section or clause of a section may have a double operation. It must have its direct or principal object, but it may also relate indirectly to or upon other things

[16] *Levering* v. *Levering*, 64 Md. 399.

[17] See Markby's Confusion, *infra* pp. 567-8.

possibly having a bearing upon persons, things and actions.[18]

THE DIVISIONS OF THE LAW

In the writings of all jurists, however much they may differ as to their method of grouping by way of a formal external arrangement, there is the recognition of natural groups or bodies of rules, wherein all the rules of a given group have relation to each other according to some principle which differentiates each and all, from the rules embraced within every other group. All recognize a body of rules relating directly to political relations, another body relating directly to the family relations, another relating to ownership or property, another relating to injuries and remedial procedure, still another relating to crimes and punitive procedure. These institutional juristic facts are universally asknowledged because they exist everywhere and at all times. They are immutable conceptions which even an omnipotent legislator cannot ignore.[19] The institutions of Society, Family, Government, Property, Remedial Justice and Criminal Punishments are inherent in the nature of things. Thus Amos says:—

> Mr. Austin established once for all, as has been already intimated, with a decisive clearness which none of his rivals in this or any other country have equaled, that in all systems of law, to whatever period or form of civilization they may belong, there are certain definite and lasting conceptions, the constant reappearance of which can ever assuredly be counted upon and which are capable of being expressed in an universal language.[20]

The question may be asked: "If this is true, why not arrange the law according to these groups?" The obvious answer is: "Assuming the premises to be true, such is the natural mode of grouping."

Why then has it occurred that there are recognized among jurists primary divisions of classification less in number than the main topics? The answer is: Because it tends to clearness, brevity and harmony to have all subjects or topics related according to the principle of classification adopted grouped in accordance with that principle—in this case the principle of genera and species. Holland says:—

> No code from the Code Theodosian to the

[18] *E.g.* the courts are every day called upon to determine whether the direct object of law is police or commerce.

This idea may be illustrated by Mr. Justice Story's observations on the modern civilian's classification of laws: "By *statutes*, they mean, not the positive legislation which in England and America is known by the same name, *viz.:* The Acts of Parliament and of other legislative bodies, as contradistinguished from the common law; but the whole municipal law of the particular state, from whatever source arising.

"Merlin says: 'This term, statute, is generally applied to all sorts of laws and regulations. Every provision of law is a statute which permits, ordains or prohibits anything.' 'Personal statutes', says Merlin, 'are those, which have *principally for their object the person*, and treat only of property (*biens*) incidentally (*accessoirement*); such are those, which regard birth, legitimacy, freedom, the right of instituting suits, majority, as to age, incapacity to contract, to make a will, to plead in proper person, etc. (*i.e.* status or capacity). *Real statutes* are those which have *principally for their object property* (*biens*), and which do not speak of persons, except in relation to property; such are those which concern the disposition, which one may make of his property, either while he is living, or by testament. Mixed statutes are those which concern at once persons and property.' But Merlin adds, 'that in this sense almost all statutes are mixed, there being scarcely any law relative to persons, which does not at the same time relate to things.' He therefore deems the last classification unnecessary, and holds *that every statute* (rule of law) *ought to receive its denomination according to its principal object.* As that is real, or personal, so ought the quality of the statute be determined."—Story's Conflict of Laws, sec. 13.

[19] "An institution (*e.g.* Property, Obligation, Slavery, Tithe, Advowson) is the same thing as a Right or Obligation, but the one is abstract, the other concrete . . .the term "Institution" connotes constancy and permanence, just as when it is used in another sense to denote the monarch, or legislative body, or tribunals, or any other permanent organs destined to perform *certain constantly recurring functions.*"—Poste's Gaius, pp. 22, 23.

[20] An English Code, p. 205.

Code Civile of Canada has yet been tolerably well arranged. Not one shows any conception of the mutual relations of the great departments of law. Not one is governed by the logical principles of dichotomy, which *though it may not always be visible*, yet should underlie and determine the main features of any system of classification.[21]

The utility of primary divisions as means of exposition is not generally appreciated because no detail treatment of rules occurs under them in the body of a work, but they have expository value nevertheless by way of showing interdependence and relation.

Why and how have jurists recognized different primary divisions? The answers to this inquiry are several: First, because of differing conceptions of the leading term which expresses the subject, that is, Law or Rights, or Duties, or Obligations, or beyond this different conceptions concerning the primary divisions of Public and Private, or Persons, Things, Substantive and Adjective Law, Primary and Sanctioned Rights, etc.

A second reason for the confusion is found in the natural tendency to confusion during the evolution of twenty centuries, occasioned by the necessity for using old terms as to matters the nature of which has gradually changed. One is never at a loss to support any opinion by a corresponding opinion of some philosopher, jurist or theologian of some period in the world's history.

The safeguard against being misled is to confine the discussion to one system of law and one epoch, using all systems and all history as lights to illumine the origin of ideas the evolution of institutions and the present meaning of names by which each is designated. Thus Amos says:—

> The term jurisprudence, like every other important term which takes its hue from the whole complex life of mankind, is ever needing to be defined afresh in the ever new language of each succeeding age.[22]

Dr. Hammond illustrates this idea very clearly in speaking of the conception of "status":—

> It must always depend on all the conditions of the law of a particular epoch, what may properly be treated as a *status*, with rights and duties differing from those of the *normal person* who is the subject of *all* the rights treated under the law of things. The changeable nature of this conception is now so generally recognized that it has become almost a common place to say that one great feature of modern law has been its advance from the form of law of *status* to that of law of contract. Hale treats ancestor and heir, lord and tenant, lord and villain as examples of status in the law of persons.[23] Blackstone omits them. Each no doubt found reasons for his course in the contemporary law, yet both had the same general notion of the division between laws of persons and laws of things. If Blackstone rewrote his commentaries today, he would no doubt omit master and servant as well. The division is by no means an arbitrary one, or it would not have the importance that has been attributed to it; but its merit in each application lies in its being conformed to the law of the time, *and clearly defined with reference to that law* and to that only.[24]

It is necessary to bear in mind that the attempt is to suggest a practical and logical classification of the mass of rules expressed in constitutions, statutes and decisions as they now

[21] Holland, Forms of Law (1870).

[22] Amos' An English Code, 206.

[23] And rightly according to the law of his time. Pollock says: "*What is characteristic of 'the feudal period'* is not the relationship between letter and hirer, or lender and borrower of land, but the relationship between lord and vassal, or rather it is the union of these two relationships."—Pollock & Maitland's *Hist. of Eng. Law*, vol. 1, p. 66.

Challis says: "Tenure was so far associated with the status of a free man, that the grant to a villain by his lord of an estate to be held thereby, or the grant of an estate not falling below the standard *quantum* would operate as an enfranchisement. From its connection with *political status*, the common law tenure acquired the name free or frank tenure and the common law estates were called estates of freehold."—Chal. Real Property, p. 6.

[24] Sandars' Justinian, Introduction, p. li.

exist in the United States of America in accordance with some logical principle which shall govern the compiler and guide the searcher as well. It is a mass of laws, rules, that must be arranged, and we are interested in theories of classification only for this practical purpose and in so far only as classification enables a clearer organization, comprehension and expression of the rules.

DIVERGENT PRIMARY CLASSIFICATIONS

Gaius, who wrote in the second century, introduced the following formula:

> The whole body of law which we use relates either to *Persons*, or to *Things* or to *Actions*.[25]

Another translation is:—

> The whole law by which we are governed relates either to Persons, or to Things or to *Procedure*.[26, 27]

The principle upon which this division, made by Gaius, relies is obviously the principle of *genera* and *species*, and the touchstone of its application is: that to which the law relates or the principal subject or direct object of the law. It will be observed that there is here no mention of a division which appears in later classical writings under the heading "Public and Private Law," and of which much use has been made in treatises on general jurisprudence, but to which no place *in classification* has ever been given in an English treatise devoted to the orderly exposition of the rules of law. If Bacon intended to use it, as logically he might, he carefully concealed the fact. Blackstone says that Bacon in his legal disquisitions purposely avoided order.

Whether the ideas symbolized by these leading terms, *Persons*, *Things* and *Actions*, are worthy of recognition at the present time depends upon whether the words, and the ideas they stand for, have been incorporated into the body of our English and American law, or may be usefully adopted. If they have been associated with the arrangement and expression of our law they should not be discarded except for some other division possessing practical advantages. Innovation should be indulged only when forced by conditions or induced by logic. An arrangement based upon principles or conditions essentially alien to our law can not be made to take the place of one associated with its development.

In commenting upon this primary classification of Gaius, Poste says:—

> What are the leading divisions of law—what are the main masses into which legislation naturally breaks itself—what are the joints and articulations which separate the whole code into various subordinate codes, like the different limbs and members of an organic whole—what is the import of the Gaian division into *jus personarum*, *jus rerum*, *jus actionum*, or rather, to adhere to the classical phrases, *jus ad personas pertinens*, *jus ad res pertinens*, *jus ad actiones pertinens*?
>
> By *jus ad actiones pertinens*, to begin with the easier part of the problem, there is no doubt that the inventor of the division intended to designate the law of *Procedure* as opposed to the law of rights; the adjective

[25] Abdy & Walker's Translation, Cambridge, 1870.

[26] Poste's Gaius, 89.

[27] Though a digression, it may be helpful to state here what will be shown to be the meaning attached to these words in the classification worked out by Hale, Wood and Blackstone. Blackstone translates *jura personarum* and *jura rerum* as "rights of persons," "rights of things." He uses the word "of" relatively, not possessively, and his meaning is law *concerning* rights incident to personal relations. If the law of persons had by his time lost much of its aspect of status it had gained more by bringing political relations within its pale. By "rights of things" he means rights in and to things external to the person, that is ownership of things, in one word, *property*. No change is made in the meaning of "actions." A great change in the conception of the word "possession" together with a much narrower scope of the word "things" indicates the changes made. The Norman French ideas expressed by the words *biens* and *chose* constitute important reasons, or causes, for in this respect the English law is not Roman but modern.

code, to use Bentham's phraseology, as opposed to the substantive code.

. . . . . .

It is more difficult to determine the principle of the other division, the relation of the *law of Persons* to the *law of Things*. They both deal with the rights and duties of persons in the ordinary modern acceptation of the word; why then, we may inquire, are certain rights and duties of persons separated from the rest and dealt with under the distinguishing category of *jus personarum*?

. . . . . .

We must look to the details of the law of Persons, and observe whether its dispositions have any common character as contrasted with the dispositions of the law of Things. The law of Persons, in other words, the law of *status*, classifies men as slaves and free, as citizens (privileged) and as aliens (unprivileged), as *paterfamilias* (superior) and as *filiusfamilias* (dependent). The law of Things looks at men as playing the parts of *contractors* or of neighboring *proprietors*. . . .

It is the more surprising that Austin should apparently have failed to seize with precision this conception of the law of Persons, as he makes the remark, in which the whole truth seems implicitly contained, that the bulk of the law of Persons composes the Public, Political, or Constitutional code (*jus publicum*).[28]

Poste in these few words almost solves our inquiries by pointing out the subtopics which would naturally be grouped under these divisions.

It is the establishment of the distinction between the *jus personarum* and *jus rerum, as used in the English law*, which constitutes the master stroke of Hale's, Wood's, and Blackstone's performance. This involved making a great distinction between the Roman conception of the same words and their meaning in the English law. Lord Hale pointed out distinctly that he intended to give a different meaning to old words so far as it suited his purpose, and Blackstone carried out the idea and established the distinction between personal relations and things in a way which has fastened itself upon our common law and implicated it in our constitutional and statutory law.

Gaius does not ignore the sources of the law, for he enumerates them, but in the face of what he probably understood as well as any other, as Austin says: "He (Gaius) divided *jus*, or law, into *jus gentium* and *jus civile*, and, having shown the various sources of the assumption of law, or *jus*, proceeds to divide the same subject according to the *objects* or *subjects* with which it is conversant."[29]

Hale and Blackstone invoke the same principle. Blackstone says: "The objects of the laws of England are so very numerous and extensive that in order to consider them with any tolerable ease and perspicuity it will be necessary to distribute them methodically under proper and definite heads;" adding, "The objects of the law of England falling into this fourfold division, the present commentaries will therefore consist of the four following parts."[30]

The fourfold division of his work into—

Part I. Law of Persons, including Public (Political) Relations and Domestic (Private) Relations and Corporate Relations (Artificial Persons).

Part II. Law of Things, including the law relating to Property, Contracts and Obligations.

Part III. Private Injuries and Redress, and

Part IV. Crimes and Punishments—

is not superior but subordinate to the primary classification "Rights and Wrongs." This latter classification corresponds in the subjects embraced precisely with the division introduced by Bentham under the names *substantive* and *adjective* law, but does not

[28] Poste's Gaius, 40, 41.

[29] Austin's Jurisprudence, 761.

[30] 1 Blk. Com., 122, any edition.

coincide with the division Public and Private Law.

Although the form "Rights and Wrongs" is confusing, and was rendered more so by his definition of law, when it is kept in mind that his attempt was to arrange laws, the meaning of his primary division becomes clear. He observes that laws have two great objects, the declaration of rights, and the establishment of justice between men; the first primary, the other auxiliary, or, primary and sanctioning, substantive and adjective.

But the main idea is, as Dr. Hammond points out: "In his theory rights had no place, except as convenient expressions for the consequence of laws. *It is a system of laws, rules, that he is treating from beginning to end.* Rights are nowhere defined, or their nature investigated. It seems as if he would have dropped the term altogether, if he could have done so without a tedious circumlocution. His use of it in the *titles* of the first and second books, and in the division of topics is simply a proof that the term was really indispensable. (That of the word 'wrongs' in the third and fourth books is *not* because in his use that word would have correlated with duties as well as with rights.) We confess that this seems to us the weak side of Blackstone's entire system."[31]

THE DIVISION "PUBLIC AND PRIVATE LAW"

In the Institutes of Justinian is found the expression:—

> The study of law is divided into two branches, that of Public and of Private Law. Public law regards the government of the Roman Empire. Private law the interests of individuals.[32]

As to the scope of Public law, that is the subjects embraced within it, Sandars' comment on this section as follows is sufficient for our purpose:—

> Public law regulates religious worship and civil administration; Private law determines the rights and duties of individuals.[33]

Why was such a classification originally adopted? That at the time of Justinian there was a body of rules which differed in their *quality as law* from the body of positive law establishing the rights and duties of subjects is quite true. Heron, speaking of the development of law, says:—

> At first only rights arising between subjects are determined and protected by law, whilst the sovereign remains above the law. Under barbaric despotism the sovereign acknowledges no legal rule binding upon him in his conduct toward his subjects, ***but in time the relations between the government and the people become subjected to certain positive laws.*** The body of laws determining the relations between the individuals and their government is generally termed "constitutional law" or "political law." The latter term is preferable.
>
> . . . . . .
>
> The political law of a nation is the whole legal relations existing between the governors and the governed.[34]

That the usages and customs of rulers are in some governments not regarded as positive laws of the same nature as the so-called "Private Laws" is made very plain by Poste in his explanation. He says:—

> Having been led to mention Public or Constitutional law, it may aid to clear our conceptions if we observe that some of its dispositions are necessarily and by the nature of the case deficient in the characters of Positive law. It is rigorously true to say that the powers of subordinate political functionaries are a status. . . . But when tracing the hierarchy of government, we come to the top of the scale; when we speak of the limitations of the sovereign we have

[31] Sandars' Justinian, Introduction, p. 1.
[32] Institutes, 1–4.
[33] Sandars' Justinian, p. 169.
[34] Heron on Jurs., p. 70.

passed from the sphere of positive law. . . . Constitutional law cannot be enforced against the sovereign body by any but moral sanctions.[35] Whereas, then, the law of Persons that belongs to private law is just as much positive law as the law of Things, *and political functionaries who exercise a DELEGATED power fall under a positive law of Persons*, the absolute sovereign is not invested with legal status. When it approaches the limitations of the sovereign Constitutional law changes its character, it ceases to be positive law, and becomes a law of opinion; or, in other words, *public law so far as it relates to the sovereign, is not properly law, but only a collection of ethical maxims.*[36]

Puchta expresses the idea which prevails generally among continental jurists as to the nature of Public Constitutional Law.

The peculiarity (he says) of a monarchy is that the Prince himself exercises the sovereign power in his own name; and it is implied that he *possesses* this authority *as a right* which belongs to him.[37]

We may now readily understand how Bacon, with his notions as to sovereignty, would naturally speak of Public Law, and why Hale and Blackstone, with a different conception, should ignore it. Bacon says:—

I shall hardly consent that the King shall be called only our *rightful* sovereign, or our *lawful* sovereign, but our *natural* liege sovereign.[38]

Blackstone says that Queen Elizabeth made no scruple to direct her Parliaments to abstain from discussing matters of state, and that at the time of Elizabeth and James the subject of sovereignty was ranked among the *arcana imperii* and, like the mysteries of the *bona Dea*, were not even to be pried into by any but such as were initiated into its service. By Blackstone's time the Constitution of England had become a real law.[39]

After commending Hale and Blackstone for rejecting the division of the law into Public and Private, and in classing political with other conditions, Austin says:—

Accordingly, Sir William Blackstone, following Sir Matthew Hale, has placed the law of political persons, sovereign or subordinate, in the Law of Persons instead of opposing it as one great half of the law to the rest of the legal system. Blackstone divides what he calls "law regarding the relative rights of persons" into "law regarding public relations" and "law regarding private relations." Under the first of these he places constitutional law and the powers, rights and duties of subordinate magistrates, clergy and of persons employed by land or sea.[40]

Mr. Terry, the learned Professor of English Law at the University of Tokio, whose article on "Arrangement of Law" appeared in the last number of the *Green Bag*, says:—

Mr. Austin has clearly shown the difficulty of drawing a distinction between the two kinds of law sufficiently accurate for scientific purposes though it is occasionally convenient to use the words Public and Private Law in a rough, popular sense and that the Public Law, so-called, is really a portion of the Law of Persons. Thus the law regulating the powers and duties of public officers which is always reckoned a part of Public Law, obviously belongs to the Law of Persons; so do the laws of citizenship, the right of suffrage, public health, taxation, etc. These all have effect only of creating duties and rights for particular classes of persons.[41]

Professor Markby, who finds fault with both the classifications "Public and Private" and "Persons, Things and Actions," says:—

All I understand to be meant by this passage (referring to *jus publicum* and *jus privatum*) is this: Public Law is that portion of law in which the attention is mainly

[35] Of course this does not apply to the United States.
[36] Poste's Gaius, p. 42.
[37] Hastie's Translations, p. 83.
[38] Argument on Post Nati of Scotland.
[39] Am. Bar Assn. Rep., vol. 25, p. 461.
[40] Austin's Jur., vol. 2, p. 776-7.
[41] Terry's First Principles, 583.

directed to the state; Private Law is that in which it is mainly directed to individuals. I do not think it means that these topics are capable of exact separation. . . .

It is said that Public Law comprises that body of law in which the people at large or, as it is sometimes put, the sovereign, or the state, as representing the people, is interested, whilst Private Law comprises that body of law in which the individuals are interested. This is a forcible, and sometimes a useful, way of putting the distinction. But it is still not accurate. For, though the interest of the public is in Public Law, conspicuous or predominant, there is hardly any law in which the interest of individuals is not also concerned. And so, also, in private law. The interest of the public may be in the background, but it is always there.[43]

As to the Gaian classification he says:—

This classification is just as inaccurate and just as useful as the last. In that one sense it may be said of every law, public or private, *ad personam ad pertinet*. Every law is addressed to a person, bidding him to do, or not to do, a particular thing; but the *objects of law*, as they are called, may be either things or persons; and it is with reference to this division between the *objects of law* that the classification of Private Law into classification of the law of Persons, and the law of Things has been made. There are, however, very few laws of which the objects are exclusively persons or exclusively things.[45]

Professor Markby nowhere shows appreciation that Blackstone and Hale so defined the meaning of *their use* of the division "Persons, Things and Actions" as to render it definite and avoid his criticism.

Mr. Campbell in his "Science of Law,"[46] after setting forth a proposed analysis of his own, says:—

It may also be remarked that these leading topics may be arranged according to the Roman principle of classification, in which case they would be as follows:—

Rights resulting from the *status* of persons.
1. Personal rights.
2. Domestic relations.
3. Political relations.[44]

Rights resulting from the acts of persons.
1. Property.
2. Contract.
3. Delict.

He mentions Dr. Hammond's opinion that the Gaian classification "which has maintained its ground from the time of the Roman classical jurists to our own and which, after all the criticism which has been lavished upon it at various times, seems to be the only method upon which we can hope today to see the desired and scientifically necessary union of internal and external systems."[45]

It is in this connection that Dr. Hammond presents his masterly exposition and defense of the classification of Hale and Blackstone[46]; and Mr. Campbell himself admits the practical value of Blackstone's arrangement, saying:—

Its value is attested by the incalculable benefit it has conferred in long practical use. It will be noticed that it wholly ignores the Roman distinction between Public and Private law. Why this division was rejected by so eminent a lawyer as Sir Matthew Hale has never been explained.[47]

In this last statement he is in error, for Austin, Poste and other foreign jurists had explained it before his book was written; and Dr. Hammond had also shown precisely by what process of reasoning it was rejected.

The difficulty of making use of such a division and something of the lack of clearness of just what is the distinction between the two divisions is indicated by Dr. Holland, who is frequently

[43] Markby's Elements, quoted from Keener's Selections, pp. 78–9. For example: The Bill of Rights is intended to safeguard individuals.

[44] Jersey City, 1887.

[44] Reverse 3 and 1 and we have almost Blackstone's order of subjects.

[45] Introduction to Sandars' Justinian, p. xxxi.

[46] See his Introduction to Sandar's Justinian.

[47] Science of Law, p. 105.

spoken of as an advocate of the division:—

> The correlation of the parts of Public Law to one another is indeed far from being settled. It never attracted the attention of the Roman lawyers, and has been very variously, and somewhat loosely, treated by the jurists of modern Europe. The subject is indeed one which lends itself but reluctantly to systematic exposition, and it is with some hesitation that we propose to consider it under the heads of —I. Constitutional law; II. Administrative Law; III. Criminal Law; IV. Criminal Procedure; V. The Law of the State considered in its *quasi*-private personality; VI. The procedure relating to the State as so considered.
>
> The first four of these heads contain the topics which are most properly comprised in Public Law. . . .
>
> The primary function of Constitutional Law is to ascertain the political centre of gravity of any given state. . . . In other words, it defines the form of government.[48]

Sir Frederick Pollock in an essay on the "Divisions of Law" has pointed out the fallacy of basing the division Public and Private upon the supposed idea that the public was interested in one case and private persons in the other. He says:—

> It will be seen, therefore, that the topics of Public and Private law are by no means mutually exclusive. On the contrary, their application overlaps with regard to a large proportion of the whole mass of acts and events capable of having legal consequences.
>
> Sometimes the distinction between Public and Private law is made to turn on *the state being or not being a party* to the act or proceeding which is being considered. Only dealings between subject and subject, it is said, form the province of Private Law. But this does not seem quite exact; unless, indeed, we adopt the view, which has already been rejected, that *the state is wholly above law and legal justice, and neither duties nor rights can properly be ascribed to it.* Many valuable things, both immovable and movable, are held and employed for the public service,—palaces, museums, public offices, fortifications, ships of war, and others; in some countries railways and all the various furniture and appurtenances of these. Whether they are held in the name of the state itself, or of the head of the state, or of individual officers of the state, or persons acting by their direction, is a matter of detail which must depend on the laws and usages of every state, and may be determined by highly technical reasons. In substance the state is and must be, in every civilized community, a great owner of almost every kind of object. Now the rights attaching to the state in this respect or to the nominal owners who hold on the state's behalf, need not differ from those of any private owner, and in English-speaking countries they do not. They can be and are dealt with by the ordinary courts in the same way as the rights of any citizen, and according to the ordinary rules of the Law of Property for the preservation and management of the kind of property which may be in question. Again, many persons have to be employed, and agreements to be made with them; and these transactions are judged, so far as necessary, by the ordinary rules of the Law of Contract. Now the rules mentioned not only belong to Private Law, but are at its centre; they are the most obvious examples of what Private Law includes. It would be strange to say that they become rules of Public Law because the property and undertakings in question are public. The true view seems to be that the state, as an owner and otherwise, can make use of the rules of Private Law, and become as it were a citizen for the nonce, though ultimately for public purposes.[49]

This is the death blow to the modern attempt to invent a new reason for the division, in place of the reason which in its origin was a real reason, but which changed conditions in England and America has obliterated.

THE DIVISION "ACTIONS"

There has not been entire accord among theoretical writers on the point that Actions is a separate and distinct head, though the practice of treating it as such is uniform. Both Austin and Mr. Justice Wilson in their lectures

[48] Elements of Jur. 320-5.

[49] 8 *Harvard Law Review*, pp. 194–5.

treat Actions as a subordinate part of Things.

Austin's Plan is concisely and accurately summarized by the editor of the Campbell edition, thus:—

The leading divisions contemplated in Austin's own system appear to be the following. He adopts as his main division of the subjects with which the law is conversant, the twofold one of the Law of Persons,and the Law of Things. This division nearly corresponds with *Jus Personarum—Jus Rerum* of the Civilians, or with *Jus Quod ad Personas pertinet—Quod ad Res pertinet*, of the classical jurists; but differs from it in this respect, that instead of being, as with them, subordinated to the division of *Jus* into *Publicum* and *Privatum*, and co-ordinated with the *Jus Actionum*, it is held superior to all these divisions. The whole of the *Jus Publicum* and of the Law of Procedure is therefore distributed between the Law of Persons and the Law of Things, according as their several parts belong more properly to one or other of those main divisions, in the wide scope attributed to them by the author.

. . . . . .

Law of Things. Austin distributes the Law of Things under two capital departments: (1) Primary rights, with primary relative dutes. (2) Sanctioning rights, with sanctioning duties. The first of these divisions is meant to include law regarding rights, and duties, which do not arise directly or immediately from injuries or wrongs; understanding the word injury or wrong in the largest sense, *e.g.*, including trespass or breach of contract. The second division regards rights and duties which arise directly and exclusively from injuries or wrongs; and includes the consideration of procedure, civil and criminal.[50]

Wilson's Plan, as stated by himself but which, however, was for a different purpose, was as follows:—

Our municipal law, he says in his Law Lectures, I shall consider under two great divisions. Under the first, I shall treat of the law, as it relates to *persons* under the second, I shall treat of it as it relates to *things*. . . .

In considering the law as it relates to persons, the legislative department of the United States will occupy the first place, the executive department the second and the judicial department the third. . . .

As to the second great division of our municipal law, which relates to things, it may be all comprehended under one word *Property*. Claims, it is true, may arise from a variety of sources, almost infinite; but the declaration of every claim concludes by alleging a damage or demand.[51]

Under this he speaks of public and private property, property real and personal, estates in realty, etc. He concludes this portion as follows:—

Property may consist of things in possession or things *in action*.

Land, money, cattle, are instances of the first kind; debts, rights of damages and *rights of action* are instances of the second kind. *These are prosecuted by suit.*[52]

It will not escape observation that Wilson and Austin agree in every essential particular. What deduction is to be made on the initial and most important question which presents itself to any one attempting the arrangement of our law? First: That as an historical fact from a time long antedating Lord Hale all our jurists who have actually done something practical by way of arranging the law have ignored the division Public and Private. Second: There is general accord in the category of topics, except as to this matter of Actions and Procedure.

This, practically speaking, leaves before us to be solved the matter of disagreement, that is why Wilson and Austin suggest that rights in action be treated under the division Things or Property, as per Wilson, or Things, subdivision Sanctioning Rights, according to Austin.

Laying out of view the unbroken practice of several centuries, of treating

[50] Austin's Jurisprudence, Campbell ed., xxviii and xxx.

[51] Wilson's Works, 45.

[52] It is not quite clear that he intends to treat procedure within this title, but assume for the time that he does.

the law concerning Actions and Procedure as a distinct division of law, this raises a question, or a series of questions, of English and American law.

The questions can be solved by understanding just what Hale, Wood and Blackstone did, and the reasons for their doing it. Blackstone explains: "Rights of Persons are those [firstly] which concern and are annexed to the persons of men; secondly, Rights of Things are such as a man may acquire over external objects or things unconnected with the person."[52]

It might have been clearer to have said: Rights of Persons are such rights as have no object unconnected with the person; but the proximity of the two makes the contrast apparent.

Blackstone uses the word "of" in the sense of *concerning* or relating to. *He does not predicate possession of all rights.*

Under the Roman Law all objects of rights, tangible or intangible, recognized and protected by law, were treated as *Things*. Hale and Blackstone differentiated these and transferred from the Law of Things to the Law of Persons all such rights "as do immediately concern the persons themselves, other than such rights as have external objects, thus bringing in the topics Personal Liberty, Personal Security and Right of Private Property as abstract personal rights; and leaving under the Rights of Things only interests in goods and estates and obligations, because these are in their nature separate and distinct from the persons according to the idiom used by Hale and Blackstone.

According to the Roman conception, what were treated by Blackstone as among the other Rights of Persons, *viz.* the abstract right of Personal Liberty, Personal Security and the abstract Right of Private Property, were regarded as *Things* and, as Dr. Hammond so clearly says:—

> If our belief, as to Blackstone's true meaning and method, be the correct one, he could finally have informed Mr. Austin, that what he proposed to do in the Commentaries was to transfer[53] to the Law of Persons, or to locate in their proper place among the Rights of Persons, all such rights (and duties) as belonged to all persons alike, *except* such as had for their object "external things *unconnected with the person*." . . .
>
> This last is in truth the cardinal point of the whole matter. Blackstone adopts as his definition of a "thing," one quite different from that employed by the classical jurists; and all the departure from civilian precedent that can fairly be charged to him, depends on, and is to be explained by this changed sense, in which he used the word "thing."[54]

English Law comprehends under the term "Property" and "Things" only such objects of right as are embraced under the terms "Real Estate," "Chattels" and "Choses."

When proceeding from tangible things like land and chattels in the direction toward intangible things the word "chose" is reached, defined and limited, we have bounded the objects included within the words "Things" or "Property" in English and American Law, but we have by no means included all of the rights of action recognized by English and American Law. A chose in action is a right to receive or recover a debt, or money, or damage for a breach of contract or for a tort *connected with a contract or connected with chattel property*.[55]

Of course, all are familiar with the existence of causes of action purely personal which do not survive, are not

[52] 1 Blk. Com. 122.

[53] From the Law of Things.

[54] Sandars' Justinian, Introduction, pp. lv, lvi.

[55] Blackstone's conception was even narrower than this, for he seems to include only damages recoverable for the *breach of a contract* express or implied.

assignable and which are not choses either in possession or in action.

To sum up: The word "Thing" in English and American Jurisprudence has a meaning broader than the popular use and much narrower than the Roman use of the word. And the word "Action" as used technically and properly in the English law has a broader and a different meaning from the word "Thing" or "Chose in Action" even.

The idea "Actions" is different from even "Chose in Action" or "Right of Action" and includes procedure, but does not include all remedies.

Dr. Hammond has pointed out the fact that Blackstone's most important discrimination has been followed by nearly all the civilians of the last century, quoting Professor Windscheid as affirming that Savigny's influence has made a great change in the *doctrine of possession* and consequently in the view of rights as objective or capable of possession, saying:—

> Savigny limits the doctrine of possession of rights connected with external things, excluding those of *personal status* and obligations. This is a mere corollary to the change instituted by Blackstone almost half a century earlier. But the fullest confirmation of Blacsktone's change will be found in the classification adopted by all the most recent civilians. None of them, so far as our knowledge extends, adhere to the old division advocated by Austin, in which the Law of Things comprehends the entire law, except the mere description of status. All of them have a class of personal rights, corresponding more or less closely to those in Blackstone's First Book. Some go further and recognize a distinct class which not only belong to persons, but constitute, so to speak, a part of the personality. They have no objects, at least no objects "unconnected with the person," and yet are rights *in rem* as distinct from obligations.[56]

In view of the history of English Law and of American Law as well, no one at this day would seriously consider treating the law relating to actions and procedure as a subdivision of Things. While it is true that some accrued causes or rights of action are in a sense property, causes of action arise by reason of events other than the primary or substantive rights or relations, *viz.*, by transactions, conduct and events sufficiently distinct in nature to justify a distinct division. That part of the law of Actions devoted to Procedure Proper, *viz.*, Pleading, Practice and Evidence, is too widely different from "Things" to be regarded in any sense as of the same nature.

"Justice," it has been said, "is the great interest of mankind." It is at once the cause and the end of law. Its establishment is the reason for the existence of governments. Judicial establishments are instruments and *Actions* the means in its administration, justice is the object of all vital law.

AMERICAN TRADITIONS

The traditions and conceptions of the profession insofar as they concern the general framework of law should be regarded, and as there are those who regard the division into Public and Private law as connected with our traditions, it may be useful to determine that by actual illustration. The following is typical of the universal habit.

Upon the recommendation of Gov. Yates of New York an Act was passed in 1824 appointing James Kent (Chancellor, retired), Erasmus Root (President of the Senate), and Benjamin F. Butler (Attorney-General and Secretary of War under President Jackson, and District Attorney under Van Buren) a Commission of Statutory Revision. Kent declining, his place was filled by John Duer, and General Root resigning, Henry Wheaton succeeded. In the

[56] Sandars' Justinian, Introduction, lx.

course of their work this Commission reported to the Legislature as follows:—

We think that our whole *written law* should be comprised under appropriate titles; that those titles should be classified in their natural order; and more especially, that the various provisions of each statute should be arranged in the clearest and most scientific method.

. . . . . .

On a close examination of our whole scheme, in all its parts and bearings, we trust it will be found, that we proposed to do nothing more than to free our written code from the *prolixities*, *uncertainties*, and *confusion* incident to the style and manner in which it has hitherto been framed, and to apply to the elucidation of this branch of the noblest of of all sciences, those principles of an enlarged philosophy, which now obtain in every other department of knowledge.[57]

Mr. Butler submitted what he called a "Project of the General Plan of Revision" which constituted the general outline of the scheme. This was to arrange the laws under the following divisions of classification (between these subdivisions the writer has interposed the headings of Field's California Code, which was Mr. Field's code adopted in its integrity):—

Div. I. Those which relate to the territory; the political divisions; the civil polity; and the internal administration of the state.

(Cal. Code, Pt. I. The Political Code.)

Div. II. Those which relate to the acquisition, the enjoyment and the transmission of property, real and personal; to the domestic relations; and generally to all matters connected with private rights.

(Cal. Code, Pt. II. The Civil Code.)

Div. III. Those which relate to the judiciary establishments, and the mode of procedure in civil cases.

(Cal. Code, Pt. III. Code of Civil Procedure.)

Div. IV. Those which relate to crimes and punishments; to the mode of procedure in criminal cases; and to prison discipline.

(Cal. Code, Pt. IV. The Criminal Code.)

Div. V. Public laws of a local and miscellaneous character; including the laws concerning the city of New York; acts incorporating cities and villages; and such other acts of incorporation as it may be deemed necessary to publish.[58]

Mr. Butler's report continues:—

The general distribution of the subjects of the whole revision, it will have been perceived, has been made conformably to the admirable system of Judge Blackstone's Commentaries, which is known to have originated with Sir Matthew Hale, and to have been much improved by Dr. Wood in his Institutes. *It seemed to us, that the same arrangement which had reduced to order and system the floating and complicated principles of the unwritten common law, must necessarily be sufficient to comprehend the written laws, which are in their nature merely supplementary to the common law.*[59] We have accordingly applied the same system in detail, to the various acts relating to property, and have therein followed the plan of the Commentaries, with entire conviction, that *from the very arrangement itself, no important omission could well occur.*[60]

It will be observed that because certain changes are made, such as dropping the division Rights and Wrongs, the revisers made no pretense that they were departing from the principles of Blackstone's general outline.[61]

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[57] Assembly Journal, 1825, Appendix D, pp. 2, 3, 4; quoted from Preface Consolidated Laws of N. Y. 1909.

[58] Assembly Journal, 1826, p. 887.

[59] This is identical with Wilson's position, stated, Wilson's Works, preface, xviii. Quoted in *Corpus Juris* article, *Green Bag*, vol. 22, p. 61.

[60] Senate Journal, 1827, p. 71.

[61] *An opinion of value*: The late Austin Abbott wrote:—

"The state of New York in 1827–30 led in giving scientific form to state legislation by the appointment of a commission of their ablest men to revise, rearrange, and improve our general laws. The result of their labors was to supersede a mass of acts standing for the most part in chronologic order by a systematic body of law in four parts:—

"I. The polity of the state. II. Rights of property and persons. III. Courts and Civil Procedure. IV. Criminal Law.

"*This new system was an example gradually widely followed throughout the Union.* It attracted attention in Great Britain, and John Duer, one of our commissioners, was examined at length before a Parliamentary Commission for the sake of the valuable exposition of statutory revision which

It must occur to any one reading this report that it is not only desirable that the arrangement of what we still call our unwritten law and the written law should be the same, and that in every part it is necessary to focus the written and the unwritten law, for the rule is the result of both.[62]

The writer of this article has always stood opposed to the idea of legislative codification of the written law *under present conditions*, but this is very far from being opposed to the codification of the written and the unwritten law as blended parts of one system, or of the written law after the common law has been reduced to such certainty and order as would enable the legislatures to have some judgment as to what common law was implicated in their expression of the written law, and the courts could have some clue as to the ideas held by the legislature, for statute law means the words of the statute construed through the lens of the common law.[63]

How closely Mr. Field had in view the same spirit and principles which actuated Mr. Butler and his associates will be seen by his expression of what he considered a code to be:—

What is required, and what must at some time or other be undertaken, is a triple process: the process of eliminating, the process of condensation, and the process of classification. *This performance would make a code*, call it whatever name you will.[64]

IMPORTANCE OF CLASSIFICATION

O. W. Holmes, Jr.,[65] writing in the *American Law Review* in 1870, said:—

We are inclined to believe that the most considerable advantage which might be reaped from a code is this: That being executed at the expense of government and not at the risk of the writer, and the whole work being under the control of one head, *it will make a philosophically arranged corpus juris possible*. If such a code were achieved, its component parts would not have to be loaded with matter belonging elsewhere, as is necessarily the case with text-books written to sell. Take a book on Sales, or one on Bills and Notes, or a more general treatise on Contracts, or one on the Domestic Relations, or one on Real Property, and in each you find chapters devoted to the general discussion of the incapacities of infants and married women. A code would treat the subject once and in the right place. *Even this argument does not go much further than to show the advantage of a connected publication of the whole body of the law.* But the task, if executed *in extenso*, is perhaps beyond the power of one man and if more than one were employed upon it, the proper subordination would be more likely to be secured in a government work. We are speaking now of more serious labors than the *little rudimentary text-books in short sentences which their authors by a happy artifice have called codes instead of manuals*. Indeed we are not aware that any of the existing attempts are remarkable for arrangement. *The importance of it, if it could be obtained, cannot be overrated.* In the first place it points out at once the leading analogy between groups. Of course cross-divisions will be possible on other principles than the one adopted.[66]

THE SIMPLICITY OF THE TASK

The difficulties and magnitude of the task of arranging our law and condensing it into definite, precise rules are

the experience of the profession in this state afforded the profession and legislators in England.

"We thus long enjoyed the best, simplest and most effective system of statutory law which the country had up to that time known. The constitution of 1846 modernized the polity of the state, terminated the propogation of special charters, and introduced the rule that there should be general laws for organizing corporations; abolished the court of chancery, and reorganized the judicial system of the state; and these changes necessarily marred with marks of repeal large parts of our Revised Statutes. It also contained provisions contemplating a re-statement of our statutory law. "*From that time we have gone on in confusion.*" —*University Law Review*, vol. 1, p. 329.

[62] This is Wilson's position. See *supra*, note 59*a*.

[63] "Every act of Parliament assumes the existence of the unwritten law." Stephen's Dig. of Ev. Introduction.

[64] American Bar Association Report, 1889.

[65] Now Mr. Justice Holmes.

[66] 5 *Am. Law Rev.* 1 (1870).

greatly exaggerated. There are those who seem to suppose that we have fifty distinct and conflicting systems of law, but such is not the case. We have one system of law, applied throughout fifty jurisdictions with but slight deviation and comparatively few contradictions in the rules of law, however much variation in forms of procedure and variety of expression in the opinions of the judges. There is in the main the same law in all the states. As Professor Beale has recently pointed out,[67] only in a few instances are there more than two distinct rules on a given subject applied by the courts of the different states. This constitutes no obstacle to *the arrangement* and statement of the law, while it does afford opportunity on the part of the revisers to throw into immediate contrast the reason underlying the contradictory rules and thereby point out the better reason in such a way as to induce uniformity; *Instances of confusion and variety, instead of being an argument against the attempt, is in fact the great argument compelling it.* The law will not organize itself. The same reason which impelled Justinian to rid the Roman Law of confusion and uncertainty compels us to re-state the *corpus juris* in order that we may possess a knowable definite body, similar to that with which our forefathers started a century ago. The common law was then one system, and so far as applicable, was in the main the law as expressed by Blackstone, in proof of which one need but to turn to such treatises as Swift's System of Laws (1795), Tucker's Commentary, and the several early American editions of Blackstone.

The unwritten law is still the greatest in bulk of our law. Our Common Law is no longer the British Common Law, but a Common Law of our creation, an evolution from our conditions; and a re-statement of it in such a manner that will display it as a definite system is imperatively demanded. With tacit sanction it will make conditions tolerable with legislative sanction it would make them ideal and will render a uniform code practicable.

Systematic consolidation is the first great need, and whether the result shall be given legislative sanction by declaratory acts constituting the *Corpus Juris Codex*[68] which shall be created evidence of our common law and thus establish a new *datum post*, may safely be left for future determination.

[67] 23 *Harvard Law Review* 194, see 22 *Green Bag* 119.

[68] To use the Roman expression for a code, *i.e.*, books of the law.

New York City.

The Sociological Foundations of Law

By Charles A. Ellwood

Professor of Sociology, University of Missouri

It is certainly an encouraging sign that the late Hon. James C. Carter, in his valuable lectures on "Law: Its Origin, Growth and Function," recognized at the outset that the subject he was dealing with was a part of the field of sociology. When an eminent lawyer and legal thinker takes such a position, it is perhaps time to emphasize that the foundations of the science of law, or jurisprudence, must be laid in a general knowledge of human society, and especially in a knowledge of the principles of its organization, development and functioning. Of course, those who are content with the mere knowledge of the law as a set of separate rules, or as a system of rules, will have little interest in any inquiry into its foundations in other sciences. But has the time not come when the study of the law should be freed from superficiality and isolation and be based upon knowledge of its nature, function and purpose in human society? It is the thesis of this paper that a proper understanding of law and of legal theory can only be obtained through the study of the social sciences, especially sociology; and that training in law should always be preceded by training in these sciences.

For the law is not something apart from the rest of our social life, but rather is that aspect of it which expresses organized public control over the whole. In other words, law has to do with the organization or order of society, and it is for the sake of maintaining a given social organization or social order that law exists. Now, sociology is the science which deals with the principles of social organization. It is evident, therefore, that it deals with the foundations of legal science, since we can not understand any given system of law unless we understand the principles of social organization which give rise to it.

When we study legal texts or legal codes we discover that they always presuppose some theory of society. Thus the very earliest Roman law presupposed the religious view of social organization which was inherent in ancestor worship and the patriarchal family. Later Roman law, on the other hand, rested on the assumption that the social order was a matter of "contract"; and this "contract theory of society" has dominated the bulk of legal thinking, and even of legal practice, down to recent times, although we may note that through the influence of the Church in the Middle Ages the supernatural theory of society and the conception of law as a divine command for a time again dominated.

The very definition of law, as legal writers have discovered, involves some theory of social organization; and definitions of law accordingly vary according to the writer's conception of the nature of the social order. Corresponding to the supernatural conception of society, we find the conception of law as a divine command, or the expression of divine will. To the contract theory of society corresponds the conception of law as an agreement or rule by which a majority "covenant" to regulate their relations to one another, leaving questions to be

decided by some commonly selected authority. Answering to the theory that social organization is a result of force, or of the rule of the strong over the weak, is the conception that law is solely based upon force, or, to use the Sophists' phrase, is "the rule of the stronger." All of these theories of society, however, on which the legal theories and systems of the past have been based, are somewhat antiquated today; and only within very recent years do we find legal theories based upon the newer organic and psychological conceptions of society. It is evident that a sound theory of the nature and function of law must rest on sound views of human society.

Political science and ethics have both been put forward at various times as the foundation sciences for law. As for the claims of political science, it must be said that law antedates the state as we understand that word, and that government, so far from being the original source of law, is simply the means of enforcing law. Law and government are rather co-ordinate expressions of the tendency of all social groups to regulate the conduct of their members in order to preserve their organization and their existence. The science of government and the science of law must both accordingly rest upon a knowledge of the nature of social organization. As to the claims of ethics to be considered the science fundamental to law, it need only be said that ethics, as the science of right conduct or of right living together, itself presupposes sociology; for we cannot know the ideal in conduct until we know the remote social consequences of conduct, and we cannot know these consequences unless we understand the laws of social life generally. All this is not saying, however, that political science and ethics are not most valuable for the understanding of certain aspects of the law. It is only saying that sociology, rather than these sciences, reveals the foundations of law—that is, its origin, nature and function in human society.

What light, then, can sociology throw upon the foundations of law? Some of the simpler facts of theoretical sociology may serve to suggest an answer to this question. No society can continue to exist without uniform practices and habits of life. Group action, except perhaps in its simpler forms, is impossible without some degree of collective control. This means that social control is characteristic of all societies whatsoever. Consequently in human groups, with their self-conscious units, we get conscious and deliberate attempts to control the activities of the individual. Human society, therefore, from the first presents the phenomena of authority and of social discipline. If an individual varies too greatly from the standards of his group, if he refuses to co-ordinate his activities in harmonious ways with the members of his group, then the group to that extent suffers disorganization and impaired efficiency. Every social organization must be coercive, therefore, to the extent necessary for efficiency. This means that individual impulse must be subordinated to social needs; hence the individual is surrounded from childhood to the grave with stimuli of all sorts, though chiefly in the way of rewards and penalties, to get him to co-ordinate his activities advantageously with his group. As Professor Giddings says, "The creation and perfecting of discipline, the standardizing of conduct and character by means of discipline, has been the work upon which society has directed its conscious efforts from the beginning." [1]

Now, the bearing of all these simple

[1] See Professor Giddings' suggestive article on "Social Self-control," in the *Political Science Quarterly*, vol. xxiv, no. 4.

sociological principles upon the law is evidently this: namely, that law is one of the chief means of social control of individual conduct. While it is not the only means, still perhaps it must be regarded as the most important means because it deals with the overt acts of the individual, and has back of it the whole force of society. We have law in society, in other words, because society feels the need of controlling individual conduct in order to preserve its organization. Every social group is in actual or potential competition with every other group as well as constantly struggling with the forces of physical nature. Defense against enemies is at the foundation of every life-process, whether individual or social; but inasmuch as we cannot have effective collective action without internal order and harmony in groups, it is evident that the need for internal order is co-ordinate with the need for external defense.

Every group must exercise, therefore, constraint upon its individual members; and the need of this constraint becomes greater the larger and more complex the group is, because in complex societies there is greater opportunity for individual variation between the habits of different individuals. Therefore, social constraint becomes increasingly necessary to carry on an increasingly complex collective life. Instead of law lessening with social evolution, then, it is bound to increase in amount and also in relative importance to the life of the group. As each new condition in the social life arises, some means of social regulation and control has to be found, and usually the most simple and direct means is through the law. Thus, when modern industrial evolution produced the "trust," because this new form of association had to be controlled in its conduct in the larger social unity, law was at once invoked to regulate the trust—that is, to make it conform its activities advantageously to the life of the whole group.

The coercive character of law, therefore, does not spring from the fact that it is the imposition of the will of a strong individual or class upon a weak individual or class, but rather it springs directly from the coercive and compelling nature of all social organization. Every social organization must be coercive in some degree if it is to assure the welfare and survival of its members. Social groups, being a mass of self-conscious individuals carrying on a common life together, enter therefore upon deliberate policies to prescribe and control individual conduct in ways of social advantage. In very large social groups, of course there are always individuals who vary in their habits beyond the limits which are judged necessary for group safety. In primitive groups such anti-social conduct was punished by the spontaneous resentment of their members, but as government became organized more and more the work of maintaining social habits or customs judged necessary for group safety was turned over to it. Hence the law became the conscious instrument by which society enforced its will upon its individual members; but it is evident that law even in its most evolved forms is closely connected with the forms of social constraint and social control which we find even in the most primitive groups of men.

The insufficiency of the "contract theory" of law and of society must now be manifest. The contract theory presupposes that every individual is an independent, self-sufficient unit in society, and that he regulates his relations to others by contract—that is, by agreement to do or not to do certain things. This theory presupposes that practically

all conduct is reasoned out, and so it presupposes a much higher degree of intellectual development than what we find in human societies. Again, it supposes that human nature is much simpler than it really is, and is made up quite entirely of intellectual elements. The word "contract" in its broadest sense is evidently quite inadequate to express the actual relations which we find between individuals, whether in civilized or in primitive society. These relations for the most part are on a basis of habit and instinct rather than that of conscious agreement. There is, therefore, no social compact or social contract at the basis of law or any other social institution.

The researches of legal historians and sociologists alike have shown that law undoubtedly had its origin in custom or social habit. Now, custom is so far from resting upon mutual agreement or contract that we can say in general that contract has very little to do with the origin of custom. Mr. Carter's chief mistake in discussing the origin of law was made when he remarked that custom rests upon "opinion of the past." Opinion, whether past or present, usually comes in to support custom, but as a rule has little to do with its origin, and especially had little to do with its primitive origin. Customs are simply collective habits, and habit rests as much upon instinct and impulse as it does upon reasoned opinion. A course of conduct may be entered upon by an individual or a group, by a series of happy accidental adjustments quite as often as by reasoned opinion. It is evident that the impulses and instincts also have much to do in determining which of several courses of conduct shall be entered upon. Reasoned opinion, therefore, has more to do with confirming custom or with modifying it in ways of social advantage than with its origin. Of course, this is saying in effect that rational opinion does play an increasingly important part in originating law as social evolution advances, but the point to be noticed is that the psychological order is law, then custom, then habit, then instinct. The laws by which social groups seek to regulate the conduct of their members rest in the last analysis upon the instincts which have been implanted in human nature through ages of collective living, but the modifications of law which so rapidly go on in civilized societies are wrought largely by reason and rational opinion, though of course "reason" must not be considered as necessarily opposed to human instincts.

If law rests upon custom, and "custom" is but another name for collective habit, then formal laws are merely social habits brought to consciousness for the sake of greater control over them. Indeed, from the standpoint of their activity, as Bentley says,[2] laws are nothing but the "habitual activities of society, enforcing themselves upon the would-be variants." Consequently law is a chief means, as we have already noticed, by which society maintains its unity and solidarity. Consequently, also, law has come to be used in recent times largely as a means of coercing a variant social minority to co-ordinate its activities with those of the majority. Where the new law represents the habits of thinking and acting of an undoubtedly clear majority of a given group, there is usually little difficulty in securing its enforcement. On the other hand, laws which represent only the habits of a minority of population, it follows, are not easily enforced—at least not in democratic communities where popular

[2] The Process of Government: a Study in Social Pressures.

will and public sentiment are the chief means of coercion. Law should follow, therefore, and not precede, changes in social conditions—that is, in the ways of thinking and acting of a majority of the population. Laws which outstrip popular will and public sentiment are notoriously powerless to better permanently social conditions, and in general it may be said that law is a relatively clumsy instrument of effecting social reforms. All that has been said implies that radical social adjustment must be made through the influence of education and public opinion, and that law at the most can only come in to enforce the new habits which have already been sanctioned in popular consciousness. Moreover, it follows from all this that law can never represent the moral and social ideal; for the social ideal stands for the maximum which society is aiming at, while the law aims simply to maintain the minimum of morality in conduct which is necessary for the safety of society at any given time.

Law is established, then, in its statutory and common-law forms for the sake of effecting a higher degree of social control and of constraining individuals that vary from the standards which are recognized as necessary to carry on a collective life. The civil law and the criminal law may consequently be considered as two great props which sustain the social order in any nation. Nothing can be socially more demoralizing than when one of these props is weakened. The weakness of the criminal law in the United States and the general disrespect for law which we find widespread in our population is, therefore, one of the gravest signs of social disintegration which confronts the American people. While the social situation in the United States is undoubtedly responsible for the present inefficiency in the administration of our criminal law and for the decline of respect for the law generally, yet the question may be raised whether the legal profession in the United States, through inadequate training and through commercialization, has not had something to do with all this.

If we have law in order to preserve a given social order, we have changes in the law in order to bring about adjustments to new social conditions. Therefore, those whose business it is to change the laws, or to reinterpret the old ones in order to meet new social conditions, should have the fullest possible knowledge of those conditions. We are still without a system of law that is adapted to our new and complex civilization. Because the legal profession has often failed to see the social character of law, they have sometimes made the mistake of considering law as something given for all time, and hence, instead of studying the new habits and conditions of society, they have often attempted to apply rigidly old systems of law with disastrous consequences. For example, the old English common law was adapted, as everybody knows, to a much simpler civilization than our own, yet we have had jurists, even down to the present time, attempt to apply that law to our modern complex society. To amend or reinterpret the common law so as to meet the needs of the day evidently requires extensive knowledge of the present society. Again, the old criminal law, or as criminologists call it, the classical criminal law, brought about by the reforms at the beginning of the nineteenth century, has proved quite ineffective to protect modern society from crime. This is doubtless not only because modern society is more complex, but because the classical criminal law rested upon an unscientific analysis of the problem of crime; yet only in

recent years have radical alterations been introduced into our criminal law, and there are still lawyers who regard the old criminal law as quite adequate. It is evident that a scientific criminal procedure and criminal jurisprudence must rest upon a scientific criminal sociology. Inasmuch as it is evident that laws need constant change to meet changed social conditions, as long as the bulk of this work of changing laws falls to the legal profession, it is the duty of the legal profession to equip themselves for this function by an extensive knowledge, not only of social conditions, but of the principles which underlie social organization and social change.

A word in conclusion may not be out of place as to the relations of the legal profession to society generally. If the social view of the law is the right one, then the legal profession must be regarded fundamentally as a social-service profession quite as much as teaching or the ministry. It is the function of the lawyer to help preserve the social order, to aid in securing justice, and to promote the welfare of society by protecting it from crime and all other social disorder. If this is the true view of the legal profession, then the commercialized conception of the profession, as having for sale primarily personal services to individuals and corporations who can pay for them, is an utterly false conception. We must do something to place our legal profession upon a higher plane in this country and to get its members to regard themselves as social servants primarily, rather than as personal servants of individuals or corporations, if the nation is to endure. At least one of the things which needs to be attempted is to give the lawyer the social point of view, and this can perhaps be secured through the study of sociology and the other social sciences better than in any other way.

On Lincoln's Advice

"If . . . you cannot be an honest lawyer, resolve to be honest without being a lawyer."
—*Abraham Lincoln.*

By Harry R. Blythe

IF these fair words were burned into hearts
So deeply that our actions sprang from them,
How many still would fret on rights *in rem*,
And still persist in playing sorry parts?
Oh! would not some of us eschew the marts
Of blighting litigation, and condemn
The whole unhappy business—seek the gem
Of truth elsewhere—win gold by other arts?

Ah! if we had the courage but to do
As oft the conscience tells us that we ought,
If to ourselves we only could be true,
The world would never say that we are bought
As Judas was. Honor would crush the few,
But all our work would be in goodness wrought.

An Old-Time Juryman

By Edgar White

FOR forty-five years "Uncle Eben" Reynolds of Middle Fork township has been a familiar figure when court was "settin' " in Macon, Mo., the county seat. During the war "Uncle Ebe" was a "Johnnie Reb," not the kind that sat around the village store and figured out a plan for Lee to surround the Army of the Potomac, but the sort that grabbed up an old deer rifle and mixed in where the most trouble was. The aged juryman has a dent on his bald head that would make a German student duelist green with envy. It was made at Shiloh by a minie ball, and looks like some one had taken a gouge and worked out a place to lay a hen egg. For this big dent "Uncle Ebe" draws no pension from the government, but at the proper legal intervals they summon him to the county seat for jury duty. It's become so much a habit with him that if they don't put him on the list he comes anyhow, trusting that some fellow will fail to show up and he'll get on as a "scrub," *i. e.* pick-up.

When "Uncle Ebe" came marching home in '65 they wouldn't let him vote or serve on a jury or anything else, but when they "reconstructed" him they immediately haled him into court as a juror. He didn't want to go a bit, as he was middlin' busy straightening up the old farm, which had sorter gone to seed during his effort to bust the government, but when he got into court, and found his old captain (Ben Eli Guthrie) among the big-wigs, it looked all right, and "Uncle Ebe" has been a juryman every year since that time.

"Uncle Ebe" was born in Middle Fork township seventy-two years ago. The only time he ever had a chance to see any of the world was when he was "soljerin' " with "Pap" Price, and then he says the Yankees kept him so allfired busy he didn't have a chance to take notes of the country.

In eight out of ten cases tried in circuit court the lawyers leave "Uncle Ebe's" name on the list of twelve. That's because they have become satisfied with the old gentleman's good sense and fairness. But there was a case the other day wherein "Uncle Ebe" balked. The clerk called out a panel of ten, and the judge asked this question:—

"Gentlemen, are your opinions such that you would refuse to return a verdict of guilty, wherein the punishment would be death, although justified by the law and the evidence?"

"Uncle Ebe" shook his head. "I'm agin it, judge," he said.

The judge repeated the question, carefully explaining its every meaning, but the old man shook his head again.

"I wouldn't vote to hang a man under no sarcumstances, judge," he replied, with such finality he had to be excused.

Later on some one asked "Uncle Ebe" how he could reconcile his bloody war record with his squeamishness in a court of justice.

"The law ain't got no right to kill a man," he explained. "Go back to the Garden of Eden. When Adam found Cain had killed Abel, what did he do? Why, he banished him. He knew it wasn't his place to kill Cain, although he knew he was a murderer. These lawyers talk a good deal about prece-

dent. Whar you goin' to get a precedent back o' that, eh?"

In the forty-five years, off and on, Mr. Reynolds has served as a circuit-court juror he has acquired considerable philosophy which might be of profit to attorneys.

"You read in the papers a good deal about what the lawyers say as to 'impressions' on the jury," said "Uncle Ebe." "I want to say this: The jury is generally with the fellow who is the most frank and honest about putting on his case. When it sees a lawyer struggling with all his might to keep something from coming before the jury —claiming it ain't legal evidence—the jury gets curious to know what it was, and thinks he's trying to hide something he's afraid of. The jury can tell awful quick when a lawyer acts smart and tries to bamboozle a witness, and it sympathizes with the witness. I've been on cases where the jury would have found one way, but was made to switch around on the other side just because of what had seemed to it to be unfair dealing at the trial.

"Lots of folks think a jury swallows all those high-falutin' orations of the lawyers. That's where they got another guess. We know what all that talk means, and if there ain't logic mixed up with it it don't go. Here's a thing that ought to be brought out: The courts ought to encourage jurymen in the asking of questions. Sometimes the lawyers ask their questions in such a roundabout way that you can't tell what the answer really means. I once heard a lawyer ask a witness what he knew about Mr. So-and-so's character for running after bad women. The witness said, 'I never knew anything to the contrary,' and the lawyer let it go at that. In the jury room there was a free-for-all fight as to whether the witness said Mr. So-and-so run after bad women or not."

Macon, Mo.

Personal Reminiscences of the Walhalla Bar

II. A SENSIBLE COUNTER-CHARGE

By R. T. Jaynes, Attorney-at-Law, Walhalla, S. C.

A FEW years ago, exact date immaterial, one of the members of our bar occasionally imbibed too freely. Once he was taken to task by one of his brethren with a view of reforming him. In order to avoid giving offense we use fictitious names.

Boon Camp, being very much under the influence of too much drink, is reclining on the edge of the sidewalk on Main street, apparently oblivious of his surroundings.

His chum, Joe Smith, who is strictly sober and reckons temperance as one of his shining virtues, walks up to Boon, takes him by the hand, and, attempting to raise him from a level to a perpendicular, says:—

"Boon, I am so sorry to see you in this fix. Can't you quit drinking?"

Boon replies: "Oh (hic) Joe, go away (hic) from me (hic) and let me alone (hic); I am drunk now (hic), and I will get over that; (hic) but you are a fool (hic), and you will never get over that (hic)."[1]

[1] [Reformers may well take this lesson to heart, and try to avoid placing themselves in a position open to similar criticism from conservatives. For there can be no doubt that for every ninety and nine sinners who reform, there is only one reformer who truly repents.—Ed.].

A Former Prisoner's Criticism of Prison Methods and His Suggestions for Reform

THE young poet known to the public only as "John Carter," who received his discharge from the state penitentiary at Stillwater, Minn. a few months ago, on the commutation of his sentence from ten to five years (see 22 *Green Bag* 337), has written an article in the September *Century* setting forth his personal impressions with regard to the *régime* of this institution. He was subjected to a rather strict discipline at Stillwater, and at a time when much of the discussion of penal problems, especially in the popular magazines, is tainted with sentimentalism and prejudice, it is a pleasure to note that he has succeeded in presenting a fair, dispassionate criticism of the methods in use at Stillwater, and typical of the better class of American prisons, which is to be accepted as a truly useful and instructive document.

On his entrance into the penitentiary he at once discovered that the state did not "pamper" its prisoners, but that the repressive system was in full sway, and he describes the methods of the institution, which evidently is well administered. His account does not reveal any grave faults in these methods. He found the discipline strict, the food by no means ideal, and many desirable privileges withheld, but notwithstanding all this, his article goes to prove that severe punitive methods can be employed without injustice or brutality.

In some respects, however, this article shows that the system can be improved upon without so radically and completely changing it as to run into the danger of sentimental leniency. For example, prisoners should not be subjected to so much *espionage* and suspicion as to deprive them of all sense of self-respect; and it would also be well to give them more opportunity for exercise in the open air. But the author's criticisms can best be set forth by quotation:—

"The sentimentalist cannot support a course of procedure which brings suffering to anybody; many men of strict integrity entertain the theory, 'Once a thief, always a thief.' Between these extremes lie the right and expedient theory and practice. My present object is merely to present a few facts that should be borne in mind in discussing this subject.

"In the first place, the silent system, if strictly adhered to, is in itself a punishment of the severest nature. Men are naturally gregarious, and as mentality decreases, the gregarious instinct increases. It has been found necessary to abolish the barbarous method of confining prisoners in separate cells by day as well as by night; it will ultimately be found advisable to permit conversation during the daytime. This may seem to menace discipline, but a careful supervision would remedy the defect. It may be argued that the effect would be to corrupt the less hardened offenders, and under present conditions there is much truth in this point of view. It is, however, becoming obvious that first offenders should not be mingled indiscriminately with those whose life has been spent in criminal pursuits. Curiously enough this principle is recognized in England, a country in which the science of penology is in its infancy.

"Another fact worthy of careful consideration is that there are many in confinement the necessity of which has passed. While the word of a prisoner is never unreservedly accepted against that of a guard, there are men in Stillwater who are so trusted—so respected, if I may use the word— that their denial of an accusation would make it desirable for the accuser to bring strong corroborative evidence. In this connection, there seems a defect in the system under which pardons and commutations are granted, at any rate in Minnesota. The Board of Pardons in that state consists of the Governor, the Chief Justice, and the Attorney-General. In granting clemency, the board, by its own admission, regards only the circumstances under which the crime was committed. That is to say, if the applicant proves his innocence he may be pardoned, and if he shows extenuating circumstances his sentence may be commuted.

"This method seems to put the most important point of all out of consideration—the present character of the applicant. Not what he was five, ten, or twenty years ago,

but what he is now should obviously be the real test of his fitness to rejoin his fellowmen. Prison life has not necessarily reformed him or dragged him deeper, but he has changed one way or the other. It is obvious that a board constituted as is that of Minnesota has not leisure to determine this most essential point, and it should be possible to select a board not merely competent to pass upon facts brought before it, but also able to devote time to ascertaining the merits of each individual case.

"The theory of the indeterminate sentence, which allows for the possibility of a prisoner's reformation, is excellent. In practice it would be necessary to guard very carefully against abuses. For many reasons it would be unadvisable to place the power of releasing offenders in the hands of any one man, much less of any one prison official. The warden of a prison, for instance, knows as little, in most cases, of the character of those under his charge as the head of a great university knows of the individual undergraduate's character. He must be dependent, in large measure, on the reports of subordinates. Were the average prison official a master of psychology and of whatever kindred sciences may be necessary to judge character, the indeterminate sentence would be unassailable. As it is, he is usually very honest and well-meaning, but there his qualifications end. Hence the unswerving hostility which the prisoner feels toward the indeterminate sentence has a reasonable basis other than the mental discomfort of not knowing whether he is serving one year or ten. It should also be recognized that the majority of serious offenses against discipline are the effects of a hasty temper, and should not be regarded as infallible indices of an evil disposition.

"In suggesting improvements on the advanced position taken by the warden of the Stillwater prison, I am aware that I tread on dangerous ground. It seems to me, however, that more opportunity should be granted to the prisoner to breathe the fresh air, which doctors agree is the best of all medicines. Drill, from being a weekly function, should become a daily institution. Even half an hour at noon or in the evening would prove of inestimable value, and would result in increased efficiency. I have already stated my opinion that the men should be permitted to talk within reasonable bounds, and I shall merely add that it should be possible to extend further privileges for exceptionally good conduct. A common reading-room in which men might smoke, read, and play games could be held out as one of these rewards. So, too, a gymnasium or a baseball field might be introduced with advantage. In the Oregon penitentiary, baseball is permitted, besides a much greater liberty in receiving presents from friends; a result brought about, it is interesting to note, by the publication of a sensational book dealing with life in that prison."

Woodrow Wilson's Appeal for the Lawyer's Skill in Meeting the Problems of Social Change

DR. WOODROW WILSON'S annual address at the meeting of the American Bar Association, delivered in the largest theatre in Chattanooga, was a very strong paper, marked by its clear discernment of the serious extent to which social and economic change is forcing readjustment of the law to meet altered conditions, and by its emphasis upon the duty of the lawyer to lend his skill to the solution of the stupendous problems of law reform,—problems which must have a skillful and deliberate solution, and must not be trusted to be solved merely by the unpremeditated expression of the popular will; in this way lawyers, he said, could turn the impending peaceable revolution into a wise reform, and ensure the symmetry and beauty of the completed structure of law. The theme of the address was "The Lawyer and the Community." To quote:—

"Society is looking itself over, in our day, from top to bottom, is making fresh and critical analysis of its very elements, is

questioning its oldest practices as freely as its newest, scrutinizing every arrangement and motive of its life, and stands ready to attempt nothing less than a radical reconstruction, which only frank and honest counsels and the forces of generous co-operation can hold back from becoming a revolution. We are in a temper to reconstruct economic society as we were once in a temper to reconstruct political society, and political society may itself undergo a radical modification in the process. I doubt if any age was ever more conscious of its task or more unanimously desirous of radical and extended changes in its economic and political practice.

"I do not speak of these things in apprehension, because all is open and above board. This is not a day in which great forces rally in secret. The whole stupendous programme is planned and canvassed in the open, and we have learned the rules of the game of change. Good temper, the wisdom that comes of sober counsel, the energy of thoughtful and unselfish men, the habit of co-operation and of compromise which has been bred in us by long years of free government, in which reason rather than passion has been made to prevail by the sheer virtue of candid and universal debate, will enable us to win through still another great age without revolution. I speak in plain terms of the real character of what is now patent to every man merely in order to fix your thought upon the fact that this thing that is going on about us is not a mere warfare of opinion. It has an object, a definite and concrete object, and that object is Law, the alteration of institutions upon an extended plan of change.

"We are lawyers. This is the field of our knowledge. We are servants of society, officers of the courts of justice. Our duty is a much larger thing than the mere advice of private clients. In every deliberate struggle for law we ought to be the guides, not too critical and unwilling, not too tenacious of the familiar technicalities in which we have been schooled, not too much in love with precedents and the easy maxims which have saved us the trouble of thinking, but ready to give expert and disinterested advice to those who purpose progress and the readjustment of the frontiers of justice. . . .

"Constitutional lawyers have fallen into the background. We have relegated them to the Supreme Court, without asking ourselves where we are to find them when vacancies occur in that great tribunal. A new type of lawyers has been created; and that new type has come to be the prevailing type. Lawyers have been sucked into the maelstrom of the new business system of the country. That system is highly technical and highly specialized. It is divided into distinct sections and provinces, each with particular legal problems of its own. Lawyers, therefore, everywhere that business has thickened and had a large development, have become experts in some special technical field. They do not practice law. They do not handle the general, miscellaneous interests of society. They are not general counselors of right and obligation. They do not bear the relation to the business of their neighborhoods that the family doctor bears to the health of the community in which he lives. They do not concern themselves with the universal aspects of society. . . .

"And so society has lost something, or is losing it—something which it is very serious to lose in an age of law, when society depends more than ever before upon the law-giver and the courts for its structural steel, the harmony and co-ordination of its parts, its convenience, its permanency, and its facility. In gaining new functions, in being drawn into modern business instead of standing outside of it, in becoming identified with particular interests instead of holding aloof and impartially advising all interests, the lawyer has lost his old function, is looked askance at in politics, must disavow special engagements if he would have his counsel heeded in matters of common concern. Society has suffered a corresponding loss—at least American society has. It has lost its one-time feeling for law as the basis of its peace, its progress, its prosperity. Lawyers are not now regarded as the mediators of progress. Society was always ready to be prejudiced against them; now it finds its prejudice confirmed.

"Meanwhile look what legal questions are to be settled—how stupendous they are, how far-reaching, and how impossible it will be to settle them without the advice of learned and experienced lawyers! We have witnessed in modern business the submergence of the individual within the organization, and yet the increase to an extraordinary degree of the power of the individual—of the individual who happens to control the organization. Most men are individuals no

longer so far as their business, its activities, or its moralities are concerned. They must do what they are told to do, or lose their connection with modern affairs. They are not at liberty to ask whether what they are told to do is right or wrong. And yet there are men here and there with whom the whole choice lies. There is more individual power than ever, but those who exercise it are few and formidable and the mass of men are mere pawns in the game.

"Corporations do not do wrong. Individuals do wrong, the individuals who direct and use them for selfish and illegitimate purposes to the injury of society and the serious curtailment of private rights. You cannot punish corporations. Fines fall upon the wrong persons—upon the stockholders and the customers rather than upon the men who direct the policy of the business. If you dissolve the offending corporation you throw great undertakings out of gear. . . .

"Many modern corporations wield revenues and command resources which no ancient state possessed and which some modern bodies politic show no approach to in their budgets. And these huge industrial organizations we continue to treat as legal persons, as individuals, which we must not think of as consisting of persons, within which we despair of enabling the law to pick out anybody in particular to put either its restraint or its command upon. It is childish, it is futile, it is ridiculous! . . .

"In respect of the responsibility which the law imposes in order to protect society itself, in order to protect men and communities against wrongs which are not breaches of contract but offenses against the public interest, the common welfare, it is imperative that we should regard corporations as merely groups of individuals, from which it may, perhaps, be harder to pick out particular persons for punishment than it is to pick them out of the general body of unassociated men, but from which it is, nevertheless, possible to pick them out, possible not only, but absolutely necessary, if business is ever again to be moralized. . . .

"You will say that in many instances it is not fair to pick out for punishment the particular officer who ordered a thing done, because he really had no freedom in the matter; that he is himself under orders, is a dummy manipulated from without. I reply that society should permit no man to carry out orders which are against law and public policy, and that if you will but put one or two conspicuous dummies in the penitentiary there will be no more dummies for hire. You can stop traffic in dummies, and then, when the idea has taken root in the corporate mind that dummies will be confiscated, pardon the one or two innocent men who may happen to have got into jail."

In conclusion, Dr. Wilson returned to the theme of the responsibility of the individual lawyer to the community at large to aid in the solution of the stupendous legal problems which are impending over the country at the present time.

"We are upon the eve," he said, "of a great reconstruction. It calls for creative statesmanship as no age has done since that great age in which we set up the government under which we live, that government which was the admiration of the world until it suffered wrongs to grow up under it which have made many of our own compatriots question the freedom of our institutions and preach revolution against them. I do not fear revolution. I do not fear it even if it comes. I have unshaken faith in the power of America to keep its self-possession. If revolution comes, it will come in peaceful guise, as it came when we put aside the crude government of the confederation and created the great federal state which governed individuals, not corporations, and which has been these hundred and thirty years our vehicle of progress. And it need not come. I do not believe for a moment that it will come. Some radical changes we must make in our law and practice. Some reconstructions we must push forward which a new age and new circumstances impose upon us. But we can do it all in calm and sober fashion, like statesmen and patriots. Let us do it also like lawyers. Let us lend a hand to make the structure symmetrical, well-proportioned, solid, perfect. Let no future generation have cause to accuse us of having stood aloof, indifferent, half hostile, or of having impeded the realization of right. Let us make sure that liberty shall never repudiate us as its friends and guides. We are the servants of society, the bond-servants of justice."

Annual Meeting of the American Bar Association

THE thirty-third annual meeting of the American Bar Association was held at Chattanooga, Tenn., August 30 to September 1.

Charles F. Libby, in his formal presidential address, referred, in opening, to the ever-increasing volume of legislation, which, he said, not only suggested that the legislative crop was being assiduously cut, but also raised the question whether some at least of our legislatures were not becoming more and more mere training schools for amateur statesmen. Mr. Libby then passed to one of the main themes of his address, namely, his belief that the remedy for the wrongs which are at present so patent in our political affairs was to be sought, not in the adoption of specific remedial legislation for curing particular defects, but in raising by continuous and persistent effort the standard of citizenship and in elevating the civic ideas of the individual citizen. He saw dangerous tendencies in the imminence of this peril, in the popular demand for constantly enlarging the activities of the federal government at the expense of the powers originally so zealously and wisely reserved by the states.

It is evident that even President Taft, he continued, is inclined to construe broadly, at least in some respects, the language of the Constitution. His recommendation of the income tax amendment at once suggests the danger that the result of the enactment of such legislation will seriously interfere with not only the resources but also the rights of the states. In some parts of the country acts have been passed authorizing, or rather attempting to authorize, the direct election of United States Senators at the primary elections, with provisions for the certification to the legislatures of the results of these elections. And yet such a change involves altering the balance of power prescribed by the writers of the Constitution after most patient deliberation and anxious attention. Mr. Libby raised the question whether any possible constitutional basis can be found for the initiative and the referendum. Are these, he asked, consistent with *representative* government?

THE PROPER BASIS FOR FEES

The second day opened with an address by Hon. W. A. Henderson, General Solicitor for the Southern Railway Company, on "The Development of the Honorarium." This subject was treated with charming humor. Judge Henderson said in part:—

"The young lawyer of today should recognize the fact that the proper bases for fees may be grouped under four heads, according to rules which have obtained for over two thousand years.

"In the first place, the attorney is entitled to charge according to the greatness of the case, which includes, among other things of course, the financial ability of the client, for it is a simple process to establish that a rich man's case is greater than that of the poor man!

"In the second place, the lawyer may consider his 'pains in and about the services rendered.' Of course the extent of these pains can best be determined by the counselor himself.

"In the third place, the lawyer is entitled to charge for his worth, his learning, his eloquence and the result of the case. These factors are also largely to be made up according to the best judgment of the lawyer himself, for no one else is so competent (in the opinion of the speaker) to determine either the worth, the learning or the eloquence of an advocate as that man himself.

"In the fourth place, a factor in determining the amount of the fee is to be found in the custom of the court. For example, it seems to be obvious that professional work of equal grade and ability is worth four times as much, according to the custom of the courts of New York, in that city, as equal work is worth in Chattanooga."

Hugh K. Wagner of St. Louis read a paper on an important topic of patent law, "Mechanical Equivalents."

THE UNIFORM BILLS OF LADING AND STOCK TRANSFER ACTS

The Association resumed the discussion of the report of its Committee on Commercial Law. This committee and the Committee on Uniform State Laws had both prepared reports, in which they asked the unqualified indorsement of the Association for the acts drafted by the Commissioners on Uniform

State Laws, entitled, "An Act to Make Uniform the Law of Bills of Lading," and "An Act to Make Uniform the Law of the Transfer of Stock." These measures had been prepared by the Conference after four years of careful consideration, during which opportunities had been given to the representatives of all who might be interested to appear and present their views with regard to the drafting of acts, before the Commission. Furthermore, the Stock Transfer Act had already been adopted by Massachusetts, Maryland and Louisiana, and the Uniform Bills of Lading Act of Massachusetts and Maryland.

Nevertheless, it seemed to some of the members of the Association that these two acts were defective in that they did not contain provisions limiting the time in which actions might be brought against corporations which had been compelled to issue new certificates of stock or deliver goods under a decree of a court secured in the manner provided for in the acts.

Hon. Edgar H. Farrar, of New Orleans, led the debate in advocating the adoption of suitable amendments providing for a limitation of possible actions,—in the case of the Stock Transfer Act to three years, and in the case of the Bills of Lading Act to one year.

Walter George Smith, Esq., of Philadelphia, President of the Commissioners on Uniform State Laws, and chairman of the similar committee of the Association, advocated very earnestly the approval of the acts as presented by the Conference, urging that it was of the utmost importance to secure uniformity of action, and not to interfere with the progress which had already been made by the adoption of these measures by the states above mentioned. After a most interesting debate, which was participated in by many members of the Association, it was agreed that the opposition to the measures should be withdrawn with the understanding that the Conference on Uniform State Laws should be at once reconvened to consider with the utmost care the amendments proposed by Judge Farrar.

The other reports made by the standing committees of the Association were accepted and their recommendations agreed to with very little debate.

At the evening meeting of the Association, Hon. Woodrow Wilson, President of Princeton University, delivered the annual address to the Association, on the subject of "The Lawyer and the Community." An article which appears elsewhere in this issue is devoted to this important address.

The main feature of the session for the third day was an address by Hon. Charles W. Moores, of Indianapolis, on "The Career of a Country Lawyer—Abraham Lincoln."

CANONS OF ETHICS

The Association continued its consideration of the committee reports. During the debate it developed that during the past two years the following states and cities, through their respective bar associations, had adopted the American Bar Association code of ethics, word for word:—

Arkansas, South Carolina, Pennsylvania, Florida, Georgia, Illinois, Indiana, South Dakota, North Dakota, Virginia, Iowa, Maine, Louisiana, Minnesota, Tennessee, Montana, Nebraska, New York, New Jersey, Washington, Boston and Chicago.

The "Committee to Suggest Remedies and Formulate Proposed Laws to Prevent Delay and Unnecessary Cost of Litigation" reported that the chances were good for a favorable action by the United States Congress on the various bills prepared by the Committee relating to procedure in the federal courts.

At the close of the morning session, the following officers of the Association were elected: President, Edgar H. Farrar, New Orleans; secretary, George Whitelock, Baltimore; treasurer, Frederick E. Wadhams; assistant secretary, Albert C. Ritchie, Baltimore.

On the evening of September 1, the customary banquet was held. Walter George Smith, Esq., of Philadelphia, acted as toastmaster. Hon. Charles F. Libby, of Maine, the retiring president, welcomed to his office his successor, Hon. Edgar H. Farrar of Louisiana, who, in a graceful speech, thanked the Association for the honor which had been conferred upon him. The other speakers were Mr. Bachmann of Tennessee, who made an address as the representative of the local bar; Hon. Frank M. Field, who spoke for the bar of Ontario, Canada, and Hon. F. J. Curran, who delivered a message of friendship from the bar of Montreal, Canada.

THE NEW PRESIDENT

Edgar Howard Farrar is the third citizen of New Orleans who has achieved the high honor of being elected president of the American Bar Association. He was born in the parish of Concordia in 1849, the son of Thomas

Prince Farrar and Anna Girault. He graduated from the University of Virginia in 1871 with the degree of A.M., and studied law at the University of Louisiana, being admitted to the bar in 1872. He became assistant city attorney in 1878, and city attorney in 1880. In 1882 he was selected by Paul Tulane as one of the trustees for the fund which he created for the establishment of Tulane University, and has always been one of the leading factors in the development of that institution.

Mr. Farrar has always taken a leading part in public affairs, his most notable work in that respect being in the anti-lottery campaign. He was one of the organizers of the National Democracy in 1896, which opposed the Bryan free silver platform, and made a notable address at the Indianapolis convention. He delivered a notable address before the University of Virginia Alumni in 1902 on "The Legal Remedy for Plutocracy." He was one of those invited by President Roosevelt to take part in the great Conservation Congress.

CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS

The Twentieth Annual Conference of the Commissioners on Uniform State Laws convened on August 25, President Walter George Smith in the chair. Twenty-four states and a delegation from Porto Rico answered the roll call, forty-four commissioners in all.

The President read his annual report, giving a full review of the results of the past year, calling special attention to the Bill Relating to the Rights and Liabilities of Common Carriers, the Warehouse Receipts Bill, the Bills of Lading Act, the Child Labor Bill, the Desertion and Non-Support Bill, the Bill Relating to Marriage and Marriage Licenses and the Business Corporation Bill, all of which had been formulated by the respective committees on those subjects. He also referred to the active co-operation in the purposes of the conference by the National Civic Federation, and urged the conference to have prepared a proper workmen's compensation bill.

In the afternoon the report of the Committee on Insurance, Hon. Talcott A. Russell of New Haven, Conn., chairman, was postponed till 1911 for consideration. No report of the Committee on Vital and Penal Statistics being presented, Commissioner Aldis B. Browne, of Washington, D. C., one of the committee, was directed to confer with the Executive Committee, of which Judge Staake is chairman, and report later during the sessions of the Conference.

The report of the Committee on the Torrens System and Registration of Land Titles, Professor Francis M. Burdick of the Columbia Law School of New York City, chairman, was then considered, and, after discussion the committee was directed to address each commissioner, asking him to take up the matter with his state legislature along the lines of the laws of Louisiana and New York. A motion to abolish the Committee on Banking was referred to the Executive Committee. Upon consideration of the report of the Committee on Purity of Articles of Commerce, Walter E. Coe of Stamford, Conn., chairman, a motion to refer the report back to the committee was adopted. The Bill to Make Uniform the Law of the Incorporation of Business Corporations was then taken up, but the discussion of section 1 was so prolific of amendments that the further consideration was postponed until Saturday.

The following officers of the next Conference were elected: Hon. Walter George Smith of Philadelphia, president; Hon. J. R. Thornton of Alexandria, Louisiana, vice-president; Hon. Charles Thaddeus Terry of New York City, secretary; Hon. Talcott H. Russell of New Haven, Conn., treasurer.

On Friday morning the report of the Committee on Marriage and Divorce, Hon. E. W. Frost of Milwaukee, chairman, was received. The committee presented two tentative bills, one "Relating to desertion and non-support of wife or children," and the other "Relating to and regulating marriage and marriage licenses." The desertion bill was first considered. Its purpose is to raise family desertion to the grade of an extraditable crime (a felony now in several states, a misdemeanor in many others, and only a civil offense in the remainder), and to punish it by imprisonment at hard labor at the discretion of the court, with the right to suspend sentence upon the offender giving bond to support his family. The bill as drafted included illegitimate as well as legitimate children, but this was stricken out, after which the bill with minor amendments was adopted finally by the Conference, and will be presented by the commissioners to the legislatures of their respective states at their next session.

The Conference then went into committee of the whole for consideration of the marriage and marriage license bill. The main purpose

of this act is to abolish common law marriages. The consideration of the bill was not finished until Saturday afternoon, when the committee of the whole recommended that the bill, with its various amendments, be referred back to the committee to report the same in printed form to the next meeting of the Conference in 1911; and it was so ordered.

The Conference then resumed consideration of the Business Corporation Bill, which was continued into the session of August 29, and, after twenty sections of the full thirty-five had been adopted, with various amendments, was referred back to the committee, to report at the next meeting in 1911.

COMPARATIVE LAW BUREAU

The annual meeting of the Comparative Law Bureau was held on August 29. The most interesting feature of the occasion was the annual address of the Director, Hon. Simeon E. Baldwin of Connecticut, in which he reviewed at length the comparative law developments disclosed during the past year. In opening his address he made extended reference to the progress made in determining rules of aërial navigation.

Turning from the subject of aviation, Judge Baldwin referred to the critical comments on the judicial organization of the United States as described in a work which has appeared during the last year from the Paris press by Prof. Alfred Nerinc, of the University of Louvain. The comments of Prof. Nerinc are somewhat unfavorable to the American courts. Judge Baldwin regarded this criticism as being well founded, although possibly exaggerated owing to the fact that the author did not have an opportunity to study the courts for a longer period of time.

The Committee on the Translation of the Laws of the Insular Possessions reported itself opposed to retranslation, in view of the fact that the Philippine legislature at its last session had passed an act creating a code commission.

The election of officers of the Bureau resulted in the choice of the following persons as officers for the ensuing year: Director, Hon. Simeon E. Baldwin of Connecticut; secretary, William W. Smithers of Pennsylvania; treasurer, Eugene C. Massie of Virginia; managers, Frederick W. Lehmann of Missouri; Andrew A. Bruce of North Dakota; William Draper Lewis of Pennsylvania; Roscoe Pound of Massachusetts, and John H. Wigmore of Illinois.

ASSOCIATION OF AMERICAN LAW SCHOOLS

The tenth annual meeting of the Association of American Law Schools was held at Chattanooga, August 29 and 30. The meeting was opened by John C. Townes, Dean of the University of Texas Law School and president of the Association, who read a paper on the "Organization and Operation of a Law School." An informal discussion of the president's paper was led by Dean Irvine of Cornell Law School, and Dean Lorenzen of George Washington Law School. On the much discussed question of the relative merits of the lecture system and the case system of teaching law, the speakers were agreed that the main difference between the two systems was one of emphasis, *i.e.*, whether the emphasis be placed on the principle of law or on the case illustrating its application.

The principal paper of the meeting was read by Dr. William Draper Lewis, Dean of the University of Pennsylvania Law School, whose subject was "The Honor System as a Means of Assuring Integrity of Examinations in Law-Schools." Dr. Lewis admitted that the honor system was effective in some institutions, particularly the University of Virginia, but he believed that its usefulness depended largely on local conditions. He said that the system had been tried at Pennsylvania and had been abandoned because conditions there were not favorable to its success. He added that the system was not adaptable to a student body drawn largely from a commercial civilization.

The second meeting was devoted to a discussion of the subject of Dr. Lewis's paper. Dean Lyle of the University of Virginia, read an excellent paper on the origin, development and operation of the honor system at Virginia, in which he placed particular emphasis on the value of the system in developing in the law student that sense of honor and responsibility so essential to an honorable career as a practising lawyer. The consensus of opinion expressed in the discussion was in accord with Dr. Lewis's conclusion that the successful operation of the honor system depended on local conditions, and could not be expected to be equally effective in different institutions.

Prof. W. R. Vance of Yale was elected president of the Association for the ensuing year.

Reviews of Books

JOHN BIGELOW'S AUTOBIOGRAPHY

Retrospections of an Active Life. By John Bigelow. Baker & Taylor Co., New York. V. 1, pp. xiv, 645; v. 2, pp. vii, 607; v 3, pp. vii, 666+ index 16. ($12 *net* for the set.)

ONE is deeply impressed by the merits of these three volumes covering the first fifty years of the life of this "grand old man" of New York State. An autobiography of the modest character of this one is unusual. The historical interest triumphs over the personal; the author views himself not as the centre of the drama of which he writes, but as the spectator of events in which he has borne a by no means inconsiderable part. In place of garrulous play of the memory, dwelling upon minute and uninteresting details of personal history, we have what is for the most part a laboriously prepared record of great events, marked by so scrupulous a regard for exactitude that nothing is left to conjecture, but practically every statement is based upon some kind of evidence reduced to writing protected from the tooth of time. There is no egotistical flavor; the author's modesty offers a splendid example to writers of autobiographies. Mr. Bigelow has kept his own personality in the background, and because the experiences through which he has passed have given him so much to write about, and his correspondence with people of celebrity has been of such interest, his method does not result in tedium or prolixity; on the contrary his pages are anim ted in style and pregnant with good material.

Mr. Bigelow was the son of a thrifty farmer and country storekeeper, whose character is suggested rather than described in casual references which show him to have been of sturdy Connecticut stock. Born and bred in the country town of Bristol, later Malden, N. Y., the son passed through no exceptional experiences that the author is disposed to regard as of importance, and was sent to what later became Trinity College, Hartford, afterward being graduated from Union College, Schenectady. There are interesting recollections of the mode of life of his parents, who cured their own hams and made their own candles, and of those who ministered to his education. The lad determined to take up the career of the law, and as his family was not acquainted with any lawyers of prominence he was thrown upon his own resources in selecting those to whom he should apply for the privilege of reading law. His choice was in the main fortunate, and eventually he found himself in a New York law office, where he was admitted to the bar. His personal qualities seem to have won him desirable friendships while he was still not much past twenty-one, and procured his admission to a debating society known as the Column, where he enlarged an already excellent connection. His success at the bar, however, was not instantaneous or rapid, and we find him turning to literary work, for which he possessed a strong natural bent. The acceptance of a number of contributions led him to take up writing seriously, and he entered the firm of the *Evening Post*, then edited by William Cullen Bryant, with the help of a loan of $2,500 generously granted by Charles O'Conor, then one of the leaders of the New York bar. This proved a wise step. In a few years he had purchased a country estate of value, had enjoyed a certain amount of travel including an extended tour of Europe, and had come to be worth about $175,000. Meanwhile he was making himself so influential a factor in public affairs that his appointment as United States Consul at Paris came about not unnaturally, and his success at that post was so great that he was selected by Secretary Seward as Minister to France. His residence in France, at these two responsible posts, extended over an eventful not to say a troublous period, which covered our Civil War, the incidents preceding the downfall of Napoleon III, and the French invasion of Mexico, and the greater portion of the autobiography deals with these important historical developments of the period of foreign residence. He closely studied the progress of events on the American continent, and his correspondence with both American and European personages, extracts from which appear, deals largely with the significance of events both at home and abroad, and reveals a minute familiarity with inner workings of state policy and close intercourse with statesmen and diplomats. The narrative ends with the year 1867, the fiftieth year of the author's life. An intimation is

given, however, that at some future time the work will be brought down to date.

It is as a publicist rather than as a practitioner of law that Mr. Bigelow appears in these volumes, and their luminous account of certain historical episodes will greatly interest students of our own Civil War and of the foreign policy of France and the United States. Such matters as the Trent affair, the death of Toussaint L'Ouverture, French interference in Mexico and the Monroe doctrine, the *Alabama* claims and various questions of maritime law, Confederate navy building in France, and the authorship of a poetical tribute to our martyred President in *Punch*, are a few examples of numerous topics which may be seen in a new light, and on which new facts are brought forward hitherto secreted in the files of unpublished private and official letters. Weighty as is all this historical material, the author is never perfunctory in presenting it, but introduces keen comment of his own on men and events, and strings his pearls of self-revealing correspondence on the thread of his own strongly individualized narrative. It is a work extraordinarily rich in human interest, completely devoid of the desultory and slipshod manner that one associates with senility, and so full of vigor and vitality that one marvels at the intellectual energy which betrays no sign of diminution in this ninety-third year of the author's age.

ESTATE ACCOUNTING

Theory and Practice of Estate Accounting; for Accountants, Lawyers, Executors, Administrators and Trustees. By Frederick H. Baugh, expert accountant, and William C. Schmeisser, A. B., LL.B., of the Baltimore bar. M. Curlander, Baltimore. Pp. xxviii, 286+index 33. ($4 *net.*)

WRITTEN primarily from the point of view of the accountant, this book is also designed to be of use to the lawyer. It is pointed out that while in the case of a small estate the lawyer may not find it necessary to call in an accountant, he will find his services indispensable, sooner or later, if the estate is one of a man of means with many different interests. The accountant, however, must have some knowledge of testamentary law, because estate accounting is very unlike commercial accounting, and this work is designed to provide a handbook which will enable the expert to keep the accounts in proper legal form, while also embracing technical information for the lawyer covering every important topic of probate practice and administration.

The book is arranged upon a simple and logical plan, and is marked by the thoroughness with which each topic is covered. Numerous illustrations show how the books of the estate should be kept. The method of separating the *corpus* of the estate from the income is gone into fully.

References to decided cases have been omitted, because there would have been room for only incomplete citation and because the accountant is not skilled in the use of reports. Instead, text-books have been utilized, the principal references being to Schouler on Executors and Administrators, Schouler on Wills, and Loring's Trustees' Handbook.

The book is compact with useful information and well serves the purpose for which it is designed.

WARE'S "FROM COURT TO COURT"

THE fourth edition of the useful pamphlet of Mr. Eugene F. Ware of the Kansas City bar, entitled "From Court to Court," recently issued, will be welcomed because of its lucid and workmanlike presentation of the method of taking cases from a state court to the United States Supreme Court. It is a practical handbook to be commended to the attention of all who may never have seen it, who will find it desirable to keep always in some place on their desks where it can be readily reached.

The new edition contains a mass of practical information, intelligently gathered and admirably arranged, and it makes a well written and well printed booklet, of such substantial quality as to be well worth a higher price than that which pamphlet literature usually commands. (Published by the author; $2.)

NOTE

John K. M. Ewing of 60 Wall street, New York, has originated a new system to be used in the trial of cases in the moot courts of law schools. This is a departure from the system in common use in this respect: Knowing only the general nature of his adversary's case, learning that case bit by bit, by questions and answers, appreciating when to interrupt and object as the case unfolds, noting in passing what facts are to be controverted, what facts are to be overlooked, marshaling his own witnesses, and bringing out by a series of pertinent questions the material facts of the case, the student

acquires an experience in the moot court conforming as closely as possible to the actual atmosphere and surroundings of the court room. Under this system the various elements of the case are printed on separate sheets bound up in a tablet, to be torn off and distributed only to the persons designated as the proper parties to receive them.

BOOKS RECEIVED

RECEIPT of the following books is acknowledged:—

A Lawyer's Recollections In and Out of Court. By George A. Torrey, of the Massachusetts bar. Little, Brown & Co., Boston. Pp. vi, 227. ($1.50 *net.*)

Race Distinctions in American Law. By Gilbert Thomas Stephenson, A. M., LL.B. D. Appleton & Co., New York. Pp. xiv, 362 + table of cases and index 26. ($1.50 *net.*)

The Settlement of Labor Disputes. Being v. 36, no. 2 (Sept. 1910), of Annals of the American Academy of Political and Social Science, Philadelphia. Pp. 198. ($1.)

The Trade Union Label. By Ernest R. Spedden, Ph.D., sometime Instructor in Political Economy in Purdue University. Johns Hopkins University Studies in Historical and Political Science, series 28, no. 2. Pp. 100 (index). ($1; paper 50 cts.)

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

Index to Periodicals

Articles on Topics of Legal Science and Related Subjects

Animals. "Cruelty to Domestic Animals." By Harold S. Stowe. 35 *Law Magazine and Review* 437 (Aug.).

Appellate Procedure. See Employers' Liability, Procedure.

Automobile. "Recent Motor Vehicle Legislation." By Albert S. Callan. *Editorial Review*, v. 3, p. 813 (Aug.).

Treating of the New York act of 1910.

Bankruptcy. "Frauds and Preferences." By R. W. Archbald. 44 *American Law Review* 481 (July-Aug.).

An exposition with many citations of the law as it stands.

Bill of Rights. See Government.

Boycotts. "Boycotts." By Almond G. Shepard. 17 *Case and Comment*, 159 (Sept.).

A clear, satisfactory exposition of the principles which determine the lawfulness or unlawfulness of boycotts by labor unions.

Conservation of Natural Resources. "The Five-fold Functions of Government." By W. J. McGee, LL.D. *Popular Science Monthly*, v. 77, p. 274 (Sept.).

The five-fold functions of government are classed as directive or elective, administrative, judicial, legislative and executive. The directive function is a primary power of government, and the paper is less a disquisition on political theory than an argument that the people of the United States shall exercise the power not specifically granted to the federal government, but reserved to them, and shall undertake the regulation of waterways and the conservation of the natural resources of the nation.

"The Public Lands of the United States." By Morris Bien. *North American Review* v. 192, p. 387 (Sept.).

Tracing in detail the history of the public land policy of the United States. The writer, who is Chief Engineer of the Reclamation Service, is confident that the public fund policy will in future be guided more directly by scientific study, and that the ultimate solution will be for the best interests of the public.

"The Case Against Ballinger—Cleared Up." By Stewart Edward White. *American Magazine*, v. 70, p. 666 (Sept.).

In this sequel to his article on the same subject in the March number of the same magazine, Mr. White sums up the recent Congressional investigation and accuses Ballinger of unfitness for office and disregard for the rights of the people.

Contracts. "Moral Obligation as Consideration for an Express Promise." By George H. Parmele. 17 *Case and Comment* 120 (Aug.).

Corporations. See Federal and State Powers, Railways, Rate Regulation.

Criminal Law. "Unpunished Crime in the United States." By George C. Holt, LL.D., United States District Judge. *Independent*, v. 69, p. 278 (Aug. 11).

In his address on "The Extent of Unpunished Crime," given at the annual meeting of the Wisconsin State Bar Association, Federal District Judge George C. Hoyt of New York made some interesting deductions. He said in part:—

"A newspaper has published statistics of the lynchings which have occurred annually in this country. It would appear that about 300,000 persons have taken part in lynchings in the last forty years. If two-thirds of this number is deducted for persons who are dead or who have been engaged in more than one lynching, we have 100,000 lynchers still living. Every person wilfully taking an active part in a lynching is guilty of murder. No person has ever been convicted of murder for taking part in a lynching. It may therefore be roughly estimated that there are approximately 100,000 unhung murderers, of that particular type, living at present in this country, mostly in the southern states.

"The reports of the Commissioner of Labor state that about 60,000 strikes have occurred in the last forty years. It would be a conservative estimate to assume that at least one-sixth of them were accompanied with violence, resulting in serious wounds, maiming or murder. Every person willfully taking an active part in an assault in a strike riot which results in a felony or murder is guilty of the crime committed. Deducting two-thirds for deaths and other causes leaves approximately 165,000 men guilty of such crimes now living. There is hardly any instance in this country of a conviction for a murder, and very few instances of convictions for felonies of any kind, committed in strike riots. It may therefore be roughly estimated that there are at least 150,000 unhung murderers and unpunished felons, of that particular type, living at present in this country, mostly in the northern states."

Declaration of London. See Maritime Law.

Disarmament. "The United States and Neutralization." By Cyrus French Wicker. *Atlantic*, v. 106, p. 304 (Sept.).

The only way remaining by which disarmament can be effected, in the judgment of this writer, is by neutralization, rather than by international arbitration or by the limitation of armaments. Neutralization is the imposition by international agreement of perpetual neutrality over land and water. The United States, we are told, should neutralize the Philippines.

"The United States Peace Commission." By Hamilton Holt. *North American Review*, v. 192, p. 301 (Sept.).

Urging the necessity for some form of world federation, as a condition precedent to the limitation of armaments. Several proposals looking to a League of Peace are reviewed. The hope is expressed that the Peace Commission may outline a practical plan for the federation of the world.

Economics. "The Cause of Social Progress and of the Rate of Interest." By Professor J. Pease Norton, of Yale University. *Political Science Monthly*, v. 72, p. 252 (Sept.).

Professor Norton attacks the time-honored theory that the means of subsistance do not increase at a rate commensurate with the growth of population, and suggests a doctrine of his own which treats social progress as really practicable, and which does not make industrial expansion dependent upon the continuous poverty of a large section of the population. His general argument is as follows: As every useful invention is worth what it saves to the community, its capitalized value increases with the increase of population. The capitalized value of the old arts already in use also increases with population, since they effect economic savings for more people than before. But not only will the value of both the new and old arts increase with population, but the productivity of inventive or exceptional minds will also increase, if we assume that the greater the population, the greater the number of exceptional minds. Consequently the value of inventions increases faster than population, or, as he estimates, at a rate not less than that of the square of the population.

Employer's Liability. "Employers, Employees, and Accidents." By Sir John Gray Hill. 45 *Law Journal* 527 (Aug. 6).

A portion of the paper read before the International Law Association in London in August. Differences between the statutes of different countries are pointed out. He recommends that only one appeal should be allowed; "in the United States this and legal delays generally are so great as to amount to a public calamity."

"The Modern Conception of Civil Responsibility." By M. P. B. Mignault, K. C. of Montreal, 45 *Law Journal* 528 (Aug. 6).

Read before the International Law Association. Mr. Mignault says that all the workmen's compensation laws of different countries are "founded upon the same basic principle, that of professional risk, and each country has solved the problem according to its own views of its obligations towards its citizens. They indicate unquestionably an advance towards the recognition generally of a wider principle of civil responsibility. It goes without saying that the new system has met with much criticism. Thus Mr. Dicey, in his able work on Law and Opinion in England, p. 282, says: 'This legislation bears all the marked characteristics of collectivism. The rights of workmen in regard to compensation for accidents have become a matter not of contract but of status.' It would be idle to deny that there is some ground for this criticism. Yet, as Mirabeau once said on a momentous occasion: *Quand tout le monde a tort, tout le monde a raison.*"

"Employers' Liability Policies." By Charles F. Krone. 44 *American Law Review* 513 (July–Aug.).

Viewing this form of insurance as opposed to public policy; notable for keen analysis.

"Employers' Liability and Compensation Legislation." By Hon. Cyrus W. Phillips. 17 *Case and Comment* 167 (Sept.).

Describing the chief features of this year's New York legislation.

"The Recent Amendment of the Labor Law." Editorial. 22 *Bench and Bar* 45 (Aug.).

Setting forth the effect of the principal provisions of chapter 352 of the Laws of 1910 of New York.

"Work-Accidents and Employers' Liability." By Crystal Eastman. *Survey*, v. 24, p. 788 (Sept. 3).

Evidence. See Procedure.

Federal and State Powers. "The Progressives, Past and Present." By Theodore Roosevelt. *Outlook*, v. 96, p. 19 (Sept. 3).

This is Mr. Roosevelt's Osawatomie speech, with some additions. The gist of it is a plea for the extension of governmental activity to bring about better social and economic conditions. Emphasis is laid upon the need of more affective federal control of corporations.

See Conservation of Natural Resources, Government.

Fourteenth Amendment. See Government.

Government. "On the question of the Validity of the Fourteenth Amendment to the Constitution." By H. D. Money. 71 *Central Law Journal* 112 (Aug. 19).

The more important points raised here are (1) that the Constitution calls for the proposal of amendments by "two-thirds of both houses," not by two-thirds of a quorum present; (2) that the amendment was adopted by a vote of 33 Senators in the affirmative, there being only 44 Senators present of the total membership of 52; (3) that this being "a union of indestructible states" (*Texas v. White*, 7 Wall. 700) the three-fourths necessary for ratification meant three-fourths of 37 states; (4) that the constitutional right of ten states to "a republican form of government" was violated when the Union compelled them to accept the Fourteenth Amendment by the exercise of military force under the reconstruction policy; (5) that the consent given by these ten states to the amendment was not the free consent contemplated by the Constitution; (6) that the votes of Ohio and New Jersey could not be counted, because they rescinded their ratification before a three-fourths vote was secured; (7) that 12 of the 37 states did not vote affirmatively on the amendment.

Were such points as these ever to be presented to the Supreme Court for adjudication, it is not conceivable that the Court would find itself greatly embarrassed in finding a way to override Mr. Money's objections. If we can suppose that some of the points would be sustained, they would amount only to a disclosure of technical defects in the procedure by which the amendment was adopted, and it is inconceivable that an amendment that has been acquiesced in for over forty years, and treated as the letter of the Constitution, should now be set aside on the ground of irregularities in its adoption. The Court would find itself without any precedent for a judicial repeal of the long established letter of the Constitution, and could invoke the doctrine of prescription if there were no other way out of the dilemma. Vattel said that "the tranquillity of the people, the safety of states, the happiness of the human race, do not allow that the possessions, empire, *and other rights of states* should remain uncertain," and it is hard to see why a state should have a prescriptive right in the possession of its own territory, as the Supreme Court has repeatedly declared, and should not have a similar right in the political status of its citizens. For in the latter case, as in the former, the denial of such a right could only result in disturbing rights and titles long regarded by the people as settled.

"The Three Last Amendments to the Constitution of the United States." By E. H. Randle, LL.D. 44 *American Law Review* 561 (July–Aug.).

This writer's view is assuredly incorrect when he says: "Suppose a bill should be passed by two-thirds of Congress and three-fourths of the states, that the trial by jury or the *habeas corpus* should be stricken from the Constitution. I think no judge in the Union would consider it valid, and that it could be made valid only by the indorsement of every state in the Union."

"Constitutional Developments in Foreign Countries during 1908 and 1909." By W. F. Dodd. 4 *American Political Science Review* 325 (Aug.).

This informing article is largely concerned with constitutional changes in the countries of Europe, but other nations are touched upon, such as the Commonwealth of Australia and the South African Union.

"If—An Exposition of the Sovereign Political Power of Organized Business." By Lincoln Steffens. *Everybody's*, v. 23, p. 291 (Sept.).

Because Mr. Morgan is supreme in Wall street, he is supreme in the United States, argues Mr. Steffens.

Nothing is said about the limitations of Mr. Morgan's power. The author, moreover, is working up a commonplace of history into what is meant to be a sensational disclosure.

It is axiomatic that political power follows economic supremacy, and an industrial society which is not ruled by business interests is inconceivable.

Australia. "One Final Court of Appeal for Australia." By Everard Digby. 35 *Law Magazine and Review* 406 (Aug.).

Finland. "Finland." 4 *American Political Science Review* 350 (Aug.).

Much light is thrown on the position of Finland with regard to Russia; its status may best be defined is that of what Prof. Jellinek calls *Staatsfragment:* it is a semi-sovereign dependent state, not unlike Canada or New Zealand in its relation to the imperial power.

France. "The Strength and the Weakness of the Third French Republic." By A. V. Dicey. *Nineteenth Century and After*, v. 68, p. 205 (Aug.).

Great Britain. "The Constitution and the Veto Resolutions, March, 1910." By N. W. Sibley. 35 *Law Magazine and Review* 417 (Aug.).

An able defense of the co-ordinate powers of the two houses of Parliament, viewing present conditions in the light of history.

India. "What Does India Want Politically?" By Saint Nihal Singh. *North American Review*, v. 192, p. 369 (Sept.).

What India wants is self-government. "While in British India the Englishmen are still engaged in academic discussions regarding the Indians' ability to govern themselves, the Gaekwar has revived the old Hindu custom of government by the village *Panchayat*—village community—and thereby has afforded his people the opportunity to develop their capabilities for self-government by exercising their faculties in that direction." He is viewed as an example to his people.

"A Case For Civilian Judges." By Anglo-Indian. *Westminster Review*, v. 174, p. 137 (Aug.).

See Conservation of Natural Resources, Federal and State Powers, Negro Problem, Public Policy.

History. "Goldwin Smith's Reminiscences; I, The American Civil War." *McClure's*, v. 35, p. 545 (Sept.).

See Government.

Immigration. "The Arrested Course of Immigration." By Matsuzo Nagai, Acting Japanese Consul-General at San Francisco. *Editorial Review*, v. 3, p. 766 (Aug.).

The stream of Japanese immigration is now stopped, says this writer. The total disappearance of Japanese labor in the United States may create industrial conditions hard to meet, and may loosen the bonds of amity between this country and Japan. The article presents much information regarding the present situation.

"A Patriotic Movement for the Assimilation of Immigrants." By Daniel Chauncey Brewer. *Editorial Review*, v. 3, p. 786 (Aug.).

"The Control of Immigration as an Administrative Problem." By Paul S. Peirce. 4 *American Political Science Review* 374 (Aug.).

Injunctions. "The Use and Abuse of Injunctions in Labor Controversies." By Hon. Charles E. Littlefield. 17 *Case and Comment* 173 (Sept.).

Of eighteen cases of injunctions submitted by Mr. Gompers, Mr. Littlefield has not been able to find "any that are the proper subject of legal criticism." He is disposed to regard them as subject to criticisms only upon the ground that "any use whatever of the power of injunction, is understood by the labor organizations to be an abuse of judicial power."

Insurance. See Employer's Liability.

Interstate Commerce. See Conservation of Natural Resources, Federal and State Powers, Government, Railways, Rate Regulation.

Judicial Powers. "Powers of Courts in Vacation." By Edwin S. Oakes. 17 *Case and Comment* 107 (Aug.).

This article imparts much interesting information.

Labor Problem. "A Solution of the Labor Problem." By Clifford Howard. *North American Review*, v. 192, p. 341 (Sept.).

The solution proposed is that of the establishment by the federal Government of a national unit of value for labor. "Based upon this unit, the wages for all classes of labor shall be automatically regulated by law," being fixed not by the employer or employee, but "by an established table of rates builded upon a fixed unit of value for labor." This unit would be based upon the actual requirements for subsistance; it might, for example, be sixty pounds of wheat flour for one day's work at unskilled manual labor; and nothing less than the unit could legally be paid.

This is of course a chimerical proposition, which aims at the repeal of the natural law of supply and demand.

See Boycotts, Employers' Liability, Injunctions.

Legal Miscellany. "Log Cabin Courts of Long Ago." By David C. Baker. 17 *Case and Comment* 114 (Aug.).

Local Government. "The Problem of Efficient City Government." By William J.

Gaynor, Mayor of New York City. *Century*, v. 80, p. 663 (Sept.).

Mayor Gaynor here lays down the principles which are guiding him in facing the problems of municipal government—such principles as those of honesty and competency in the civil service, concentration on local issues in elections, and a belief in the intelligence of the foreign-born voters of New York.

"Municipal Non-Partisanship in Operation." By James Creelman. *Century*, v. 80, p. 667 (Sept.).

The gains of the first six months of Gaynor's administration are here said to have included not only the masterly suppression of graft, but to have resulted in a saving of millions to a city spending over $200,000,000 a year.

Maritime Law. "The Declaration of London." By Rt. Hon. Arthur Cohen, K.C. 45 *Law Journal* 523 (Aug. 6.)

Read at the Conference of the International Law Association. This learned jurist, whose connection with the *Alabama* case will be recalled, thus summarises his views:—

"I. I think the article relating to the destruction of neutral prizes ought to have contained a proviso to the effect that the mere fact of the cruiser being unable to provide a prize crew should not justify her destruction, and I also think that the *bona fide* and out-and-out sale of merchant ships in contemplation of or during war should be allowed. . . .

"II. The Declaration of London contains two complete and admirable codes of the law of Blockade and Contraband.

"III. The provisions in the Declaration may be considered on the whole, *as far as they go*, partly a very able exposition of existing laws, and partly a very fair and equitable compromise of divergent views.

"IV. But the Declaration of London leaves the following three important questions unsettled: (*a*) Is the rule of 1756 to be maintained? (*b*) What constitutes the enemy character of the owner of goods on board merchant ships? (*c*) In what circumstances and subject to what conditions should the conversion on the high seas of merchant ships into warships be allowed?

"V. It will be for His Majesty's government and Parliament to determine whether, with a view to the immediate establishment of the International Prize Court of Appeal, these three questions should be left to be decided by that court, in accordance with the principles of justice and equity, or whether the existence of that Court shall be deferred until these questions shall have been settled by means of diplomatic negotiations or at another International Naval Conference. I doubt, however, whether this important question can be usefully discussed before it is known whether it has been the subject of negotiation between Great Britain and the other principal Naval Powers.

"Whatever may be determined as to the ratification of the Declaration of London, the International Naval Conference of London will be, I venture to assert, ever memorable in the annals of international law as having framed two complete and admirable codes of the law of Blockade and Contraband, and as having established on sound principles the important rules relating to Compensation and the Resistance to Search."

"The Declaration of London." By Sir John Macdonell, C.B., LL.D. 45 *Law Journal* 526 (Aug. 6).

A summary of the criticisms contained in his paper read before the International Law Association. Many of the criticisms are unfavorable, though the learned author approves of the harmony and unity brought about by the Declaration in place of the confusion and uncertainty of hitherto conflicting rules.

"The Declaration of London." By Norman Bentwich. *Fortnightly Review*, v. 88, p. 327 (Aug.).

A readable summary of the main features of the Declaration, which "not only marks a stage in the history of the law of neutrality, but is a step in the 'federation of the world.'"

Negro Problem. "The American Negro as a Political Factor." By Prof. Kelly Miller. *Nineteenth Century and After*, v. 68, p. 285 (Aug.).

The Dean of the College of Arts and Sciences of Howard University, Washington, D. C., strongly urges the elevation and purification of the negro suffrage, as the only solution of the problem of the negro in politics.

See Government.

Penology. "Giving the Convict a Chance." By Eugene L. Bertrand. *World's Work*, v. 20, p. 13373 (Sept.).

Describing methods of reforming convicts in Colorado, where they are put out to work at road building on the "honor" system, with the opportunity to reduce their sentence ten days in every thirty by good behavior while they are engaged in this out-door work.

"The Death Penalty and Homicide." By Arthur Macdonald. *American Journal of Sociology*, v. 16, p. 88 (July).

"Prison Life as I Found it." By "John Carter." *Century*, v. 80, p. 752 (Sept.).

See p. 584, *supra*.

"The Working of the Prevention of Crime Act." By E. G. Clayton. *Nineteenth Century and After*, v. 68, p. 307 (Aug.).

The writer thinks the new penal system of England too lenient, and makes out a strong case from the evidence which he adduces.

Pleading. See Procedure.

Population. See Economics.

Procedure. "The Burden of Proof where Mental Incapacity is Pleaded." By Oscar W. Hoberg. 44 *American Law Review* 538 (July-Aug.).

The true conception is that the *onus probandi* is on the aggressor and not on the party who first on the face of the pleadings expressly suggests incapacity, according to this author, who appends some observations on the charge in the *Guiteau* case.

"Directing Verdicts." By M. J. Fulton. 16 *Virginia Law Register* 241 (Aug.).

Dealing with the law and practice in Virginia.

"Amendments to the New York Code of Civil Procedure in 1910." 22 *Bench and Bar* 55 (Aug.).

"Civil Judicial Statistics, 1908." 35 *Law Magazine and Review* 448 (Aug.).

Public Policy. "Some Late Workings of the Doctrine of Public Policy." By W. Irvine Cross. 44 *American Law Review* 551 (July-Aug.).

The writer voices the old-fashioned theory that courts of law do not legislate, consequently the doctrine of public policy assumes an objectionable aspect in his eyes, and he attacks it as tending to undermine respect for the law.

Railways. "Physical Valuation of Railroads." By Henry Edwin Tremain. *Editorial Review*, v. 3, p. 758 (Aug.).

This writer fails to see how, until Congress shall declare a fundamental principle that shall underlie the complete inquiry, the physical valuation of interstate public utilities, or the certification of security issues, can be of practical value to the public, though the latter may be of value to investors.

Rate Regulation. "The Railroad Fight for Life." By C. M. Keys. *World's Work*, v. 20, p. 13419 (Sept.).

Discussing the problem of freight rates. The writer's sympathies seem to be more with the shippers than with the railways.

"Ought the Railroads to Advance Rates?" By Samuel O. Dunn. *American Review of Reviews*, v. 42, p. 338 (Sept.).

The gist of this article is that the railroads are prosperous, but investors are demanding more than they did ten years ago, and in view of the necessity of financing costly improvements rates may have to be advanced.

"The Railroad Machine as it Works Now." By Charles Edward Russell. *Hampton's*, v. 25, p. 364 (Sept.).

Mr. Russell aims to show what has made the rates on the Southern Pacific excessive, and he regards the case of the Southern Pacific as typical, in some degree, of all American railways.

Real Property. "Examination of Titles to Land." By Edward W. Faith. 71 *Central Law Journal* 93 (Aug. 12).

A practical and helpful statement of leading principles which should govern the examination of titles.

Waterways. See Conservation of Natural Resources.

Workmen's Compensation. See Employer's Liability.

Miscellaneous Articles of Interest to the Legal Profession

Biography. "Goldwin Smith." By W. D. Gregory. *Outlook*, v. 95, p. 950 (Aug. 27).

Cost of Living. "The Real Reason for High Prices." By Samuel Hopkins Adams. *Cosmopolitan*, v. 49, p. 460 (Sept.).

Attributing the high cost of living mainly to overcapitalization.

Fiction. "Law and Order." By O. Henry. *Everybody's*, v. 23, p. 299 (Sept.).

It is unnecessary to recommend anything written by the late Sydney Porter. He has here written a story of Texas frontier justice in his usual vigorous and dramatic manner.

Party Politics. "The Race to the White House." By Ira E. Bennett. *North American Review*, v. 192, p. 326 (Sept.).

The writer thinks that Mr. Taft will be renominated in 1912. He has successfully weathered the usual storm and stress of the President's first year. The "conservatives" will doubtless triumph over the Insurgents.

"Two Revolts against Oligarchy: The Insurgent Movements of the Fifties and of Today." By Amos Pinchot. McClure's, v. 35, p. 581 (Sept.).

The Whig downfall of fifty years ago is considered a warning to the Republican party of today, confronted as it is by the crisis arising from the "eternal and irrepressible conflict between the people and the great industrial interests for control of government."

"Governor Hughes and the Albany Gang." By Burton J. Hendrick. *McClure's*, v. 35, p. 495 (Sept.).

The author admits that Speaker James W. Wadsworth is clean, but he attacks the Republican organization as exerting a pernicious power in state politics, and uses the Allds incident as a text for unjust misrepresentation of the motives of some Republican leaders.

Political Corruption. "The Lorimer Scandal." By C. S. Raymond. *American*, v. 70, p. 571 (Sept.).

Giving full details regarding the political corruption recently uncovered in Illinois, with portraits of the men most conspicuous in the bribery case.

"What Are You Going to do About It? III, The 'Jack Pot' in Illinois Legislation." By Charles Edward Russell. *Cosmopolitan*, v. 49, p. 466 (Sept.).

Sugar. "The Men Higher Up." By Harold J. Howland. *Outlook*, v. 95, p. 771 (Aug. 6).

Further light on the sugar-weighing customs frauds, by the author of "The Case of Seventeen Holes."

Latest Important Cases

Citizenship. *Parsees Come Within "Free White Persons" Clause.* U. S.

In *U. S.* v. *Balsara*, decided by the United States Circuit Court for the second circuit July 1, it was held that Parsees belong to the white race and are eligible to citizenship. Judge Ward said in his opinion:—

"We think that the words refer to race and include all persons of the white race as distinguished from the black, red, yellow or brown races, which differ in so many respects from it. Whether there is any pure white race and what peoples belong to it may involve nice discriminations, but for practical purposes there is no difficulty in saying that the Chinese, Japanese and Malays and the American Indians do not belong to the white race. Difficult questions may arise and Congress may have to settle them by more specific legislation, but in our opinion the Parsees do belong to the white race, and the Circuit Court properly admitted Balsara to citizenship." (Reported in *New York Law Journal*, Sept. 12, 1910.)

Defamation. *Publication of Fiction Purporting to be "News"—A Libel without Justification.* N. Y.

The circumstances of the case of *Snyder* v. *New York Press Co.*, 121 N. Y. Suppl. 944, were somewhat extraordinary. A short newspaper article was published to the effect that, upon the assurance of a process server that Mrs. Snyder was anxious to see him, the naïve Irish maid admitted him to the bathroom while she was in the bath tub; that the mistress screamed, but was nevertheless served with a subpœna; and that motion was made to have subpœna vacated on the ground that it was impossible for the process server to identify her under the circumstances. Defendant contended that the article was innocent, and belonged to the class generally recognized as having a "news value." The Appellate Division of the Supreme Court of New York held that it was difficult to perceive what news value it could have, and impossible to discover its literary value, and that if newspapers saw fit to give their readers fiction instead of news they did so at their peril. In the opinion of the court it was libelous, as holding plaintiff up to ridicule and lowering her character in the estimation of the community.

Contracts. *Benedictine's Vow of Poverty and Obedience a Valid Contract—Administration of Estate of Deceased Monk.* U. S.

An unusual case was decided by the United States Circuit Court in Minnesota in June, involving the legal effect of the vows of a monk of the Order of St. Benedict. Augustine Wirth, a member of the Order, died in 1901 leaving assets which included royalties on a large number of religious books. The Order brought suit against the administrator, claiming an equity in all the moneys at issue, in view of the fact that the rules of the Benedictine Order require members to surrender all individual ownership and possession of property.

The court (Willard, J.) held that the monastic vow of poverty, chastity and obedience in this case constituted a contract which the court would enforce, and ordered that a decree issue in favor of the petitioner. *Order of St. Benedict* v. *Steinhauser, Administrator.*

Labor Unions. *Peaceful Picketing Illegal—Acts Done in Pursuance of Closed Shop Policy Unlawful.* N. Y.

A far-reaching decision has been handed

down by Justice John W. Goff in the *Cloakmakers' Strike* case in the Supreme Court of New York, which seems to go further than the established line of decisions which support the open shop policy. This strike was referred to as a common law civil conspiracy, and peaceful picketing or any other act furthering such conspiracy was declared illegal. The Court said:—

"What the employers may not do, the workmen may not do. If a combination of one to refuse employment, except on condition of joining a union, be against public policy, a combination of the others to cause refusal of employment, except on condition of joining a union, is alike against public policy." . . .

"A common law, civil conspiracy having been shown by overt unlawful acts, done in pursuance of an unlawful object, it remains only to consider the breadth of the temporary injunction to be issued. The court cannot compel workmen to return to work; it should restrain all picketing and patrolling, which, though lawful where not accompanied by violence and intimidation, are unlawful where in aid of an unlawful object. It should, as a matter of course, restrain violence, threats to workmen, and intending workmen, and, against their will, following them persisting in talking to them or visiting at their houses, and it should restrain the use of opprobrious epithets and language calculated to provoke a breach of the peace directed to members of plaintiff's association and its workmen, but no order will issue to restrain acts which are not shown by the moving papers to have been threatened, such as the issuance of circulars or holding of public meetings; nor will the court, in the exercise of its discretion at this time, restrain the free expression of opinion. No injunction will issue against the individual defendants."—(Reported in *Chicago Legal News*, Sept. 24, and in *New York Law Journal*.)

Public Lands. *Reclamation Act Constitutional—Federal Government may Acquire Water Power Sites.* U. S.

The constitutionality of the reclamation act was upheld by the United States Circuit Court of Appeals at San Francisco July 5, the court sustaining the decision of the Idaho district court in favor of the government in the case of *Burley* v. *United States*.

The decision establishes the right of the Secretary of the Interior to acquire by condemnation or otherwise, lands and waters in the furtherance of reclamation projects. It also extends the right of the government to take over any needed private water sites in carrying out the provisions of the act.

Taxation. *"Equalization" of Assessments—Administration of Tax Laws—Due Process of Law.* Ky.

In *Armstrong* v. *Ray* and *Hero* v. *Ray*, decided by the Chancery branch of the Jefferson Circuit Court of Kentucky July 20, the plaintiffs sought to enjoin the county officials from increasing their taxes 12 per cent under the provisions of a statute of 1906 creating a "State Board of Equalization and Assessment." The actions were based upon several distinct allegations, all of which were overruled. On one of the more important points the ruling of the Court (Shackelford Miller, J.) was as follows:—

"Does the limitation of the hearing to five witnesses deprive the individual taxpayer of due process of law? The act of the board in revising the assessments operates equally upon every property holder of the county, and every witness appears and testifies equally for all of them. The interest of every taxpayer is thereby represented, and the requirement that the witnesses be limited in number and selected by the county judge, instead of permitting every taxpayer to appear in person, is neither arbitrary, oppressive nor unjust. On the contrary, it gives the property owner that opportunity to appear and be heard which the circumstances of the case reasonably require; and this, we have seen, constitutes due process of law. *Kelly* v. *City of Pittsburg*, 104 U. S. 87; *McMillen* v. *Anderson*, 95 U. S. 42; *C., N. O. & T. P. Ry. Co.* v. *Commonwealth*, 81 Ky. 492, 511, affirmed in 115 U. S. 331."

Waste. *Mortgagee May Recover Damages from Lessee for Use of Mortgaged Premises for Small-Pox Hospital.* Mass.

The Supreme Judicial Court of Massachusetts on September 8 handed down a decision in the case of *Delavan C. Delano* v. *Nathan B. Smith et al.*, members of the board of health of Everett, Mass., to the effect that a mortgagee of real estate may recover damages from the board which has leased the mortgaged premises from the mortgagor and used them for a small-pox hospital, such use being without the consent of the mortgagee, who was unaware of the use to which the premises were being put. The court holds such use to warrant the finding that waste has been committed.

The Editor's Bag

UNIFORMITY OF COMMERCIAL LAW

THERE are obviously three possible agencies, the operation of which can be invoked to secure that uniformity of commercial law throughout the United States toward which a current has set that will flow on irresistibly till it overflows the banks of local prejudice and floods the marshes of stagnant state law. The first of these agencies is the co-operation of the several states in securing the adoption by their legislatures of uniform acts, the second is enactment by Congress of model statutes covering all subjects within the scope of the interstate commerce clause as construed by the Supreme Court, and the third is the advancement of systematic law writing and expository codification. None of these three agencies can accomplish everything that is to be desired without some aid from another, and in which order they shall be invoked, or to which the heartiest support should be accorded, is largely a question of practical expediency.

Mr. Joseph Wheless, of the St. Louis bar, thinks that the time has come for invoking federal action to promote uniformity of legislation. At the annual meeting of the American Bar Association he introduced the following resolutions, which were referred to the appropriate committee without reading or comment:—

THE AMERICAN BAR ASSOCIATION, IN ANNUAL CONVENTION ASSEMBLED:—

Considering: That among its organic purposes is that of promoting the improvement of the laws, and of securing a uniformity of legislation among the states particularly in respect of general commercial law, and to this end it has for years directed its efforts to secure the adoption by the several states of Uniform Laws on such commercial subjects as negotiable instruments, sales, bills-of-lading, warehouse receipts, corporate stock transfers, etc., all of which are essentially acts and instruments of commerce; and that it is highly desirable that all such commercial regulations should be uniform and uniformly enforced throughout the United States; and

Considering: That the federal Constitution vests in the Congress the power to regulate commerce between the states and with foreign nations, and that this power, as declared by the Supreme Court, is complete in itself and acknowledges no limitations other than are prescribed by the Constitution, and that it extends to every act, means and instrumentality of interstate and foreign commerce, including legislation and contracts which directly affect or regulate such commerce:—

Therefore, Resolved by the American Bar Association, that the federal Congress has plenary power under the Constitution to enact laws governing all phases of commerce between the states and with foreign nations, and incidentally to prescribe the form, terms and conditions of commercial contracts and instruments used in carrying on such commerce, such as are now being sought to be made uniform by identical state legislation; and that such power may be exercised either by the enactment of a series of laws on the several subjects, or by a Code of Laws regulating all such general commercial acts and contracts; and

Resolved: That the American Bar Associa-

tion hereby declares in favor of the enactment by the national Congress of a Federal Commercial Code, embracing in one uniform legislative Act all titles and subjects of interstate and foreign commerce, superseding thereby the conflicting regulations of the several states, tending to induce the several states to adopt the same regulation for their internal commerce, thereby securing a practical uniformity of legislation on commercial matters throughout the country, and placing the United States on commercial equality in point of legislation with the enlightened commercial nations of the world; and

Resolved: That this Resolution be referred to the Committee on Commerce of this Association for its consideration and report, for the purpose of securing effective action in the premises.

If one can suppose that Congress has the authority to enact a code of the character contemplated by these resolutions, because the powers granted by the interstate commerce clause, as judicially interpreted, are sufficiently broad to embrace nearly all the subjects of commercial law, it must, however, be borne in mind that the boundary between federal and state power is still too vaguely defined for Congress to enact a comprehensive code dealing with the entire field of commercial law, as applicable to interstate transactions, with the positive assurance that in doing so it will not tread here and there on controversial ground, and that the proposed code will not be attacked in some of its provisions by protracted and eventually successful litigation. The work is one that would demand of Congress much caution and circumspection, and we have much doubt of the wisdom of Congress proceeding at this time to undertake the drafting of such a code. A better draft would undoubtedly be the outcome later, when the powers of the federal government have been defined with greater precision.

There is another possible objection to the adoption of such a federal code at this time. Is there not the danger of such a code doing more to arrest than to advance the work undertaken by the Commissioners on Uniform State Laws? The Uniform Acts drafted by these Commissioners are in the main admirable, and they have been evolved by processes of scholarly research and mature deliberation which we can by no means be sure that Congress would be in a position to continue in the spirit of the Commissioners, with the same careful marshaling of all the data necessary for a model draft. Moreover, if the proposed federal code is to be not simply a confirmation of the work already done by the Commissioners, but a model for state legislation on subjects not yet covered by the Uniform Acts, it could only have the effect of throwing a wet blanket on the work which the Commissioners now have under way, and the usefulness of this body would probably come to an end. More would be lost than would be gained, in our judgment, by taking the work of drafting model uniform commercial statutes from the Commissioners and giving it to Congress.

CRITICISM OF THE "AMERICAN *CORPUS JURIS*" PLAN

THE project for a logical, co-ordinated statement of the American *corpus juris* is arousing continued interest, and it seems only fair to ask that whatever criticism be directed against it be fair, and be free from any misrepresentation, even though unconscious, regarding the nature of the undertaking proposed. This plan is now opposed by two of our esteemed contemporaries as a scheme for the unification of law. As a matter of fact it is nothing of the kind. This hostile attitude is based, as all who have studied the project will instantly perceive, on a grave miscon-

ception, which must be due solely to neglect to inform oneself about what one is criticizing before passing judgment upon it.

The *Central Law Journal* said in its issue of Sept. 2:—

> As a matter of fact, "America" has no law, that can be stated. The United States could not give a uniform answer to hardly a single important legal question, unless we permit the federal Supreme Court to declare for us what might be said to be the only pure uniform and thoroughly established system of American law.

Who has ever maintained that the United States possessed a uniform body of law? Such a view would be stupid, chimerical, preposterous. The term *corpus juris* does not imply a uniform body of law. Our body of American law has in some respects unity, in others divergence, but there is no logical sequence in saying that because laws are not uniform they cannot be stated. The object of the projected statement of the *corpus juris* is to state the law as it is, to state it in its unity and in its divergence, and this talk about giving a uniform answer to every legal question is deluded.

The *National Corporation Reporter* said editorially, Aug. 11:—

> If the purpose is merely to compile a digest of the decisions, or an encyclopedia, in which the substance of the decisions will be stated in text-book form, the criticism which at once suggests itself is that the scheme involves a duplication of labor and an expenditure of money which could hardly be justified by any probable superiority in the results of the enterprise over existing works of the same character.

This reveals a misconception readily avoidable, for no proposal has been made that the law be stated "in text-book form"; what is contemplated is the adoption of a form more succinct than that of the text-books—a form not unlike to that of Professor Wigmore's Pocket Code of Evidence (*supra*, p. 247). Without such compression of materials the proposed work would truly be a senseless duplication of effort, and the statement of the entire law in the limited number of volumes proposed would be an utter impossibility.

If the plan is not to duplicate the work of text-writers, argues the *National Corporation Reporter*, there is one other alternative:—

> If, on the other hand, it is proposed to condemn or approve doctrines which have met with general or partial acceptance, with a view to influencing courts and legislatures in the direction of an unified system of law for all the states—to make the work a sort of stepping stone to the adoption of a single code of laws for all jurisdictions—then the obvious criticism is that such a work should not be left to a small number of editors, even though the board should have the assistance, as suggested by Mr. Alexander, of eminent judges and practitioners, to whom parts of the work after completion, but before publication, would be submitted for criticism.

Here the ground is less shaky, but our learned contemporary errs, nevertheless, in supposing that the primary purpose may be other than that of *stating* the law with such completeness that the exception is as easy to find as the rule generally prevailing. The chief object will be to state the law as it prevails in every jurisdiction of the United States. The selection of particular doctrines for commendation or disapproval will be a secondary matter; it will not be paramount to everything else as this criticism assumes.

The outcome might be a code similar to Professor Wigmore's Pocket Code of Evidence, which might well serve as a basis for uniform legislation when conditions are ripe for uniformity, but the methods proposed would not on that ground be open to censure as seeking to influence legislation without recourse to the advice of a sufficiently large and representative

body of opinion. The whole plan is misconceived when it is thought of as primarily a scheme to promote uniformity of legislation.

This whole controversy has come to assume a ludicrous aspect since Professor Wigmore branded the plan as "untimely, unsound and futile." For if the learned jurist is right, these adjectives must apply to the latest product of his own rare ability as an expositor of law. The "Pocket Code of Evidence" must be "untimely, unsound and futile." And the situation is rendered still more ridiculous when a critic bases his attack on impressive quotations from the Chicago jurist and has little to add in the way of original ideas.

Is it not curious that while one of our contemporaries claims to have received letters from all over the country commending its hostile attitude, the *Green Bag* has not received a single letter disapproving its own position? As an example of the sort of criticism that has come to our ears, we print the following letter of Charles A. Boston, Esq., of the New York bar. This letter was written to a firm of lawyers in a Southern city:—

HORNBLOWER, MILLER & POTTER.

24 Broad street.

New York, Sept. 19, 1910.

Dear Sirs: Many thanks for the copy of the *Central Law Journal* condemning the proposed American *Corpus Juris*. Mr. Wigmore's success in stating the law of evidence in its present condition throughout the United States was the fact that convinced me that it could be done with respect to existing law, and that the task was not beyond human accomplishment. Mr. Wigmore's own successful efforts are a more convincing argument to me than his letter to the contrary written to the Editor of the *Green Bag*.

Very truly yours,

CHARLES A. BOSTON.

A JUDGE'S VALEDICTORY

A READER in Atlanta, Ga., writes: "In a not far distant number of the *Green Bag* I ran across a lamentation that a good poet had been spoiled to make a better judge in Logan E. Bleckley. Thinking you might be interested in the inclosed that I ran across today, I am forwarding it to you."

The inclosure consisted of the following verses read by Justice Bleckley when he left the bench:—

IN THE MATTER OF REST

Rest for hand and brow and breast,
For fingers, heart and brain!
Rest and peace! a long release
From labor and from pain:
Pain of doubt, fatigue, despair—
Pain of darkness everywhere,
And seeking after light in vain.

Peace and rest! Are they the best
For mortals here below?
Is soft repose from work and woes
A bliss for men to know?
Bliss of time is bliss of toil:
No bliss but this, from sun and soil,
Does God permit to grow.

"Justice Bleckley, having resigned at the conclusion of his last opinion read from the bench the above exquisite little poem, which was ordered spread upon the minutes by the Court. It constitutes a fit close to the judicial career of one whose opinions in these reports show him not only to have been the profound lawyer, but also the accomplished scholar."—Quoted from Henry J. Jackson, Reporter for the Supreme Court of Georgia. See 64 Georgia 452.

ENTERPRISING SELF-ADVERTISING

SOME Iowa lawyers seem to have some original ideas about advertising, if we may judge from the business card of one sent by a friend of the *Green Bag* in that state. This lawyer calls himself a "non-union counselor-at-law, and points on his card:—

"Laboring people form unions to get half they make and lawyers form unions to get the other half; the capitalists and corporations are not in the deal."

Another Iowa lawyer uses an unconventional letter-head, in which he inserts the words:—

"Red-Headed Legal Napoleon of the Slope. Happy But Not Satisfied. References, My Enemies—They are Unbiased. Fees are the Sinews of War."

THE LAW MADE RIDICULOUS

IN the cases recently instituted against the National Packing Company in Chicago, failure to insert a half-dozen words in an indictment undid the work of weeks—of months.

Lengthy investigation on the part of government officials; extended sessions of a special grand jury; examination of witnesses from widely separated sections of the country; weeks of labor by lawyers, and the paying out of enormous sums of money,—all counted for nothing simply because a grand jury had overlooked a trifling averment, in making its return to the court.

The prosecution, in the formal presentation of the case, neglected to set up an obvious fact, namely: that the defendant was engaged in business having to do with interstate commerce!

There were hundreds and hundreds of words in that indictment—words that repeated over and over again, what the defendant had done, and wherein it was charged with violating the law. Its language left no room for mistaking the character of the accusation and what the government expected to prove. All the notice that justice, or common sense, could ask, had been given the defendant. Indeed, the charge itself made it clear to every mind, that it was proposed to show the company engaged in the sort of business referred to.

This, however, had not been set out, formally, in an extra lot of legal verbiage, and for that reason,—and that reason alone, the case had to be dismissed.

No single right would have been lost had the case gone to trial on the indictment. In the event the government had failed to show that the defendant company was engaged in interstate business, then there could have been issue against, and the assumption that there was an effort making to prosecute for an offense which could not exist made necessary a most wretched contortion of human reasoning.

Still, the judge in his ruling in the case, did nothing more than follow the law. In the face of such occurrences as this—and they are numerous—is it at all surprising that our courts are congested with "business," and that it is next to impossible to secure a prompt and satisfactory administration of justice? Is it at all surprising, either, that the public is fast becoming disgusted with the law, as a means of punishing crime, or adjudicating civil differences? And there is nothing strange that we find the President of the United States, himself one of the foremost lawyers of the country, protesting against senseless judicial delays.

Is it not about time we were getting away from webs woven about our courts of justice, by centuries of practice and precedent? And the lawyers of the country should lead the way in this matter, instead of aiding in the perpetuation of the evil, and its inevitable augmentation.

A STORY OF CHIEF JUSTICE FULLER

A NUMBER of years before the late Chief Justice Melville W. Fuller was appointed to the United States Supreme Court, he presided, at the request of a Chicago coroner, at an inquest at which one of the jurors, after the usual swearing in, arose and pompously objected against service, alleging that he was the general manager of an important concern

and was wasting valuable time by sitting as a juror at an inquest.

Judge Fuller, turning to the clerk, said: "Mr. Simpson, kindly hand me 'Jervis,' the authority on juries."

After consulting the book a moment, he turned to the unwilling juror:—

"Upon reference to 'Jervis' I find, sir, that no persons are exempt from service as jurors except idiots, imbeciles and lunatics. Now under which heading do *you* claim exemption?"

DID NOT KNOW THE AUTHORITY

IN Kennebec county, Maine, a man was arrested recently and charged with an attempt at murder, the injured man having been a close friend of the culprit's. Furthermore the prisoner was a man of very high standing in the immediate community and had been respected and revered all his life.

Just before the time set for trial a new state's attorney was elected, and he felt somewhat at a loss to overcome the feeling that he was sure would exist in the minds of the jury in favor of the prisoner, and was apprehensive of a disagreement. He sought out the former state's attorney and said:—

"Here, X——, you know these folks better than I do; how am I going to impress them with the fact that this man's former upright life only makes his act worse and more deserving of punishment?"

"Well," said X——, "why don't you quote the case of Judas Iscariot, who was on intimate terms with a family for a long time and a man of high character and yet who betrayed his best friend for thirty silver dollars?"

"Capital!" said the new attorney, "That's great! Say, where did you find that illustration anyway? I'd like to read up the case."

NOT UNUSUAL

A JUDGE in the district court situated in a country district was much annoyed by the noise in the court room, where the lookers-on were gossiping freely as each case came up.

Finally he hammered on his desk and roared loudly: "Officer, you must keep silence in this court! It is a strange thing that this noise can not be stopped; why, I have decided I don't know how many cases without having heard a word of them!"

AN ABSENT-MINDED MAGISTRATE

JUDGE GAYNOR related a little anecdote while lying at the hospital, after the dastardly attempt on his life, which proved that the Mayor was cognizant of certain evils and not at all adverse to giving them publicity.

"I knew a man over my way," said the Judge with a smile, "who had formerly been a bartender. Going into politics he was elected a police justice. With some dread he heard his first case. Mary McMannis was up before him for drunkenness. The ex-bartender looked at her for a moment, and then said, sternly:—

"Well, what are you here for?"

"If yer please, yer Honor," said Mary, "the copper beyant pulled me in, sayin' I was drunk. An' I doan't drink, yer Honor; I doan't drink."

"All right," said the justice, absent-mindedly, "all right; have a cigar."

IOWA ARGUMENT AND TEXAS JUSTICE

RECENTLY a case of much importance was tried in Texas, involving certain points involved under the Constitution, and this was pleaded and argued by the Texas parties. The Iowa attorney who represented the plaintiff in the land case arose to reply as follows:—

"We have been accused justly I believe of many things in Iowa of late. We are led to believe that the progressive wing of our party has strayed far away from the old fold and is no longer a part of that old party. But far as we have gone on many issues, crazy as we have been about many questions which have arisen, we have never yet forgotten that we live under the Constitution of the United States."

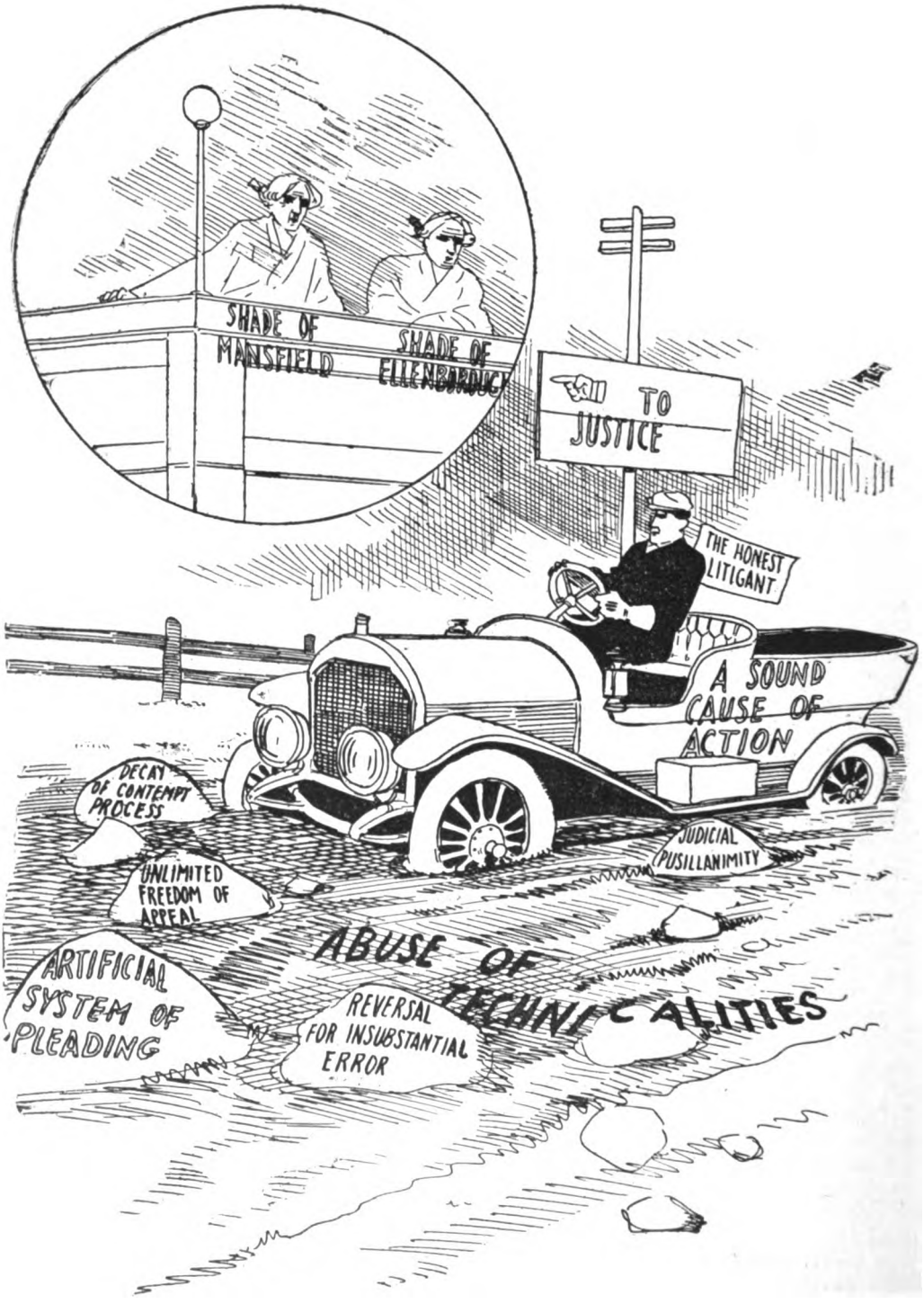
HE DID NOT LIVE ANYWHERE

A WITNESS of foreign birth was asked by the lawyer where he lived and he replied:—

"I don't live no place, I haven't got no land yet. I expect to get land and then I will live some place, too."

Although he lived as a renter for a number of years on one place, his idea of a home was to the effect that he must own it.

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



Shade of Mansfield—"It will be no small engineering feat to make this road passable."

The Legal World

The International Law Conference

The International Law Association held its twenty-sixth conference in London, Aug. 1–5. Questions of vital importance to the legal profession both here and abroad were discussed, and there was an attendance of some two hundred delegates, of whom forty came from America. Although a variety of subjects were considered, possibly the three most important were Divorce, Unification of the Law of Bills of Exchange, and Workmen's Compensation. J. Arthur Barratt of the United States and English Supreme Court bars offered a very full report on divorce, and Prof. F. P. Walton, Dean of the Faculty of Law of McGill University, Montreal, took part in the discussion of this topic.

The report of the committee dealing with Bills of Exchange was presented by Mr. Justice Phillimore, who stated that the rules proposed were not meant to be exhaustive, but merely to do away with unnecessary formalities. The rules were adopted, and will be laid before the International Conference of Government Representatives upon Bills of Exchange, which will meet next year. Unanimity upon a large number of important points, among leaders of the Anglo-Saxon and Continental systems of jurisprudence, has been attained in these rules.

A paper was read by Sir John Gray Hill on Workmen's Compensation (see p. 595, *supra*), in which he pointed out the differences between the laws of different countries on this subject. Arthur Williams of New York also discussed this subject.

The Declaration of London was dealt with by the Rt. Hon. Arthur Cohen, K. C. (see p. 598, *supra*), Sir John Macdonell (*ibid.*, *supra*), and Dr. Th. Baty. Mr. Justice Phillimore expressed himself as utterly opposed to ratifying a treaty permitting the destruction of neutral prizes, which he thought would be a backward step. The general feeling of the Conference seemed opposed to the ratification of the Declaration as a whole.

Professor C. Noble Gregory of Iowa, dealing particularly with the question of Continuous Voyage, argued that the doctrine first evolved by the American Prize Courts during the Civil War had since won the approval and acceptance of the great European Powers, and must be regarded as part of the law of nations at least in respect of contraband, and that the United States should not permit the abrogation of any part of it.

The Americans who took a prominent part in the deliberations included Cephas Brainerd of New York, Former Justice Henry Billings Brown, Prof. C. Noble Gregory of Iowa University, Austin Griffiths of Seattle, Consul-General John L. Griffiths, Arthur K. Kuhn of New York, Everett P. Wheeler of New York, Arthur Williams of New York, and Justice G. M. Sharp of Baltimore.

Lord Alverstone, Lord Chief Justice of England, Lord Justice Kennedy, and Justices Walton and Phillimore presided alternately. Maitre Clunet, a leader of the Paris bar, was elected President for the ensuing year.

Miscellaneous

A bill drafted by Harry Eugene Kelly of the Denver bar, designed to stop the "third degree" abuse, has been enacted by the Colorado Legislature. The author of the Act would like to see it enacted by the various state legislatures, and will present a similar bill to Congress at its next session.

A splendid statue of the late Thomas B. Reed, Speaker of the National House of Representatives, designed by Burr C. Miller, was unveiled with impressive ceremonies in Portland, Me., on August 31. The principal oration, delivered by Congressman Samuel W. McCall, LL.D., of Massachusetts, was admirable as a historical review of Mr. Reed's career and first-hand characterization of the man in both his public and private life.

The United States Civil Service Commission announces an examination on October 19–20, 1910, to secure eligibles from which to make certification to fill vacancies in the position of land law clerk in the Forest Service, Department of Agriculture, at entrance salaries ranging from $900 to $1,600 per annum, and in the positions of register and receiver's clerk in local land offices under the Department of the Interior, at an entrance salary of $900 per annum, with possibility of promotion.

The able address of Col. John W. Hinsdale, which he delivered as incoming president of the North Carolina Bar Association last June, largely dealt with the disadvantages of trial by jury in civil actions. He favored giving judges the right to express an opinion upon the facts in proper cases, where there is no conflict in the evidence, and he would abolish the unanimity rule. He was convinced that while the organic law of North Carolina would not be changed in this generation so as to abolish juries in civil actions, the day would come when a better mode of trying such actions would be adopted.

Samuel Davis of the Boston bar is strongly in favor of the federal regulation of insurance companies. In a recent newspaper article he says: "The opponents of federal supervision

have the Supreme Court with them and no flaw can be found in the court's repeatedly pronounced decisions. The correctness, however, of their initial premise may be challenged and the metaphysical concept which they persist in holding as to the definition of the word 'commerce.' . . . There is on the one side a conception of the meaning of the word 'commerce' strongly held to by the United States Supreme Court, while on the other hand is the irresistible pressure of economic evolution. It is my opinion that economic force will win in the end. Of necessity it will win as the result of an amendment to the federal Constitution which shall in express terms give Congress jurisdiction of insurance."

Necrology—The Bench

Bailey, Charles A.—At Bangor, Me., August 12, aged 72. Former law partner of Hon. Daniel F. Davis, former Governor of Maine; formerly judge of Bangor Municipal Court, and twice strongly endorsed for the Supreme bench.

Cowell, George H.—At Waterbury, Ct., August 10, aged 70. Clerk of Connecticut House of Representatives, 1872; Clerk of the Senate, 1873; judge of the city court in Waterbury, 1877; judge of district court; chairman of the judiciary committee of the House; Judge-Advocate-General.

Fleming, J. H.—At Raven, Ill., August 19. Had much to do with early development of Nebraska.

Lathrop, John.—At Dedham, Mass., August 24, aged 75. Graduated from Harvard Law School, 1855; abandoned practice to enlist and distinguished himself at South Mountain and elsewhere; Reporter of Decisions of Supreme Judicial Court, 1874–88; Associate Justice of Superior Court, 1888–91; Associate Justice of Supreme Judicial Court of Massachusetts, 1891–1906; formerly lecturer at Harvard Law School and at Boston University Law School.

Lynch, John.—At Atlantic City, August 17, aged 71. Elected to Congress in 1886; President Judge of Lucerne county (Pa.) courts.

Moulton, Austin H.—At Palmer, Mass., August 17, aged 85. Former judge of county court, Fairbury, Neb.

Saufley, Michael C.—At Lexington, August 12, aged 68. Judge of the 13th Kentucky district court; former Associate Justice of Wyoming Territorial Supreme Court.

Silkman, Theodore H.—At Yonkers, N. Y., August 22. Former Surrogate of Westchester county; prominent Republican.

Smith, Harsen D.—At Cassopolis, Mich., August 8, aged 65. Former chairman of Republican county committee; former prosecuting attorney for Cass county; former circuit judge.

Stern, Jacob.—At Buffalo, August 19, aged 57. Surrogate, 1878–80.

Watson, James A.—At Parkersburg, W. Va., July 29, aged 59.

Necrology—The Bar

Davis, Andrew J.—At Bar Harbor, August 10, aged 77. Prominent attorney of Wilkesbarre, Pa.

Dennett, Liberty B.—At Portland, Me., August 17, aged 77. Prominent lawyer in Maine; magazine writer.

Farnell, Frank.—At Providence, August 11, aged 33. Youngest man ever admitted to the Rhode Island bar; court stenographer.

Lyman, Samuel H.—At Nauheim, Germany, aged 71. Graduated from Yale in 1863; formerly of United States Coast Survey; former clerk of the District Court of the United States for southern district of New York; former commissioner of the United States Circuit Court.

Murphey, Asmon A.—At Barnesville, Ga., August 5, aged 60. Prominent lawyer of middle Georgia.

Paine, Robert Treat.—At Waltham, Mass., August 11, aged 75. President of the American Peace Society; best known philanthropist in New England; member of Massachusetts House of Representatives in 1884; brought about many reforms in favor of workingmen.

Pond, J. E.—At North Attleboro, Mass., August 18, aged 70.

Rice, William L.—At Cleveland, August 6. Prominent in Cleveland.

Schnebley, Peter R.—At Xenia, O., July 25, aged 73. Leading member of the Greene county bar.

Simmons, J. Edward.—At Lake Mohonk, N. Y., August 5, aged 69. President of New York Stock Exchange during panic in 1884; former president of New York clearing house and chamber of commerce; personal friend of Grover Cleveland and Samuel J. Tilden; to his probity is attributed the firm establishment of the board of water supply as a non-partisan commission.

Walker, William A.—At Nyack, N. Y., August 1. Authority on admiralty law; former president and founder of the New York Lloyds for marine underwriters; president and founder of Average Adjusters Association of New York; associated with the late Walker Blaine as counsel in the *Alabama Claims* case.

HON. IRVING G. VANN

ASSOCIATE JUDGE OF THE NEW YORK COURT OF APPEALS

(Photo. by Albany Art Union)

The Green Bag

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Judge Irving G. Vann

THE ability of the New York Court of Appeals is generally recognized, and the supreme tribunal of no other state enjoys a higher reputation for learning, shows a more skillful grasp of the recondite problems of modern commerce and finance, or exerts a stronger influence in moulding the doctrines of American jurisprudence. No member of this Court, probably, is better known to the profession generally than Judge Irving G. Vann, who is one of the oldest judges in point of service. His work in the tribunal whose traditions he has so ably upheld dates back to 1889, when he was designated as a Judge of the second division of the Court of Appeals, under the provisions of a constitutional amendment which permitted that Court to secure the assistance of seven Justices of the Supreme Court to sit as a separate body.

Judge Vann is now in his sixty-ninth year, having been born at Ulysses, in Tompkins county, N. Y., January 3, 1842. He received what is now a good preparation for the bar and what in those times was doubly so. Fitting for college at Trumansburg Academy and at Ithaca Academy, he was graduated from Yale in 1863 and from Albany Law School in 1865. He then read in the office of Boardman & Finch, Ithaca, and was admitted to the bar in 1865, beginning the practice of law at Syracuse as a member of the firm of Raynor & Vann, which firm was afterwards Fuller & Vann, and still later Vann, McLennan & Dillaye. For about fifteen years he practised his profession, winning a leading position at the bar before his elevation to the bench. His legal career, however, was interrupted by a term of service as Mayor of Syracuse, to which office he was elected in 1879.

Judge Vann was first elected to the Supreme Court of New York in 1881, being re-elected in 1895. He therefore had many years' honorable experience not only at the bar, but on the bench of the Supreme Court, before his advancement to the Court of Appeals. In 1896 he was appointed Judge of the latter Court, on the second division of which he had served from 1889 to 1892. His fourteen-year term expires this year, and it is gratifying to note that the two leading political parties have concurred in renominating him to serve until he reaches the age limit. As the *New York Law Journal* has observed, "this nomination is a fresh illustration of the disposition to take the judiciary out of partisan politics."

On October 11, 1870, Judge Vann married Miss Florence Dillaye of Syracuse. He received the degree of LL.D. from Hamilton in 1882, from Syracuse in 1897, and from Yale in 1900. He is a member of the Century, University, and Citizens' Clubs of Syracuse, and of the Fort Orange Club of Albany. His address is 316 James street, Syracuse.

A Lawsuit in Mexico

By Joseph Wheless, of the St. Louis Bar

Author of "The Laws of Mexico in English," etc.

ON a former occasion, taking a noted criminal case for my text, I gave the readers of the *Green Bag* somewhat of a study of Mexican penal procedure, drawing some comparisons between its simplicity and expedition, and the tortuous and technical course of a prosecution under the archaic formalities of our own law.[1] My present attempt is to invite the interest of my brethren of the bar to a civil suit under Mexican procedure, being the relation of a case which I conducted in the courts of our sister republic, involving some interesting features of civil law practice under the excellent code of civil procedure of Mexico.

At a time when American lawyers and associations of lawyers are getting alive to the necessity of revising our own codes of practice, it may serve a useful purpose to take note of a system based upon the most enlightened principles of the great civil jurists of the Continent, many features of which might be profitably imitated among us to the end of simplifying practice and expediting justice in our common law states.

My narrative shall have as little as may be of personal allusion in it, though, as it is founded upon actual experiences in the suit spoken of, which will best serve as a concrete application of many of the rules of practice which we are to make this study of, the *ego* must occasionally crop out; it is however only as a sort of peg to hang the tale on. To premise then: In December, 1908, the holders of a large amount of the past-due notes of a copper mining company operating in Mexico enlisted my services to take steps to protect their interests. The copper mines in question are located in the state of Sonora, near its capital city, Hermosillo, —well named, for it means, and is, a "little beauty." It was necessary therefore to reach the property through the *forum rei sitæ;* so to that forum I resorted. It was my first "personally conducted" lawsuit in foreign parts; but with the confidence of him "who hath his quarrel just" I went about my interesting employment with no misgivings as to the result of my maiden efforts in pleading in a friendly foreign tribunal.

As I intimated, the evidences of debt with which I was armed were promisory notes, seventy-seven in number. Being all in the English language, though drawn in form to meet the requirements of the Mexican law, which requires the nature of the consideration to be stated both in the note and in its indorsement, and the latter to be dated, the first move was to have them all translated into Spanish, for this must accompany their presentation in a Mexican court.

The Mexican practice, and that of civil law countries generally, requires a formal power of attorney to be executed by the client to his attorney, without which he cannot bring a suit or collect a debt or judgment. These notes being payable to a number of different holders, living in several distinct cities in the States, it would have been a long and painful process to have them all execute powers of attorney, all of

[1] See 19 *Green Bag* (1907) pp. 462, 532. .

which then severally must go the rounds of authentication, notarial, consular, and ministerial, in the United States and Mexico, and costing much time and fees. This Gordian difficulty was averted by the simple expedient of causing all the notes to be indorsed in due form to myself, who, being thus the legal owner of them, and present in the forum, suing *in propria persona*, needed no such credentials.

Another fine point of Mexican law now protruded itself, and this time could not be gotten around. The notes, although made and payable in the United States, could not be put into suit in a court of Mexico until "validated" by a very liberal application of Mexican internal revenue stamps, at the rate of one tenth of one per cent, which amounted to nearly a thousand dollars, and required a whole afternoon in the stamp office to plaster them on the notes and cancel with the seal of the office. This stamp tax is all but universal to every act and document, every sheet of paper and book of entry in Mexico, and is the principal source of the federal revenue, after the customs tariff. In a number of particulars it is a very good form of excise and means of regulation of business. I shall have occasion to refer to it again.

At the threshold of the case, now ready to be brought into the Second Court of First Instance, a matter of procedure of important interest presents itself, known as *reconocimiento de firma*, or "acknowledgment of signature," which is an admirably devised "process preliminary to suit," as a step preparatory to "commercial suits." It may be noticed here, that all commercial transactions and litigations in Mexico are covered by the Code of Commerce, which is a federal statute exclusively in force throughout the Mexican United States. The Civil Code and Code of Civil Procedure of Mexico, as federal enactments, apply only within the federal district and the territories; but as all the Mexican states have adopted those codes as law within their respective jurisdictions (with little or no changes), the federal codes are practically in force throughout the Republic,—which very much simplifies the law in Mexico.

Commercial suits are of two kinds, ordinary and executive, the former of which, as its name implies, applies to ordinary commercial matters. It is the "executive action" which claims our interest at this time, being the course followed in the "case at bar." The code provides that "the executive proceeding may be followed when the demand is founded upon a document which bears preparatory execution,"—which is as nearly as I can render into English the peculiar Mexican law term *traiga aparejada ejecución*. What this is may appear from the following clauses declaring what documents "bear preparatory execution," to wit: final judgments which have become *res adjudicata*, and inappealable arbitral awards; "public instruments" (which are all such as are executed before a notary public); judicial confessions by the debtor; letters of exchange, bills, drafts, notes, and other commercial papers; policies of insurance; awards of adjusters stipulated for in policies; invoices, current accounts, and all other commercial contracts *signed and judicially acknowledged* by the debtor.

My documents being simple notes of hand, before they could become the subject of the extraordinary "executive" procedure there must be the "judicial recognition of signature" by the maker. The code provides that the executive action may be prepared by requiring the

recognition of signature of mercantile documents; and that if the debtor refuse to recognize his signature, it shall be taken as recognized if the debtor, being twice cited to appear, fails to appear and recognize it. The first step therefore is to petition the court to cite the debtor to appear and recognize his signature. This proceeding is naturally preliminary to, and is apart from, a suit on the "recognized" document, which suit may be then brought, or at any later time within the limitation of the cause of action.

It may be interesting to quote the brief petition filed for this purpose, which I translate from a certified copy of the record which lies before me. I may take the occasion to say that this and all the other pleadings in the case were written, in Spanish, by myself, as I was "my own lawyer" from first to last, and had no local associate.

PETITION ASKING THE RECOGNITION OF SIGNATURES AS MEANS PREPARATORY TO THE EXECUTIVE ACTION.

To the Second Judge of First Instance:—

Joseph Wheless, domiciled in the Hotel Arcadia in this city, in my own right, before you, in due form of law, respectfully say: That in order to prepare the executive mercantile action which lies for the recovery of the sum of . . . thousand dollars, American gold, which the V. G. Copper Co. owes me, as appears by the 77 notes which I exhibit, which were executed by the said company in favor of the persons mentioned in them, and which, as can be seen, were endorsed to me, I come to petition you, in accordance with articles 325 of the Code of Civil Procedure and 1167 of the Code of Commerce, that you may please to cite Messrs. J. D. F., manager, and R. D. W., secretary and treasurer of said V. G. Copper Co., to the end that they may recognize, in the character indicated, the signatures attached to the notes which, with their respective translations, are annexed, and also that they may declare whether they acknowledge the debts which the said notes express in favor of the persons named in them, and that you please to set a day and hour for the act which is requested. The domicile of the said J. D. F. and R. D. W. is in the Hotel Arcadia in this city.

Hermosillo, December 12, 1908.

(Signed) Joseph Wheless.

From the foregoing simple *escrito* (writing), as all pleadings are called, several points of practice appear which we will notice. The first is the almost entire want of formalities of pleading, caption, venue, term of court (of which there are none), etc., familiar to common law and code pleadings. It is noticed that the place of residence of plaintiff and defendant is stated, this so that all future notices,—of which there are many,—may be there served, either on the party, or his duly constituted *apoderado* or attorney. The most significant feature, however, is the setting out of the precise article of the code upon which the right claimed is based. This is required in every pleading of either party, and of the judge in his written decision on every point; for every decision on every matter arising in the course of the progress of a cause must be in writing, and supported by an exact reference to the articles of law conceived to justify the ruling of the judge, who, in many instances, makes his decisions on his own personal responsibility, civil in damages to the injured party, and penal.

Another point, physically "appearing on the face of the record," is the prime matter of costs. Here the Mexican practice is worthy of all praise and imitation. No bond or deposit for costs goes; the rule is "pay as you go"—in the invariable form of a fifty-cent revenue stamp pasted on every sheet of paper used in the record,—the winning party recovering his expenditures in the judgment. Several inci-

dents result from this practice, first of which is the practical discouragement of prolix and frivolous pleadings, which cannot be too much commended. Another result is that pleadings and orders are all written on both sides of the sheet of paper, without paragraphing or blank spaces (which latter are prohibited by law); and all orders and decrees are begun on any unused portion of a sheet on which the preceding pleading or order is written. Another novel feature is the record itself; it is formed from day to day by adding the accumulating sheets to the preceding ones with needle and thread, all the sheets having a wide left-hand margin, by which they are sewed together in the form of a book, and thus accumulated and preserved, instead of as a bundle of separate folded documents as with us. It is a very convenient and durable form of record, easily examined, and is thus preserved smooth and clean for all future reference.

A few cordial words I must now tribute to my good friend the Second Judge of First Instance of Hermosillo, and the pleasant personnel of his court in its local setting, which will serve to give a typical and intimate view of the civil courts of Mexico. The court is situated on the ground floor of the Palace of the State Government, its wide doors opening from the arched corridor around the large open *patio* or inside yard of the Palace, its iron-barred windows giving upon the lateral street outside. The low building across the side street from the Palace is the office of the local notary, the brilliant and distinguished lawyer, *Lic.* Alberto Flores.

The court room is rather long and quite plainly furnished, presenting somewhat the aspect of a rural Justice of the Peace shop. At one end is a plain table at which his Honor sits, piled around with papers and books; at the opposite end a table used by one of the *asistentes* of the judge; to the right, midway between the doors, another table occupied by the other *asistente*, these two functionaries supplying the place of the secretary or clerk of the court in the absence or want of that official. On another desk across the room sits a typewriter machine, operated quite well by one of the *asistentes*, for the purpose of writing all notices, orders, decrees and other process of the court. For it must be mentioned that no "blank forms" of process, mesne or final, are used in the Mexican courts; every document from first citation to final execution is textually written by hand or machine, signed by judge and clerk, or both *asistentes*, and by the parties concerned or their attorneys.

His Honor the Second Judge of First Instance is the Senor *Lic.* Ricardo Searcy, an excellent and upright judge and a very *simpática* personality. The name is seen to be not Mexican, and the Judge Searcy is himself half a *gringo*, for his father was an American who lived in St. Louis in the fifties, went to Mexico and married a Mexican lady and Don Ricardo was born a Mexican citizen, and has spent his life in that country, having but made brief visits as far as Tucson, just across the border in Arizona. His father-language he has never acquired, and speaks only his mother-tongue, "the sweet and phonetic idiom of Spain." Judge Searcy is thoroughly a Mexican, too, in the possession of all the innate courtesy and politeness for which his people are distinguished; and I shall always be pleasantly mindful of his exceeding courtesy and good nature as shown to myself during my appearances before him in court. I must relate,

as a signal instance of this, that Judge Searcy suspended all other business in his court for three days, so that the business of the foreign visitor might be dispatched without interruption, and he and both his amiable *asistentes*, Don Márcos Gómez and Don Joaquín L. Pérez, devoted their entire activities to "breaking all records" for dispatch in the courts of Mexico. This was made possible, however, by the fact that the defendant could interpose no valid defense to the relief asked, and by entering appearance and waiving the time allowed for each defensive move, very materially expedited the progress of even this summary action.

In Mexico there are no "terms of court"; the Code of Civil Procedure declares that "every day of the year is *dies jurídicus*, except the holidays recognized by law [very few] and Sundays, between the hours of sunrise and sunset"; and the judge can "legaize" all other days and hours in case of urgency, by an order to that effect. This certainly is "going one better" in giving effect to our constitutional injunctions that the "courts shall always be open for the administration of justice,"—followed by stated terms of court at long intervals, lengthy vacations, inordinate delays before and between pleadings, interminable continuances, and *practicable denial of justice* by appeals to higher courts several years "behind with their docket," *et id omne genus* which goes to make up the discouraging tale of the "law's delays," to make a mock of the Bills of Rights which declare, with Magna Carta, that "justice shall not be sold, denied or *delayed*," and to justify the feeling which so many share with Shakspere toward "Old Father Antic, the Law."

In Mexico, a suit is filed on any day; within twenty-four hours from the hour filed, return of service must be had on the defendant, "under penalty of $10 fine, besides such other punishment as it may deserve under the laws." Exception of course is made in case where the party cannot be found or lives in a distant place, in which instances notice by publication or summons sent through the local tribunal of his residence are available with but little delay. If the party to be notified is not at his residence, a notice is left for him, notifying him to be there at an hour certain within the next twenty-four, at which time the secretary must call again, and either serve him, if there, or if not a copy left for him with some one living in the house is sufficient, the facts being set out in the return. If personally served, the party cited or notified must sign the return, "*that he hears it*"; or if he cannot or will not sign, the secretary signs for him. All notifications, after the first, must be made on the same day that they are ordered, to the parties in person, or to their attorneys if they have them, duly authorized, and be signed as above.

Within the fixed period of three days after the citation, the defendant must appear and plead, either to the merits, or by way of exception; and thenceforward, periods of but three days each must elapse between the successive steps of pleading in making up the issues; in proper cases, this period may be extended, but never to exceed other three days. An appeal must be taken within three days from an interlocutory judgment, and within five days from a final judgment; the appellate tribunal must hear the appeal within thirty days, and render its decision within twenty-four hours. These expeditious provisions from the chapter of the code "of the dispatch of business,"

form a striking contrast to all known United States methods. Yet Mexico is called the land of "Mañana"; if so, the United States, in respect of judicial proceedings, is the land of "any old time" within the natural course of life, or after.

Having outlined this phase of practice and duly philosophized about it, we will return to the case in hand.

The petition for recognition of signature having been presented to the judge, accompanied by the translation of the notes (made by me before leaving St. Louis), the judge himself made the entry, beginning immediately after my signature on the *escrito:* "Received on its date with the seventy-seven notes attached at ten a. m. *Conste:* Let it be recorded"—followed by his *rubric*, or flourish of pen which is an inseparable part of the signature of every Mexican. And here a right singular custom, recognized by statute: the judges, and public officials generally, sign their names in three different styles, according to the nature and "dignity" of the document to be signed, whether with their full name, "half name" or *rúbrica*. The Code of Civil Procedure provides, article 66: "Judicial resolutions are: (1) Simple orders of practice, which are called decrees, and shall be authenticated by the *half-signature* of the judge and secretary; (2) Decisions on matters not of simple practice, which are called *autos*, and shall be authenticated with the *half-signature* of the judge and the *entire signature* of the secretary; *they must set out the legal grounds upon which they are based;* (3) Judgments, final and interlocutory; they must all be authenticated with the *full signatures* of the judge and the secretary."

The following steps are briefly recorded, and as they illustrate the above mentioned points of practice I will quote them from the record. It is proper to state in this connection that the officers of the defendant corporation, having, as indicated, no defense to make, good-naturedly remained in court and responded to the several notifications required to be made to them. The first step was to appoint an official translator for the perfunctory service of verifying the translation of the notes, and incidentally to charge a fee of $30 for this and another piece of work—which I also performed personally.

Hermosillo, December 12, 1908.

Presented the foregoing *escrito*, with the accompanying documents in the English language; let the due course of process be had, while they are being translated into Spanish, for which purpose Sr. Antonio Canale is appointed expert translator, who will be notified of his appointment that he may accept it and take oath to faithfully perform it. Let it be notified. The Second Judge of First Instance so ordered and signed. We attest.

(Signed) Ricardo Searcy. M. Gómez, *Asistente*. Joaquín L. Pérez, *Asistente*. *Rúbricas*.

Then follow the notifications to the parties, who although actually present the record must show in due course.

On the same date Mr. Joseph Wheless, being notified, said: that he hears it, and signs. We attest.

[Signed by Searcy; also the *Asistentes* and Wheless; *rúbricas*.]

Then the record as to the translator:—

On the same date Señor Antonio Canale being notified, said: that he hears it, accepts the duty imposed upon him, makes oath for its faithful performance; and thereupon he presents his translation in fifteen utilized pages, declaring it to be correct after the originals, and signed before the undersigned judge and assisting witnesses. We attest.

[Searcy; Antonio Canale. *Asistentes; rúbricas*. Fee.]

These preliminaries being disposed of,

all the entries being written one after the other in longhand writing by one of the *asistentes* (there being no secretary and the two *asistentes* supplying his place), and each read to the judge and interested parties and signed by them, the next step is the process of citation to the defendant to come in and recognize its signatures; this too being written out, read over and signed as the rest.

Hermosillo, December 12, 1908.

The translation of the accompanying documents having been made, therefore in accordance with articles 325 of the Code of Civil Procedure in connection with 1167 of that of Commerce, cite Messrs. J. D. F., as manager of the V. G. Copper Co., and R. D. W., as secretary and treasurer of the same corporation, for that on the third lawful day after being notified, or upon being notified, they recognize, in the character indicated and under the oath of law, the signatures attached to the said notes, and also that they declare whether they acknowledge the indebtedness in the amounts expressed in each one of them, or altogether the sum of . . . thousand dollars, American gold. Let it be notified. So decreed and signed the Second Judge of First Instance. We attest.

(Signed) Ricardo Searcy. [*Asistentes; rúbricas.* And the notices:] On the same date Mr. Joseph Wheless being notified, said: that he hears it, and signs. We attest.

[Searcy. *Asistentes;* Wheless; *rúbricas.*]

The "recognition of signatures" follows, ending this preliminary proceeding:—

On the same date, being present in this court Messrs. J. D. F., as manager of the V. G. Copper Co., and R. D. W., as secretary and treasurer of the same corporation, and being notified of the foregoing *auto*, they said: that in order to avoid delays, and upon legal oath to say the truth, they recognize as signatures of the V. G. Copper Co. those attached to the notes which are exhibited to them, and also, in the name of the V. G. Copper Co., which they represent and in the name of which they signed, that it owes the sum which each note expresses, or altogether the sum of . . . thousand dollars, American gold; and they signed before the undersigned judge and the assisting witnesses. We attest.

[Signed by Searcy, R. D. W., J. D. F. *Asistentes; rúbricas.*]

The foregoing makes up the complete record of the preliminary proceeding to obtain the recognition of signatures; the documents so "recognized" becoming now commercial documents "bearing preparatory execution," upon which at any time suit may be instituted, and the process of attachment immediately issues as of course against the property of the defendant, a custodian is appointed to watch it, final judgment is rendered in due time, execution follows levied on the property attached, notice of sale published, and the property sold to satisfy the execution. The only features of these proceedings which differ materially from our own practice are the form of *escrito* or petition, the form of the judgment, and the form of bidding at the judicial sale. As these several matters afford some interesting comparisons, I shall briefly sketch these several documents from the record before me, omitting details not pertinent to the study of the procedure.

Immediately upon the recognition of the signatures, I proceeded to file suit for judgment on the notes, having prepared before leaving St. Louis the following:—

PETITION FOR SUIT IN EXECUTIVE ACTION

To the Second Judge of First Instance:—

Joseph Wheless, in my own right, before you with all respect and in due form of law, say: that in accordance with the bases of fact and of law which I will proceed at once to set out, I come to sue in executive mercantile action the V. G. Copper Co. for the sum of . . . thousand dollars, American gold. *facts:* (1) [the facts of incorporation of the defendant corporation in Arizona for

the purpose of operating mines which it owns within the jurisdiction of the court]; (2) [that certain of the attached notes are based upon a certain consideration, stating it]; (3) [that the consideration of the other notes is so and so, stating it]; (4) [that no part of the debts or interest owed had been paid, and the several amounts are therefore due on them]; (5) that as evidence of such debts the V. G. Copper Co. had executed to each of its creditors its promissory notes, which are attached, and the amount of which is . . . dollars; (6) all said notes have been indorsed to me, as can be seen; (7) the total amount of the notes of the company for which I demand judgment is . . . thousand dollars, together with interest at the rate mentioned in the notes, amounting to . . . dollars, which with the amount of the principal is a total of . . . dollars, American gold, or . . . *pesos*, national currency. *law:* The V. G. Copper Co. is a foreign corporation and the validity of all its acts is attested by its having complied with the requirements of article 265, clauses 1 and 2, of the Code of Commerce; (2) the executive mercantile action lies when the demand is founded upon a document which bears preparatory execution, as provided in article 1391, clause 4, of the Code of Commerce; (3) the annexed notes, basis of this suit, are mercantile documents, because they meet the requirements of article 546 in its seven clauses, and the signatures of the same having been recognized, I have duly prepared the executive action, according to articles 1167 of the Code of Commerce and 325 of the Code of Civil Procedure. Therefore, and also in accordance with articles 1391, clause 4, 1392, 1393, 1394, 1395 and 1396 of the Code of Commerce, I pray you, Judge: First, that you please to issue the writ of execution with the force of a mandate in due form, requiring said company to make payment of the said amount of . . . dollars, with interest calculated in the sum of . . .dollars, with costs and damages, and if it does not do so, that sufficient of its property be attached to cover the debt and costs; Second, that in due course you pronounce judgment of sale, condemning the said V. G. Copper Co. to the payment of the amount demanded, interest, costs, expenses, losses and damages. It is justice, as in due form I make oath.

Hermosillo, December 14, 1908.

(Signed) Joseph Wheless.

Upon this petition the judge proceeded to indorse his *auto* as prayed, that demand be made on the copper company to pay the amount sued for within three days, or failing in this, that execution be had of the property of the company; which order was promptly and in due form notified to the parties, who said they heard it, and signed. Being duly notified and demanded, the officers of the company replied that although it is true that the company owes the money as alleged, it cannot make the payment because of want of funds; they will proceed therefore, as required by law, to designate sufficient of the company's property on which execution shall be levied, to wit: (making a complete inventory of the real and personal property of the debtor corporation, all of the stated valuation of so-many dollars).

The Mexican law requires that an appraised value be put upon property attached under execution, as upon the execution sale the bidding must begin not lower than two-thirds of the official appraisement. By consent of the parties the general manager of the company was appointed by the court as *depositario* or receiver of the property pending the further proceedings in the cause; he accepted in writing the charge and took oath for its faithful discharge. The defendant, having been notified and having admitted inability to pay, made a written waiver of the term of three days allowed it in which to comply with the payment, or to show cause why it should not pay. Nothing remained therefore but to ask execution by a sale of the property, this being done by a short petition, stating the fact of the waiver of the three days for making or opposing payment, and praying, in accordance with article 1404 of the Code of Commerce, and after due notice

to the parties, that order of sale be made.

Notices being given, "heard" and signed of record, the judge proceeded to render his formal judgment. As I have indicated, all decisions in Mexican courts are in writing, in the nature of a special finding of facts, and specially citing every article of the codes on which the relief granted is based; and being divided in the formal sections *visto*, "seen," or premises, *resultando*, or findings of fact, *considerando*, or conclusions of law, and the *fallo*, or final decree of the court. This decree is too lengthy to quote in full, but as it illustrates so entirely this important phase of the civil law practice, and shows the care with which decrees and judgments are prepared, in quite syllogistic form, and sticking in the legal pegs on which every adjudicated right is hung, I will try to give a skeleton of it which will convey an accurate idea of its form and substance. It may be remarked that these decrees, like all other parts of the record except pleadings, are written by the secretary, signed by himself and the judge, and sewed into the folio of the record. The decree, which is in effect a *résumé* of the entire record, in substance follows:—

Hermosillo, December 15, 1908.

Visto, the present executive mercantile suit, brought by Mr. Joseph Wheless, domiciled in the Hotel Arcadia, of this city, against the V. G. Copper Co., represented by [etc.], domiciled [etc.], for the payment of . . . dollars; *vistas*, [the record of the preparatory proceedings and all other things appearing by the *autos* in the record and necessary to be seen]; and,

Resultando, I: [here is recited the petition for recognition of signatures, and that the notes were "revalidated" by attaching revenue stamps];

Resultando, II: [here recital of the appearance of the representatives of the defendant, the recognition of signatures, and admission of the indebtedness];

Resultando, III: [here recital of petition in executive mercantile action, with the details of its allegations and prayer; the issuance of *auto* citing the defendant, and demanding payment of debt, the answer of the defendant admitting the debt but declaring it could not pay; the designation of property on which to levy execution, and the waiver of the three days, and the appointment of the receiver];

Resultando, IV: That by *escrito* dated the 14th of the current month, the plaintiff prayed that the parties be cited for judgment, which was accordingly on the same day decreed; and,

Considerando, I: That the preparatory proceedings for the suit, brought by plaintiff, are in due form, being in accordance with article 1167 of the Code of Commerce, and praying, as it prayed, the recognition of the signatures of the notes on which the suit was based, which signatures, as well as the amounts expressed by each note, were legally recognized;

Considerando, II: That although the notes presented for recognition were executed in a foreign country, nevertheless they were revalidated according to law, so as to make them enforceable within Mexican territory, by paying the proper stamp duties, in conformity with articles 1, section 2, and 71 of the Stamp Law now in force, the said documents, as the basis of the demand presented by the plaintiff, being plenary proof by virtue of article 245 of the said Stamp Law in connection with article 1296 of the Code of Commerce;

Considerando, III: That it is well established law that the decree will only dispose of the claims made and defenses offered respectively in the petition and answer (article 1327 of the Code of Commerce), and, that in the present case there are no defenses to consider, because the company made none, but only the claims made by the plaintiff;

Considerando, IV: That the notes which he presented as the basis of his demand, having been indorsed to the plaintiff by their different holders, they became his property, they having been transferred by indorsements in conformity with article 477 of the Code of Commerce;

Considerando, V: That as the indorsement of said notes meets all the requirements of article 478 of the Code of Commerce, as appears by the translation of them from English to Spanish made by the expert translator appointed by the Court, said

indorsements should be held and are accordingly held regular;

Considerando, VI: That the ownership of said notes having been thus transferred to Mr. Joseph Wheless by their holders, it is incontestable that all said obligations of the defendant company must necessarily be fulfilled towards Mr. Wheless, and he alone has the right to demand their fulfillment of the said V. G. Copper Co., which is obliged to pay said obligations to him. Contracts legally executed oblige not only to the fulfillment of what is expressly stipulated, but also to all consequences which, according to their nature, are agreeable to good faith, custom or law, obliging only the persons who executed them, without leaving the validity and fulfillment of said contracts to the discretion of the parties bound, with the exception of the cases expressly mentioned in the law in articles 1276, 1277 and 1278 of the Civil Code.

Considerando, VII: That the said notes being, as they are, each and every one of them, a contract legally executed between the defendant company and the holders of them, according to article 545 of the Code of Commerce, and executed in accordance with article 547 of said code, it is undeniable that the action prosecuted by Mr. Wheless, now the sole holder of said obligations, is legal, as he has moreover amply proved in the course of the present suit, wherefore he is entitled to the sale of the attached property of the defendant company for the satisfaction of the amount claimed with interest and costs;

Therefore, In view of the premises and of the legal principles cited, it is decreed: First, that the plaintiff has fully proved his action in the present suit; consequently execution and sale of the attached property of the V. G. Copper Co. should be had to secure the payment to the creditor of the sum of . . . thousand dollars, with interest from the date of the execution of the notes until the payment is made. Second: The legal costs of the present suit shall be taxed to the defendant company. Third: Let it be notified. Thus finally adjudging, the Second Judge of First Instance decreed and signed.

We attest.

(Signed) Ricardo Searcy. M. Gómez. Joaquín L. Pérez. *Rúbricas.*

The notices were duly given, "heard" and signed; the defendant in writing waived the terms permitted by article 1079 of the Code of Commerce, sections 3 and 5, granting eight days to petition for the cassation of the judgment, and five days to take an appeal, and for all other recourses against it, and accepted the judgment, which waiver was ratified and decreed by the court. It would seem that this should be about the end of the proceeding; but the law requires yet other formalities. The first of these is a petition to the court asking that the judgment be declared final and executed, of which three days notice must be given within which to oppose any defenses, decision of which must be had within the following three days. The court accordingly made this *auto*, notice was given and accepted, and the defendant answered that it was *conforme* or agreeable that the judgment should be declared final, as it was but justice. Whereupon the court adjudged:—

Hermosillo, December 15, 1908.

Visto in regard to declaring final the judgment rendered in the present cause; and,

Considerando, I. That those judgments are final: (1) which are expressly confessed by the parties, by their lawful representatives, or by their attorneys in fact with special power or clause to that effect; and, (2) those of which notice having been given in due form, no recourse is interposed within the time fixed by law;

Considerando, II: That in the present case not only was notification in due form made, but as appears from the record the party defendant expressly accepted the said judgment and waived the term granted by law for interposing all recourses;

Therefore, In view of the premises, and in accordance with articles 625 and 626 of the Code of Civil Procedure, it is decreed: First: The judgment rendered in the present suit is final and has the authority of *res adjudicata*, without further recourse. Second: Let it be notified, and copy of said judgment issued for registration. Thus adjudged and signed the Second Judge of First Instance.

[We attest, etc. Notices given, "heard," and signed by all parties.]

This closed the record of the judgment, which was formally declared to have "caused execution" or become executive, and left nothing but to proceed to the execution of the lands, tenements and hereditaments of the defendant corporation. Instead of being simply an executive act, as with us, this proceeding partakes rather more of a judicial character under the civil law. The first step on the part of the plaintiff was a written petition addressed to the judge, in the usual form, reciting the recovery of the judgment and that it has been declared subject to execution.

Wherefore in order to ask its execution, it is necessary that the attached property of the said company be first appraised, therefore in compliance with article 1410 of the Code of Commerce, I appoint on my part Mr. A. B. as expert appraiser, and beg that he be notified of his appointment so that he may accept it and take oath to faithfully discharge the same; and that the defendant be notified to appoint its appraiser, and if there be any disagreement between them, that the court appoint a third. What I ask is justice, which I protest.

Thereupon the order is made, the notices given, the plaintiff's appraiser accepts, the defendant proceeds to appoint its appraiser; and the appraisers, being personally familiar with all the properties,—

Respectfully appear and say: that complying with our duty as expert appraisers appointed to value the attached properties of the V. G. Copper Co., with which properties we are personally familiar, we proceed to appraise them as follows [here following itemized valuations of mines, buildings, personal property, etc.], all in the value of $..... and we make oath to having proceeded in good faith according to our best knowledge and understanding.

The appraisers' report being thus rendered, the plaintiff presented his formal petition reciting that fact, and asking that the debtor be notified to comply with the final judgment of the court and pay the judgment within three days, in conformity with article 745 of the Code of Civil Procedure. This being notified to the defendant, it filed its reply, asking that the term of three days be taken as waived by it on account of the impossibility of compliance, decree to which effect the judge thereupon rendered. The plaintiff then presented his petition reciting this waiver of time in accordance with article 747 of the Code of Civil Procedure and 1411 of the Code of Commerce, and prayed that the court accordingly proceed forthwith to the sale of the attached property, first making the certificate required by article 818 of the first cited code. This article of the code requires that before sale under execution is ordered a certificate of the officer in charge of the Public Registry of Property be presented to the judge showing the state of incumbrances, if any, on the property for twenty years back or that there are no such incumbrances. This certificate being presented, the court decreed:—

In view of the foregoing petition, and it appearing from the annexed certificate of the officer in charge of the Public Registry of Property that there are no incumbrances on the attached property except the attachment in favor of the creditor in the present action, it is therefore decreed, as prayed by Mr. Wheless, that the sale of the attached property proceed, the same to be held in the office of this court, on the ninth lawful day after the last publication of the first auction, at 10 o'clock in the morning; the sale to be announced by means of edicts published three consecutive times in the official paper *La Constitución* and in *El Occidental*, which are published in this city; the basis of the sale being the sum of $....., equal to

two-thirds of the appraised valuation of the attached properties.

Let it be notified. Decreed and signed by the Citizen Second Judge of First Instance, in accordance with article 1411 of the Code of Commerce. December 15, 1908. We attest. [Followed by signatures of all parties.]

The publication of the decree of sale, nearly two newspaper columns in length, proceeded once a week for three weeks, that being the period of issuance of the two papers named in the decree. It will be noticed that the day certain for the sale is not named, it being indicated merely as "the ninth lawful day after" the last publication. In Mexico the whole newspaper containing legal advertisements is added bodily to the files and sewed into the record; this is no doubt the "best evidence" of the fact of publication, rather than our "affidavit of the publisher" with a clipping of the advertisement attached. The record recites the receipt and insertion therein on January 5, 1909, of these newspapers containing the advertisements of sale; and that on the same day the judge designated the 13th day of January as the date for the sale, notice of which was given to all parties, and they signed.

A brief *résumé* may here be made of the chapter of the Code of Civil Procedure governing the execution sale of real property; it being remarked that sales of personal property are always held at the local Monte de Piedad, or official pawn shop maintained nearly everywhere. The chapter *De los Remates*, or concerning execution sales, provides that they shall be held in the office of the court, and must be accompanied by the certificate in regard to incumbrances for the preceding twenty years, and that all creditors appearing in such certificate must be cited to attend the sale. Such creditors shall have the right to intervene in the sale, and take any steps appropriate to protect their interests, and can appeal from the decree approving the sale. The judge shall decide all such claims summarily and upon his responsibility. During the sale the report of the appraisers, and any plans there may be of the property on sale, shall be exposed to view. Bidders shall be free to make their bids and shall be furnished with all such information which they may ask and which is to be found in the record. All bids must be in writing, and shall state the name, age, legal capacity, status, profession and domicile of the bidder, and the same details in respect to his surety; the amount which he offers for the estate, specifying how much will be paid in cash, and the time which he wishes for deferred payments, and rate of interest he is willing to pay; and he shall expressly declare his submission to the jurisdiction of the court so that the contract may be enforced against him. The bids must be guaranteed by a surety, unless the offer is all in cash, in which event the sum is to be deposited with the judge. The paper containing the bid must be signed before an official *corredor*, or broker, and the surety guarantees the bid and all raises which the bidder may make. If the execution creditor wishes to become a bidder, he need only bid an amount in excess of his judgment debt. One person cannot make a bid for another, except under formal power of attorney. No bid shall be legal which does not equal at least two thirds of the valuation fixed by the appraisers. On the day of the sale, at the hour named, the judge will personally pass a list of the bidders presented, and shall grant half an hour for new bidders to offer, at the expiration of which time the sale shall proceed

and no new bidders be allowed. All bids found to be legal, and with good sureties, will then by order of the judge be read aloud by the secretary, and if any bidder wishes to increase his bid, fifteen minutes will be allowed for putting it into proper form. At the expiration of that time, the judge will declare the property sold to the last bidder who has raised his bid higher than the others; and within three days thereafter the judge will render a decree approving or disapproving the sale. An appeal lies from this decree if the amount involved exceeds $500, and the appeal must be decided within five days after the record is filed in the appellate court. The debtor may free his property from sale by paying the debt and costs even after the sale has begun. Within three days after the sale is approved by the judge, the judgment debtor must execute a deed of conveyance to the purchaser on the terms of the bid; and should the debtor refuse to execute the deed, the judge himself *ex officio* will make the deed. If on the first day of the auction there should be no legal bidder, a second auction shall be declared within seven days, with a reduction of ten per cent of the appraised valuation of the property; and so from week to week until a buyer is found, the appraised value being reduced ten per cent each time; though at any such time the creditor, if there be no other bidders, may himself buy in the property at not less than two thirds of the price then fixed as the basis of the bidding.

In conformity with the foregoing requirements of the code, the sale of all the mining properties of the defendant company was held on the 13th day of January. Previous to that time, as part of my instructions and plan of action, I had duly organized a new corporation, by name the "H. . . . Copper Co." to which I made a formal assignment of the judgment recovered in my name in favor of the creditors whom I represented, against the V. G. Copper Co. It may be interesting to remark that in Mexico all corporations are formed under the Code of Commerce, which is a federal enactment in general force throughout all Mexico. A better incorporation law, for the strict protection of the investors and the public, would be hard to find. The process of formation is quite simple, the incorporators going before a notary public, stating the bases of their agreement, and the notary writing the articles upon his big book, where they are signed by the subscribers, to whom a certified copy is issued to be recorded in the proper public registry. On the day of the sale the "highest and best bidder," as qualified under the Mexican law, was this new H. Copper Co., the substituted judgment creditor, and to it all this property was adjudicated and sold in due form of law, the decree of the judge reciting step by step, and sanctioned article by article of the code, all the requirements therein prescribed.

The final act was the decree approving the sale of the property, which also recited the adjudication of sale and the regularity of the several steps taken in conformity with the various code provisions, and proceeded: "It is therefore decreed: First, that the sale or adjudication to the H. Copper Co. of all the attached property of the V. G. Copper Co., and which are the same as are described in the writ of attachment, is approved; Second, let the said property be delivered to the assignee H. Copper Co., and let the debtor company be notified that it execute the proper deed of conveyance within the term of three days, and that if it fails to do

so the judge will do it *ex officio*; Third: let it be notified. Thus decreed and signed the Second Judge of First Instance. We attest," followed by the full signatures of judge, the two *asistentes*, and the legal representatives of the creditor and debtor corporations.

This was at the close of the third *dia hábil*, or court day, since the suit had been instituted, and thus I "broke all the records" of the courts of Mexico for the expeditious administration of justice. Of course it was possible only under the peculiar circumstances of this case, with no defense to be offered and the defendant consenting to waive delays. Nor even then would the result have been accomplished without the uniform courtesy and complaisance of his Honor Judge Searcy and his *asistentes*, who suspended other court business and gave their foreign visitor "right of way" through his court.

The case which I have stated affords a sufficiently adequate view of the pleadings and procedure in the progress of a civil suit through the civil law courts of Mexico. There is no jury, all evidence is documentary or by deposition, never by oral testimony in open court, and the practice is clear-cut and well adapted to accomplish even and speedy justice between litigants.

If I have helped the friendly reader to while away an hour agreeably, or have called his attention, comparatively, to some of the needs of betterment in our own system of practice and procedure, I shall feel myself well rewarded for my trip to Mexico and for this sketch.

American Legal Orators and Oratory

By Charles Fennell, of the Lexington, Ky., Bar

AMERICAN legal oratory is of two distinct kinds, arguments made to the courts on points of law alone, and those addressed to juries on questions of fact sometimes interwoven with questions of law.

Few of the first class in our literature are worth the reading as models of eloquence. In order to give full effect to the law in the case our legal orators have neglected, almost without exception, practically all of the graces of oratory.

There have been many able arguments of this kind at all times in our history, but few of these are such that a disinterested person could endure to read them.

In the early days Emmet, Hopkinson, Wirt, Dexter, Martin, Webster, Clay, Pinkney, Rowan and others shone with varying degrees of brilliancy in this art, while later Preston, Hofman, Crittenden, Choate and Benjamin were leaders.

Even among these, however, the reader will search in vain for many great and truly eloquent speeches. Perhaps many of the best were not reported. Luther Martin possessed boundless legal erudition, but positively none of the imaginative faculties of the orator, nor

did he always marshal his arguments so as to give to his learning the greatest possible effect, but he poured it forth at random in a disconnected manner, often tiresome and ineffective. With nothing like the learning of Martin, Samuel Dexter was more ingenious and successful in combining his facts into a series of well-knit sequences rendering them singularly forceful. Like Martin, however, he was not gifted highly with oratorical graces, and while always a leader at the bar, was not listened to as eagerly as were Emmet, Hopkinson and Wirt.

These three, indeed, together with Pinkney, inaugurated the golden age of American legal oratory. Practising before the bar of the United States Supreme Court almost exclusively, they spurred each other to higher efforts of eloquence and grander productions of learning. To be lacking in learning, eloquence or any attribute of orator and lawyer would have insured anyone a minor place at that bar.

Thomas Addis Emmet possessed the brilliant oratorical faculties and generous sympathies of his brother Robert Emmet, and though seriously handicapped by his unfamiliarity with our system he steadily rose to a commanding position even among the giants of his day. No lawyer, aside from Pinkney, ever won a clear-cut and decisive victory over him. His oratory was bold, natural, impulsive, and gave to any subject a peculiar interest and charm.

Hopkinson and Wirt were learned and literary as well. In their day the Supreme Court must have been a fairyland to lovers of eloquence. Among the best they stood foremost, and in all of those early epoch-making cases will be found the names of one or the other. Wirt was, however, at his best as a jury orator, and it is there the reader will find a more thorough notice of him.

But by long odds the greatest of our purely legal orators was William Pinkney of Maryland. His speeches were the beacon-lights that directed the footsteps of the Supreme Court of the United States in the formative period of our government. His argument in the epoch-making case of *McCulloch* v. *Bank of Maryland* was praised in the most enthusiastic terms by Judge Story, then on the bench, and was regarded on all hands as the wonder of its day. Webster, in the same case, was said to have seemed dry and tame by comparison. It was triumphant, too, beating down all opposition and winning the verdict.

The great argument in the *Nereide* prize law case is steeped in a richer rhetoric than almost any other of his speeches. The bold figure of Hercules, crushing the Nemean lion, has been referred to as one of the sublimest in our oratory.

Seldom has any man been so abundantly equipped for the highest displays of eloquence, and this, too, was largely the result of his later studies.

When sent as an Ambassador to England he was asked at table, one day, for his opinion on a certain Greek phrase being discussed at the time, and was ineffably mortified and humiliated to confess that he knew nothing of the subject under discussion. Then and there was born in him the determination to be a classical scholar, and bending himself to the task he became in a few years highly proficient not alone in the ancient but in the modern classics as well. His mind became a reservoir of judicial and literary learning and his speeches began to bear the indefinable impress of mental superiority. The most gorgeous and deceptive claptrap would have shone forth doubly revolting by comparison with his speeches, while mere brilliancy or excellence could not hope to vie with it in

any particular. His eloquence satisfied the intellect as well as the love of ornament. No vocabulary ever surpassed his in full and rounded excellence. Poetic to a rare degree, yet governed, withal, by an almost perfect taste, he clothed his large philosophy in the sheen of such a golden style as made it seem quite a matter of course that Story and Marshall should pronounce him "incomparable" and that he should be the "boast of Maryland and the pride of the United States." It is not too much to say that had all of his speeches before the Supreme Court and elsewhere been preserved he would have been universally esteemed the greatest of legal orators in the whole world. He was greater than Isæus or Lysias because his view was broader and more philosophical and his powers of expression by far more poetical, captivating and persuasive. Almost his last thoughts were bent on Italy, her art, romance and song, and much of the immortal beauty of these objects of his love lives and breathes in the finest masterpieces of his own genius.

While Pinkney was the foremost and almost the only one of our legal orators whose speeches are interesting to read, our juridical oratory boasts of quite a number of speeches that are very readable.

The excitement attendant on these occasions generally spurred the orators to their best efforts, and the occasions were generally made available as the stepping stones to political careers. Nearly all of our great orators won their early renown before juries. Many of these speeches were never reported and have been irrevocably lost. Clay's great speech in defense of Charles Wickliffe—one of the most eloquent, electrifying and successful pleas of modern times—was allowed to pass unreported, while Crittenden's wonderful speech in the same case suffered a like fate.

Many others that made a noise in the world at the time of their delivery were lost in the same manner, and to some of them this is, perhaps, an advantage, since innumerable speeches that in their delivery worked wonders with the juries who heard them would hardly be considered eloquent or even tolerable by the mere reader. It is, however, always pleasant to the lover of eloquence to linger over the traditions of those mighty speeches and fondly endeavor to picture to himself each rapid, captivating glance and hear each burning word. We can imagine how burning and irresistible was the eloquence of William L. Yancey in a great murder case after we have read his speech on the Oregon bill and several other of his more splendid productions; we can conceive in a general way of the eloquence by which Choate worked his magic spells over sworn jurors; but no tolerable reports of the juridical addresses of either of them has ever been published so far as the writer knows.

Among the hundreds that have been reported, however, a few stand out in such glowing freshness and beauty as to be by universal consent in a class by themselves, while others enjoying great fame are not at all eloquent.

The speech of John Adams in defense of the British soldiers, and of Dexter in the *Selfridge* case, though very able in argument, can certainly not be considered finished speeches, while Patrick Henry's juridical speeches are known only in tradition.

The first in point of time among the great speeches of this type that have come down to us is William Wirt's speech prosecuting Aaron Burr, which though addressed to the judges on a motion to discharge is nevertheless a jury trial

speech. This is, indeed, in the fullest sense a great speech. His retorts to the strictures of opposing counsel are models of their kind, and the language is of that florid, glowing and descriptive quality always so effective in a trial. The famous description of Blennerhassett's Isle is one of the gems of American oratory and has gone into history as a masterpiece of descriptive power. The sketch which Wirt drew in this speech of the character and ambitions of Burr, though ridiculed in many a jest by that unfortunate man, has become the accepted version. Wirt was one of those few great American orators whose highest ambitions were centred on his work at the bar. In this respect he strongly resembled his great rival, Pinkney. His taste was not always so delicate and correct as that of the Marylander, nor was his grasp of the philosophy of the law so abstruse or thorough, yet in some of the graces of oratory he was superior.

After Wirt's speech many years intervened before another truly great speech was reported, although many had been delivered.

In 1840 a stenographer reported the celebrated murder trial of Judge Wilkinson at Harrodsburg, Kentucky. It was graced by the eloquence of the famous Judge Rowan, of Ben Hardin, one of the best trial lawyers the country has produced, and of the brilliant and meteoric Sergeant S. Prentiss. Though Hardin's speech was a masterpiece of oratory and argument, it was made under the vast disadvantage of being on the wrong side of the case, while that of Prentiss was undoubtedly the universal favorite of the occasion. On this occasion Prentiss outshone himself in a brilliant speech, shot to the core with that vivid power and color which he alone seemed able to impart to spoken words. Never was there such large and literary sarcasm or such beautiful figures of speech. It is said that one juryman was able, forty years later, at the age of ninety-seven, to repeat it almost *verbatim*. Never were irony and sarcasm made so beautiful or used so effectively as in this speech, while few can read his appeal to that jury as Kentuckians without foreseeing the inevitable verdict of not guilty. It was, indeed, just such a speech as would have the greatest effect upon a cultivated popular audience. Light and spontaneous, it thrills the senses with delight. The color and glow of rhetoric is there without its labor and affectations. In many respects it is the greatest of Prentiss's speeches, and in all events will rank among the first half dozen of the kind ever delivered in America. It differs from Wirt's speech in the Burr trial as the flood differs from the placid stream. To employ Pope's figure further, Wirt's speech is the river within bounds flowing through beauteous woodlands and many a green and pleasant sward, reflecting the over-hanging boughs, the blue skies and the fleecy clouds, self-contained, easy, buoyant, sinuous and graceful. Prentiss's, on the other hand was the raging flood, sublime in its strength and impetuosity, rolling its fervid energies in a tumbling torrent to the sea and leaving no part of its journey untouched by its triumphant force. If Wirt could have fashioned the sleeping marble into a mimicry of life more real than that of Angelo, Prentiss could have made the white cold figures glow with real life and warmth.

Combining much of the fiery and dashing qualities of Prentiss with the more subdued beauties of Wirt, and adding to them an original sarcasm and humor, racy and irresistible is Thomas F. Marshall's speech in defense of Matt F. Ward. It is in this argument that, in

speaking of the uselessness of life without the right of self-defense, he exclaimed, "Had I no other right than that of existence I would raise my own wild hand and throw back my life in the face of Heaven as a gift unworthy of possession." Though slightly tinged with irreverence, perhaps, there are few sentiments more stirring or more beautifully expressed, and it has been used by others since on innumerable occasions. The whole of this speech is admirable. The features of Ward's life which had been graphically placed before the jury, and his peculiar position in the case as the champion of a brother's rights, the fact that he was a gifted young author and, moreover, newly-wedded, furnished Marshall with abundant opportunity to display his powers of description and of subtle appeal to sentiment. Then, too, the great speech of R. B. Carpenter in opening the prosecution had aroused the highest feeling, and it was openly conceded by the defense that it must be answered at once and effectively or all hope was gone. This task was undertaken most cheerfully by Marshall, who in his exordium scored Carpenter in as graceful a strain of irony and sarcasm as ever was listened to by any jury, and then proceeded in that bantering, humorous, chivalric style so peculiar to him, until he had swept jury and audience with him as the leaves of the forest and obliterated the impression made by Carpenter's splendid effort. This speech of Marshall's is one of those rare creations of genius such as he alone seemed able to conceive or fashion. Few faults can be found with it from any point of view, and like the speech of Prentiss referred to above, it was crowned with success, though this result was in a large measure aided by the speech of Nat Wolfe and the beautiful address of Crittenden, both of them his co-counsel. Wolfe was a cool-headed, veteran lawyer and a jury orator of rare power. Few things in the way of a retort are better than his scorching reply in this trial to one of the minor counsel of the prosecution who, in descanting at large upon the wonderful array of counsel for the defense and the comparative paucity of equal timber on the part of the prosecution, erroneously referred to himself as "David going forth against the Philistines armed only with a sling." To this unique comparison Wolfe replied, mercilessly reminding him that it was not David who went forth against the Philistines, but Samson, and that instead of being armed with a sling, he wielded the jaw bone of an ass to the great consternation and destruction of the Philistines. Then turning with a look of mock fear to his fellow-counsel he concluded by saying, "And I hope that we are not here to be ruthlessly slaughtered with the same dangerous and difficult weapon."

Crittenden's speech was even finer. This prince of persuasive orators whose tongue, we are told by enthusiastic contemporaries (students of Milton, doubtless), "dropped manna," pleaded on this occasion with a truly golden eloquence. He was as different from Marshall as could well be. With him persuasion was the master object, and never did a musician attune his instrument to a more delicate melody than our orator on this occasion. A noble and lofty love of mercy and humanity runs through it all, while here and there is an irresistible appeal to their pride or mercy. There is something beautiful, indeed, in his simple use of the German allegory telling of the creation of man and how, when God hesitated whether or not to create, and Justice and Truth had each advised him "No," because man would destroy their works and fill the world with crime, gentle Mercy came and knelt

at the throne and said, "Create him, Father, for I will be with him in all his wanderings and amid all his temptations, and by the experience of his own errors will lead him back to Thee." There was also something very tender and productive of tears in the few simple words with which he sketched the "awful agony that would beat in some hearts" during the jury's absence from the room, while his proud remembrance that the prisoner was "something better than the common clay" and that it was "the blood of a Kentuckian" that they "were called upon to shed," were direct appeals to that pride in their state, which he, Clay, Marshall and the other orators of Kentucky, had instilled into the people of that state, in the many exciting political battles of the past.

It was Marshall who said that no great orator of whom he knew suffered so much from being reported into mere words as Crittenden. To his oratory, the grand presence, the slight and perfect modulations of his voice, and the expression of the "mobile and eloquent muscles of his face" were an accompaniment of infinite charm and effect. Yet the beautiful philosophy of his plea for mercy, clothed as it is in language of almost unrivaled sweetness, purity and simplicity, is among the finest gems of American oratory. Crittenden's oratory was, as a rule, free from affectation and the ambitious fineries of rhetoric, and in this respect he stands out in delightful contrast to most of the great orators of his time. The great fault of those orators was, that they were inclined to overdo, while Crittenden followed those masters of language who convey their most powerful impressions by suggestion.

Had Daniel Webster understood this simple truth he might have eradicated many of the most serious faults of his oratory. He could never attempt the ornate without overlaying his argument with those faults of taste which caused a contemporary writer in an English periodical to refer to his great speech in the Knapp trial as being overdone. The most effective oratorical passage comes like the lightning stroke, rapid, dazzling, terrific; clearing the atmosphere, as it were, in one stroke, yet giving no hint of whence it came and leaving no trace of whither it went. The best oratorical eloquence, needless to say, is that which gives to its studied phrases the appearance of extemporaneous inspiration, a difficult task and one which Webster's phlegmatic disposition rendered peculiarly difficult to him. He never warmed up enough on ordinary occasions to impart to his speeches the warmth, glow and spontaneity of his reply to Hayne, and some of his attempts to be grand resulted in a sort of elephantine floundering in the mazes of rhetoric. This speech in the Knapp trial reveals its faults perhaps more glaringly to the reader than to those who heard the speech itself. That oft lauded apostrophe to duty is unworthy of Webster and yet is singularly Websterian. These heavy, turgid pictures of moral abstractions are not in place on an occasion of the kind on which he attempted their use. It must not, however, be thought that the speech is all in this style, for, as a matter of fact, it is in many respects marvelous. Webster was always happier in the grouping of facts and arraying of arguments than in his attempts at the ornate and grand. By some few admirers, more enthusiastic than discriminating, he has been hailed as the equal of Edmund Burke, a criticism which has evoked many a smile. Some competent critics, however, have contended that he was never the jury

orator that Choate was. Unfortunately Choate's speeches of this character were not reported, and thus the two great New Englanders cannot well be compared. Choate was undoubtedly more poetical in sentiment and style, while Webster was much the better logician. Choate was by far the better scholar, while Webster possessed the greater and more expanded intellect.

This period before the Civil War produced two masterly examples of juridical eloquence in which the plea of insanity was made a defense to crime. In the Freeman trial William H. Seward delivered his masterpiece. Gladstone is quoted as saying that it was the finest forensic discourse ever spoken, though this, like many another alleged quotation, is to be taken *cum grano salis*. There is the effect of Erskine's speeches visible in its general style, but considered in its entirety it is original and remarkable. While by no means as smooth in expression as Erskine, Seward nevertheless possessed a deal of that poetic vision which is so effective in an orator, and in this speech he wrought the quality into the beautiful plea in which he adjured the jurors to forego vengeance, as it would not restore to life the manly form of the murdered Van Sant, nor "call back the infant boy from the arms of his Saviour."

His client was, however, convicted and died pending an appeal. On examination it was found that his brain was almost entirely rotted away, thus vindicating the view which Seward had upheld with rare moral courage, and perhaps rarer eloquence, in the face of a veritable storm of disapproval.

Even better than it as a plea of insanity is the argument of Chief Justice Robertson in the Baker trial. This speech is one of the great intellectual efforts of American oratory. Never was there a speech which dealt so subtly and philosophically with the nature of insanity and yet succeeded in giving a beautiful expression to the thoughts therein evolved. The subject was peculiarly adapted to the inquiring mind of the great judge who delighted in the study of the sciences and in the contemplation of abstract truths. It has been called "the greatest insanity plea ever delivered in America."

It differs from those of Erskine and Seward quite as much as two addresses could well differ. His style was inferior in every quality of grace and strength and elegance to Erskine's, and was not persuasive enough to be adapted to the exigencies of a jury trial, as the Englishman's great speech in the Hadfield case. Erskine was persuasive, while Robertson sought to overwhelm with weighty logic, and though inferior as an orator he was doubtless superior as a theorist.

William Evarts made many able addresses to juries, though hardly any of his speeches of the kind can be said to be masterpieces. His rotund and pedantic style was hardly conducive to the accomplishments of oratory. Simplicity, directness and force in expression have the greatest effect on jurors. Listeners do not wish to be led through the labyrinthine mazes and baffling perplexities of long sentences, and to grapple with the intricacies of speech, but desire each thought so clearly expressed as to leave them no option but to hear and enjoy. It is a pity that Evarts allowed himself to cultivate this fault as he did, for he was gifted with the learning, the imagination and the poetic sentiment of the true orator and was not altogether deficient in humor and wit, as his reply to Hoar shows. Hoar had remonstrated with him against using long sentences, and he promptly replied that he knew of no one who objected to long sentences

save criminals. Evarts was a greater lawyer than orator, and figured prominently in several of the greatest trials in our history.

The addresses of Judah P. Benjamin before juries are said to have been wonderfully impressive and beautiful. After leaving America he became the head of the English bar, and was in all probability the most widely learned lawyer of the English-speaking race since 1860. His reputation for this character of speech, however, lives mainly in tradition, but if this alone be followed he would take high rank indeed, since his legal speeches never failed to elicit the same applause that always greeted his admittedly splendid political and Parliamentary and occasional addresses.

After the war, the great jury orators of the country were notably fewer and less eloquent. Public life still lured the great orators from the bar, while at the same time public sentiment began to prohibit the public men from accepting legal employment at the hands of certain interests which had hitherto been their chief source of income. Thus while there were many great lawyers there were comparatively few really great orators.

Charles O'Conor first won national fame as a lawyer in the case of *McFarland* v. *McFarland*, and from that day until his death held a high rank both as orator and lawyer. His oratory was more practical than beautiful, and will hardly be read for its own interest by any one. Beach, on the other hand, while equally as persuasive, was more eloquent. He possessed the heart, the sentiment, that sways juries, and he could clothe those sentiments in such beautiful language as to make them worthy of a place in literature. Brady was not equal to either of these as an orator, and perhaps none of the three was equal to Matt H. Carpenter.

He added to the learning and literary accomplishments of the scholar and lawyer, the presence and the silver voice of the orator. His voice has been by various writers styled the perfection of melody. Like most of modern orators he was rather diffuse yet withal interesting. He belonged to the school of persuasive reasoners who without many passages of supreme beauty managed to make their speeches meet the requirements of the case and carry conviction with them. A large portion of the eloquence lay in the voice of the speaker and in his magnetic qualities.

Carpenter's contemporary, Ben Hill, known as "the stormy petrel of debate," was a great jury orator. His was a high type of intellect. He could present an array of facts in a manner almost invincible. Strength was his chief characteristic, and when he indulged in sarcasm, sentiment, or invective, it was generally to make more terrible and potent the effectiveness of his argument. There "was argument even in his declamation."

A very different type was Daniel W. Voorhees, whose speeches glowed with the fervid, the fiery and opalescent beauties of rhetoric. His defense of John Cook, charged with treason in connection with one of John Brown's raids, was the wonder of its day, and a copy of it printed on silk was sent by some of his admirers who heard it. The peroration, with its plea for mercy all glowing in golden rhetoric, is one of the best ever delivered. In this case the orator was confined to a plea for mercy inasmuch as his client had pleaded guilty, and it must be confessed that he threw his soul into the task with great fervor and won all the success possible.

Even greater, however, was his speech

in the Mary Harris trial. Never did the feeling of a noble heart burst into higher strains of indignant and burning eloquence, and with the story of a wronged woman's sufferings and misery win a more complete and popular victory than did he on this occasion. These two speeches were epoch-making in their brilliancy and are enough of themselves to forever secure the fame of Voorhees as one of the very greatest jury orators of America. He was a great Bible reader and he turned his knowledge of that book to many uses. His speeches were colored by its beauties and instinct with its poetry. He was widely read and in his general style resembled somewhat the famous Kentuckian, Tom Marshall. Though he served long and brilliantly in Congress and was the idol of popular assemblies he nevertheless shone brightest at the bar. His talents as well as his ambitions were such as to fit him to fascinate juries and to exult in the shifting uncertainties of the legal battle.

Colonel Breckinridge, though more widely known as a political orator, was a great power at the bar. Senator Beck, who knew him well, once said of him that had he devoted himself entirely to the law he would easily have ranked at the head of the American bar. It has also been remarked of him that no matter what the occasion, or who the speakers, his speech was always the most eloquent. Possibly he encountered as many of the great lawyers of America in his day as any other man, and in nearly all such cases he was successful. If accounts of the trials in contemporary newspapers are to be trusted, his speeches were as a rule the best. In the trial of Buford for the murder of Judge Elliot of the Kentucky Court of Appeals, he was opposed by Curtis of Massachusetts, who conducted the defense. Both made great speeches, but Colonel Breckinridge, by the unanimous consent of those who heard both, was far and away the best. Not bitter or vindictive, as so many prosecuting speeches are, it was a masterpiece of persuasive eloquence. The defense had interposed the plea of insanity and this was torn to pieces with rare skill by Breckinridge. The speech abounds in little touches of poetic sentiment which add greatly to its charm. Referring to Buford's birthplace, he said that it was "so fair that it seemed that God created it with a smile and the smile became crystallized in the landscape." His mind seemed the very mint of invention in fashioning beautiful and polished sentences. Like Crittenden, he was persuasion personified, and few, indeed, have been the orators who could wreak a more potent spell over the mind of the listener than he. Vice-President Sherman, taking leave of his associates in the House, referred to Colonel Breckinridge as the greatest natural orator he had ever heard. It is an interesting fact, however, that Breckinridge did not possess such a wonderful natural talent for oratory as this remark would indicate. In his early days he was surpassed by John Young Brown and other men of his years. He was of the kind that improve with time, and as he grew older the power and beauty of his voice became the wonder of the day. Never was enunciation so clear, limpid and free from effort. While his voice never sounded loud to those nearest him, it was nevertheless clear and distinct to those who were farther removed.

One of Breckinridge's former friends, Ed C. Marshall, figured as a star in the great Kalloch murder trial, one of the *causes célèbres* of the Pacific Coast. His speech in this case was favorably compared to the masterpieces of Curran and Grattan. It glitters like a diamond.

Referring to the counsel who had preceded him in a long and tiresome speech, Marshall characterized him as suffering badly from that lately discovered disease, "dementia oral, the insane desire to hear oneself talk." It was just such a speech as would have been most effective in the prosecution of any great criminal case, and deserves to rank among the greatest masterpieces of American oratory.

Another great orator of those times was Jere Black, the Pennsylvanian, whose oratory was virile, strong, full of wit and sarcasm, and was generally effective in driving opponents to shelter, although it laid him open to terrible excoriation on one memorable occasion when he engaged in a magazine controversy with Ingersoll. There were few men, however, if any, who could withstand him in the glittering clash of wits in an oratorical duel in court.

Ingersoll's chief power as a lawyer lay in his oratory. He could work wonders with a jury. Always earnest, he impressed others with his deep sincerity, while as on all other occasions his speeches were glowing and brilliant. The victories in the Star Route trials and the Davis will case, as well as several other notable performances, are tributes to his power over men. Many of these speeches have been preserved by Mr. Farrell in the famous Dresden edition of Ingersoll's works, perhaps the best edition, from the bookmaker's standpoint, ever published of the works of any orator. Ingersoll, in his excellences as well as in his faults, was closer to the people than most any of our orators of the North, who have, as a rule, been rather too academic for public speaking before mixed crowds. To read any of Ingersoll's better speeches is to be transported into a fairyland of sentiment and revel amid multiform beauties of thought and expression. His arguments are seldom elaborate, but are as a rule clear, simple, terse and accompanied by a sarcasm or a poetic sentiment that at once clinches and confirms their effect. While arguing one case he referred tauntingly to the poor spelling of a witness whom he had charged with the forgery of a will. Instantly the lawyer on the other side came to the defense of the witness with the remark that such evidence was not convincing, and that he "had done worse" himself.

"You have *done* worse," replied Ingersoll, "but you have never *spelled* worse." After this, he was more or less free from interruption. Ingersoll possessed in a high degree this faculty of rising with extemporaneous power to the emergencies of debate, and it is a pity that his life was not so shaped as to bring into fuller prominence his capacity for these intellectual jousts.

To one who wishes to read the great speeches of which this article treats, the mean truth will readily appear that no adequate collection of great legal speeches has ever been made. Judge Donovan's Modern Jury Trials is a fine and discriminating work, but not complete enough. Snyder's collection of great legal speeches suffers from the same fault. Some publisher should open the hidden wealth of American legal oratory and give it to the public in the masterpieces of the masters from every section of our country. Here's our best to him who tries.

A Nullified Divorce

By Lurana W. Sheldon

THE case was on the calendar as Smithkins *versus* Green
And every one was wondering what such a thing could mean,
For even in New England, where they've wooden nutmegs still,
A wife went by her husband's name until she got a Bill.

When 'Mandy Green was married to Jed Smithkins it was said
She had a lot of notions about Suffrage in her head,
But no one ever once surmised she'd stick out for her claim
"That a woman of importance always kept her maiden name."

But 'Mandy took to writing, and "Amanda Susan Green"
Quite often in the papers and the magazines was seen,
And Jed—he tore his hair and raved—her doings made him say
"He wouldn't live with nobody that treated him that way!"

He said he'd "l'arn that wife of his her name was Smithkins too!"
He'd "show her what was what some day and also who was who!"
He "didn't want his wife to vote, nor lectur' day or night!"
And all the men-folks in the place agreed that Jed was right.

But 'Mandy had a stubborn will, and what was even more,
She meant to raise all womankind so they could likewise soar;
She meant to elevate her sex and show them they could be
Quite independent of the men, exactly as was she.

So when Jed couldn't clip her wings or even curb her tongue
He went around to Lawyer Fee's and his sad tale he sung,
And when they wrote the paper out Jed "'lowed" it should be seen
He wanted separation from "Amanda Susan Green."

From one Amanda Smithkins, wheresoever she "mout" be,
He had no desire whatever to forevermore be free,
"But ef thar warnt no sech person, 'twas plumb wicked," so he swore,
"Tew be harborin' a spinster in his homestead any more!"

When Amanda saw the notice she was horrified, of course,
Though 'twas not that she objected to her freedom by divorce,
But as she was highly moral she was mortally afraid
To be first to go on record as a ten year wed old maid.

So she flew and told the lawyer he must quickly change the name—
She would be Amanda Smithkins never mind what ever came!
And that so upset the action that Jed never got his Bill
For at last accounts Amanda was Amanda Smithkins still.

Some Political Bosses

By Leman B. Treadwell, of the New York Bar

THE democracy of the town of Eastchester, N. Y. was of the rock-ribbed variety, and those who rallied around the Jeffersonian standard at the times in which these scenes are laid were in the majority, and ruled the destinies and finances of the town with strong hands; the ostensible ground for their zeal and patriotism was the aforesaid destinies, but the real interest centered around the finances.

The high priest of the political majority was a voluntary exile from the "Ould Dart," who has since become very prominent in the affairs of the party and of the nation, and under whose leadership the lesser lights held sway and prospered, and, as the town was a fertile field, and yielded bountifully and readily of her substance to the touching advice of the master mind and his satellites, the loyalty and patriotism of the rank and file who rallied around the master could always be depended upon.

Chief among the admirers and supporters of the high priest were two worthies, who helped him share the burdens of the town government by holding down the office of justice of the peace, and town constable, respectively, the former bearing the undignified name of "Bob Edmonds," and the latter the soubriquet of "Country Bill," otherwise known as William Watts.

This trio had their headquarters in a back room of Gould's Hotel located in the chief village of the town, and it was there it was commonly reported that the deals were arranged which determined the policies of the triumvirate that were afterwards given effective shape under the plausible title of "the policy of the party."

The high priest had been at one time a schoolmaster, but being ambitious he had studied law in his spare moments, and at the time of his domination in town affairs his shingle as "Attorney at Law," swung to the breezes at convenient proximity to the aforesaid refectory, for divers reasons it was said. His practice was said to be chiefly at the bar of the aforesaid Justice's court, the bar of the county court, and at the bar of the aforementioned refectory.

In the county court, and before the aforesaid Justice, his oratory was matchless, and he could paint a word picture with consummate diction and grace, while his platitudes have passed into history as oratorical gems, barring the froth that was always apparent; he was sought to grace all public gatherings of clans, societies and associations, and it was said that he was equally at home at an Indian pow-wow or at a German *gabfest*, having, it is reported on good authority, learned the Indian tongue from "Indian Bill" Hannibal, a lineal descendent of Orawaupum a noted chief of the Siwanoy Indians, and the "Platt-deutsch" gutterals from a noted Hungarian count whose linguistic abilities at home had been the chief cause of his involuntary emigration to the country where his title was of no account; and then, it was also currently reported and never contradicted, the distinguished and

matchless orator had actually kissed the Blarney Stone of his native land with due, solemn and appropriate rites ere he expatriated himself from the "ould sod," so that as an orator before the said courts and at such gatherings he attracted much attention, and his oratorical flights made him a *rara avis* indeed.

But at the other bar, the bar of the refectory, his nicely rounded periods, his matchless eloquence, and his verbosity seemed to have deserted him, and his language was monosyllabic and repetitious but to the point, and the attendant had come to know it by heart, so that when the well-known, concise and suggestive phrase of "the same," fell from his fevered lips, the receptacle containing the favorite refreshment was already before him.

The high priest is yet living and is making history on more high-toned and probably remunerative lines, but the Justice and the Constable have now passed over to the great majority.

"Country Bill," the Constable, was a strange mix-up of character and a lack of character combined; he always wore a black frock coat of ample dimensions, a white shirt with a high standing collar, but his trousers and his shoes, like his habits, always needed mending.

The upper part of his make-up reminded one of an unfrocked clergyman, and the lower half suggested the "dusty roads" of the humorous paragrapher.

When "Country Bill" was invited to drink he was never known to refuse, for he said that refusals tended to discourage cordiality, for Bill was nothing if not cordial, especially if the invitation and the expense came alike from the other fellow; so with an alacrity that was not likely to be construed into merely an observance of duty and policy, Bill would step up to the bar, and performing that mysterious rite of "fingering the glass," that is, covering the glass with the four fingers of his hand, for the reason, as he invariably explained, that the whole hand was indicative of the whole heart, which convinced everybody but the barkeeper that his explanation was disingenuous, would call for his favorite beverage of "rock and rye," and filling his glass would turn his face heavenward as if to emphasize his assertions of fellowship and goodwill toward his generous companion, drain its contents to the very last drop; then, remembering that it would be his turn next to stand treat should they tarry long, he would hastily depart after striking his entertainer for a moderate loan which he would generously promise to return the very next day, and at the same time confidently assuring his admiring friend, if a resident of the town, that he would nominate him for town committeeman at the very next meeting of the board, and that he would jam the nomination through himself, "by Gawd, sir."

On these occasions Bill would almost invariably secure an invitation to the high priest and the justice to participate, as they were generally to be found in the "back room," so that it early became known that invitation to Bill could be counted on to be an invitation and extension of hospitality to the three, for Bill was loyal to the men who furnished him with the means and opportunity to get the most out of life for the smallest return, and it is said that the only real differences that sprung up between him and the other two arose from their neglecting to reciprocate when the entertainer was their friend and not his.

Bill too, was noted as a "fisherman," but the waters tributary to the town

were never depleted of their stock of fish through any piscatorial effort of his, as his quarry in the art made famous by Walton, was that species of the *genus homo* known as the "tramp," and many a poor fellow who was simply down on his luck fell into the net of William, who, quickly haled the poor unfortunate before his fellow-pirate, the Justice, who invariably and unhesitatingly pronounced the stereotype sentence, "ten dollars, or ten days"; and it is said that the Justice always looked sad and regretful-like when he found that the culprit was, as the Wall street men say, "long on time and short on cash," for be it said to the credit of the Justice that the sovereign and divine right of the town to impose a fine on those whom Bill charged with "loitering" on its highways and byways was never overlooked, yet the exercise of that right never brought profit or benefit to the town if the culprit had the means to ante-up in lieu of the dreaded "ten days."

"Bob" Edmonds, the Justice, was in looks, stature and demeanor not unlike a recently deposed deputy commissioner of insurance, and had all the bombastic manner and confident assurance of the typical "town boss"; and he ruled with an iron hand over those who came under his authority and jurisdiction, but to those above him in the political or social scale he was servility itself, and he bowed in abject humility to those in higher station and power.

The crowning glory of his life came when he was named as one of a committee of the loyal Democratic citizens of Eastchester (I use the term loyal advisedly), to wait on the then Democratic governor of the state, John T. Hoffman, to urge the Governor's veto of a bill then in the legislature to correct the abuse of power by justices of the peace and constables in dealing with vagrants, and to curtail their fees in relation to the same.

In the course of their visit to the capital, Bob obtained an introduction to the Governor by his local member of assembly.

To say that Bob was pleased and elated at the sudden honor thus gained hardly expresses his state of exhilaration, he talked of it by the hour to his friends and equals, and boasted of his friendship and pull with the Governor to his constituents, in fact, he thereafter dated all of the events of his life from the time of his introduction to the Governor.

But his day dreams of power and preferment met with an untimely end at the next spring town election, when the good people of the town of Eastchester, tiring of the misrule and extortions of the Democratic party in general and of this triumvirate in particular, routed them "horse, feet and dragoons," and elected an entire Republican town ticket from supervisor to constable, and the rule and supremacy of the triumvirate came to an end.

Bob, as soon as he could collect his shattered nerves, bethought himself of his friend the Governor, and of the deep regret and concern he knew the Governor must feel over the trailing in the dust of the banner of Democracy so long floating in victory over the town and its finances, and concluded that he would inform the Governor of the common humiliation and defeat, and so hying himself to the telegraph office he wired this burning message to Governor Hoffman:

"H—ll to pay in Eastchester, the town has gone Republican, and the country is lost."

Personal Reminiscences of the Walhalla Bar

III. A CONTEMPT PROCEEDING

By R. T. Jaynes, Attorney-at-Law, Walhalla, S. C.

INFERIOR judicial officers are known in South Carolina as magistrates. The jurisdiction of this court extends in civil matters to $100 and in criminal matters to fines not exceeding $100, or imprisonment not more than thirty days.

A few years ago a rather indifferent specimen of the *genus homo* was plying his trade as a hawker and peddler. His stock in trade consisted of a lot of furniture polish, which he sold at twenty-five and fifty cents a bottle. During his stay of about ten days he was stopping at a boarding house conducted by a widow, who finally became impatient because of his boisterous conduct. Complaint was lodged with the magistrate and a warrant issued against the peddler for plying his trade without a license.

The magistrate was J. R. Earle, who had recently removed from Georgia, and after about six months he had been appointed a magistrate by Benjamin Ryan Tillman, then Governor. Armed with a warrant the sheriff went to arrest the accused and found him in the master's office in the court house in company with N. B. Cary, attorney. The peddler looked rather the worse for the ware. He might easily have been taken for Darwin's "Missing Link" —half man, baboon or monkey. After the reading of the warrant Mr. Cary said to the prisoner:—

"Suffer me to go along as your professional adviser; and, before we go out of this room, let me give you a word of professional advice: *Claim that you belong to the human family, and keep your mouth shut.*"

After brushing up the prisoner, he was carried to the magistrate's office, the attorney accompanying in his professional capacity. The prisoner being seated, the attorney makes some preliminary remarks about fixing a date for the trial. Suddenly the prisoner gives a wild exclamation, startling the court and spectators. The attorney turns and strikes him a blow on the head, laying him limber at his feet, and saying:—

"I told you to keep your mouth shut, and let the claim be made in your behalf that you belong to the human family; and I mean this to emphasize my advice."

The Court of its own motion orders the case continued, saying:—

"I perceive that neither the accused nor his attorney are in fit condition for business today. This case stands continued until tomorrow morning at ten o'clock. Mr. Sheriff, remand the prisoner to jail."

Next morning, shortly before the call of the case, defendant's attorney approaches one of his brethren, and says:—

"Bob, give me a quarter."

"Why, what do you want with it?"

"Well, I am going to raise a constitutional 'pint' on the Court today. You know Dick Earle come from Georgia, and was here about six months when he was appointed a magistrate by Ben Tillman. He was not a qualified elector, not having been here one year, and he shan't try my client."

"All right, here's your quarter."

The hour of ten arrives, the prisoner is brought into court and the case is

called. Defendant's attorney demands a jury, saying: "If this is a *de facto* court, we want a *de facto* jury." The Court remarks:—

"Mr. Cary, we have had several trials, and if you demand a jury in this case it cannot be tried until tomorrow."

"Well, does your Honor presume to put your *personal convenience* above the demands of *public justice?*"

The Court: "Mr. Sheriff, prepare the jury box."

To obtain a jury in this court eighteen names written on separate slips of paper are put in the box. Each party has six peremptory challenges, and six jurors constitute a jury. The drawing of the jury begins, the Court inquiring as each name is drawn whether there is any objection to Mr. So and So as a juror. Two or three names have thus been drawn when the defendant's attorney, rising from his seat and walking up directly in front of the magistrate, says:—

"No, I don't challenge the jury; I challenge the judge, for he isn't a citizen of the state of South Carolina, neither was he when he was appointed."

The Court: "Mr. Sheriff take Mr. Cary, and commit him to jail twelve hours for contempt of court."

"I am not going, sir."

The sheriff: "Give me a commitment and I will carry him."

"Yes, sir, and it will be the dearest commitment ever you handled."

At this point excitement was running high and feelings tense. The Court, agitated, requests the writer to prepare the commitment. Having written: "State of South Carolina, County of Oconee, —To B. F. Douthis, Sheriff"—a tug is felt on the elbow, the force being applied by the defendant's attorney, who says:—

"Bob, come out here, and let me see you a moment."

We retire from the presence of the Court, when counsel for the prisoner says:—

"Now, Bob, you know me. Go back there, and say to the Court, *if it is a court*, I am sorry I have fallen into its contempt, *if it be possible for me to fall into its contempt!*"

We return and due apology is made. The contempt is purged, and the only fine imposed is one of ten dollars, which is paid by the *baboon*.

The Wrangle

By Harry R. Blythe

A question rent the empire twain
And sundered every legal school,
The issue was, Do monarchs reign,
Or do they (curse them) merely rule?

The white-haired judges were arrayed
In two opposing angry ranks,
The hungry lawyers stood dismayed,
The crafty cranks fought with the cranks.

Then one dark night the phantoms came
And met in old Westminster Hall
To give their judgment, place the blame,
Decide the question once for all.

Coke, Blackstone, Leake and Littleton,
Lord Mansfield, Chitty, Hale, were there,
And many others, one by one,
Filed up the dark Plutonian stair.

They mulled the mighty question o'er,
Then each his great opinion wrote,
And slunk him back to Styx's shore
To sail with Charon in his boat.

The multitude, the cranks, the wits,
Into the Hall at daybreak went,
Found the opinions, then threw fits,
For every one was different.

Mr. Untermyer's Plan for the Regulation of Monopoly

MR. SAMUEL UNTERMYER of the New York City bar has devised a plan for the regulation of the trusts. He would establish a commission to regulate the prices of commodities, with powers over industrial corporations similar to those exercised by the Interstate Commerce Commission over the railways. A statement which he recently issued, setting forth this interesting project, slightly condensed, is as follows:—

"It is impossible to ignore the fact that there is a deep-seated and growing distrust of both our political and financial stability throughout Europe. Our manifest inability to deal promptly and effectively with corporate abuses from which we are suffering seems to have destroyed their confidence in us. Everywhere one is asked by thoughtful men of affairs as to the probable outcome of the pending suits and as to the legal effect of decisions in favor of the Government. The idea that some sort of financial catastrophe is hanging over us seems to have become fixed in their minds from their reading of the ill-considered expressions of our newspapers. It is in vain that one explains that there are no far-reaching results of any kind to be apprehended from these decisions, even if the Government wins; that the results will be largely academic; the property is still there; it cannot be confiscated; it still belongs to the shareholders, and it may at most take on another form.

"Nothing more trifling or impotent from the standpoint of practical results was ever attempted by a great Government than this political grand-stand play which is bound to lead to nowhere. The idea of disbanding or dissolving or scattering the trusts at this late day seems unworthy of consideration. Nobody seriously believes it can be done. Nobody will ever try it.

"Every fair-minded student of the subject must admit that there are grave economic evils in the unchecked domination of any industry by a single corporation or group of individuals. These evils are emphasized in the industries in which it is necessary for the welfare of our people to maintain our protective duties—which is shielding the industries that have built up a home monopoly against competition from abroad. On the other hand,

I think we all recognize that the over-production which comes from unchecked competition and which results in erratic price movements and great waste are evils which the trusts have done much to eradicate, and that in so far as they regulate production according to demand they are of assistance to modern commerce.

"Their greatest danger lies in their power (1) to enhance prices and thus reap abnormal profits, (2) to stifle new competition by piratical methods, and (3) to prevent the development of new inventions. I suggest the following remedy for the existing situation:—

"First— Enact a federal incorporation law such as has already been discussed, under which any corporation engaged in interstate business may incorporate.

"Second—This law to provide for a commission to fix the maximum prices at which commodities may be sold, based upon an investigation of cost of production, with powers in the commission over interstate industrial corporations similar to those of the present Interstate Commerce Commission over railroads.

"Third—Then, having created a refuge for those corporations which are willing to subject themselves to these restrictions, let us enforce the civil and criminal provisions of the Sherman law until every trust has been forced to subject itself to control, and allow no other corporations engaged in interstate business to operate under state charters if they come within the regulations of Congress and can be thus controlled, as most of them can be.

"Fourth—The commission should have power summarily to investigate all complaints of oppression and unfair competition and to direct criminal prosecution and suits to forfeit the charters and disband all corporation so offending.

"Germany has already 'blazed the way' for us in dealing with this vexed and complicated problem of legislative enactments which we would do well to study. In May of this year the Reichstag passed a law regulating the potash industry. Germany controls the world's output of potash. It has the only known deposits. There were fifty-four companies owning and operating these deposits. They were producing largely in excess of the demand and as a result they were depleting the deposits without profit. In order to correct this condition, and on the ground that the Government is interested in the conservation of its natural resources, this law was passed. It fixed the proportion of the demand which each corporation is permitted to produce and established the maximum price at which it may sell. A court is established which is to reapportion every two years the production of each company, based on the demand the preceding years. Any corporation producing in excess of its allotment must pay a prohibitive governmental charge.

"There is no legal difficulty under our constitutional restrictions that cannot be overcome. It is imperative that we take some practical step without further delay. Neither political party can accomplish anything on the lines as at present drawn. The opposition can denounce the party in power and make impossible claims and promises, but if given the power it can do no better. Suppose it succeeds in sending the heads of a few of the trusts to jail (a violent if not impossible supposition, in the light of the experience of the past twenty years), will that rid us of the trusts?

"It is impossible to again resolve these combinations into their original parts. The next best thing is to treat them as *quasi*-public corporations; get for the public what is best in them and curtail their power to oppress and levy tribute upon the people. It can be done if we will but substitute sane business reason for wild demagogic denunciation. Thus far we have been playing into the hands of these astute gentlemen. There has been great blowing of trumpets over the accomplishments of the administration in the courts, but the trusts go merrily on; not one has really been affected or ever will be by such methods as are now being employed."

The *New York Times* is disposed to regret "that so cool an observer should go so far to identify himself with a popular hysteria which he disapproves." It asks:—

> Is there any such essential difference between the operations of our trusts and Germany's methods of regulating industry as to warrant our displacing procedure before grand and petit juries by the inquisitions of federal commissions? When the worst truth is said about our trusts, have not the selected victims either justified themselves before juries or been guilty of acts respecting which courts are divided in opinion? And is it not beyond dispute that most men regard the law against trusts as one to be obeyed by other men and broken by themselves? In particular is it not true that a process of discipline is proceeding of which too little notice is taken?

The *Springfield Republican* is opposed to the plan on different grounds. Federal incorporation, it thinks, "would be a needlessly radical if not an unconstitutional step in hostility to state autonomy. The same results can be achieved through a federal license system for corporations engaged in interstate commerce such as has applied from the earliest days of the republic in respect to vessels engaged in the interstate coastwise trade." But this paper goes further, and intimates that the whole scheme is socialistic:—

As for a federal commission to fix maximum prices—well, is not the *Wall Street Journal* about right when it says a commission to regulate lawyers' fees is equally or much more needed? To concede the necessity of a price-controlling commission for manufacturing and trading businesses is to concede the necessity of abandoning the whole principle of competition as a regulative force in industry. If this concession is to be made, then the soundness of the whole socialist position is to be conceded, and we might as well at once pass over our whole trust problem to that school of economic thought to work out for us on the basis of public ownership of all means of production.

The *Boston Herald*, on the contrary, is of the opinion that while Mr. Untermyer is ahead of the times, we are trending in the direction of the reforms which he advocates, and how far he is ahead of the times may be a question:—

When the Sherman anti-trust law was passed, it was thought to be sufficient to place the ban on certain forms of business organization which were deemed inimical to public welfare We have learned by experience that this was a mistaken policy. Now we are preparing to waive our protest against the form of organization and to rely on the power of the federal Government to supervise and regulate the methods of trade. We still hesitate to approach the question of commodity prices directly, and, although our avowed object is to prevent the manipulation of prices to the disadvantage of the majority, we insist on accomplishing that object by roundabout means. It is not impossible that we may find that even the federal incorporation of all interstate commerce, together with all the inquisitorial power that has been suggested as requisite for an efficient bureau of corporations, all the schemes of publicity that may be devised and all the restrictive conditions that may be included in the charters, may yet leave us a long way from effective regulation of commodity prices or from any practical relief from the present situation. In the end we may be much nearer Mr. Untermyer's point of view than we seem to be at present.

Principles of Practice Reform

PROFESSOR ROSCOE POUND'S views on the reform of procedure have been expressed in two recent notable writings, first in two articles in the Illinois Law Review (see 22 *Green Bag* 237), secondly in a report presented to the Illinois State Bar Association (22 *Green Bag* 438–456), and these views are now somewhat familiar to a considerable section of the legal profession. These opinions have more recently found additional expression in the able report written by Professor Pound for the American Bar Association's Special Committee to Suggest Remedies and Formulate Proposed Laws to Prevent Delay and Unnecessary Cost in Litigation. This document has been reprinted in 71 *Central Law Journal* 221 (Sept. 30). We extract from this luminous report merely the main heads of this latest program of procedural reform, omitting the full explanatory discussion:—

I. A practice act should deal only with the general features of procedure and prescribe the general lines to be followed, leaving details to be fixed by rules of court, which the courts may change from time to time as actual experience of their application and operation dictates.

II. In framing a practice act or rules thereunder, careful distinction should be made between rules of procedure intended solely to provide for the orderly dispatch of business, saving of time and maintenance of the dignity of tribunals, on the one hand, and rules of procedure intended to secure to all parties a fair opportunity to meet the case against them and a full opportunity to present their own case, on the other hand; rulings on the former should be reviewable only for abuse of discretion, and nothing should depend on or be obtainable through the latter except the securing of such opportunity.

III. The sole office of pleadings should be to give notice to the respective parties of the claims, defenses and cross-demands asserted by their adversaries; the pleader should not be held to state all the elements of claim defense or cross-demand, but merely to apprise his adversary fairly of what such claim, defense or cross-demand is to be.

IV. No cause, proceeding or appeal should be dismissed, rejected or 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.

V. The equitable principle of complete disposition of the entire controversy between the parties should be extended to its full extent and applied to every type of proceeding.

(1) The courts should have power and it should be their duty in every sort of cause or proceeding to grant any relief or allow any defense or cross-demand which the facts shown and the substantive law may require.

(2) No cause or proceeding should fail or be dismissed for want of necessary parties or for non-joinder of parties, but provision should be made to bring them in.

(3) Joinder of all parties proper to a complete disposition of the entire controversy should be allowed in every sort of cause, and at every stage thereof, even though they are not all interested in the entire controversy.

(4) Courts should have power in all proceedings to render such judgment against such parties before it as the case made requires in point of substantive law, to render different judgments against different parties or in favor of some and against others, whether on the same side of the cause or not, and to dismiss some and grant relief to or against others, imposing costs in case of misjoinder or unnecessary joinder upon the party or parties responsible therefor.

VI. So far as possible, all questions of fact should be disposed of finally upon one trial.—To give effect to this principle, four propositions may be suggested:—

(1) 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 on appeal, to enter judgment, either upon the verdict or upon the point reserved, as its judgment upon such point reserved may require.

(2) In case a new trial is granted, it should only be a new trial of the question or questions with respect to which the verdict or decision is found to be wrong, if separable.

(3) Wherever a different measure of relief or measure of damages must be applied depending upon which view of a doubtful question of law is taken ultimately, the trial court should have power and it should be its duty to submit the cause to the jury upon each alternative and take its verdict thereon, with power in the trial court and in any court to which the cause may be taken, on appeal, to render judgment upon the one which its decision of the point of law involved may require.

(4) Any court to which the cause is taken on appeal should have power to take additional evidence, by affidavit, deposition or reference to a master, for the purpose of sustaining a verdict or judgment whenever 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 be competent.

VII. No judgment should be set aside or new trial granted for error as to any matter not involving the substantive law or the facts, that is for error as to any matter of procedure, unless it shall appear to the court that the error complained of has resulted in a miscarriage of justice.

VIII. So far as they merely reiterate objections already made and ruled upon, exceptions should be abolished; it should be enough that due objection was interposed at the time the ruling in question was made.

IX. An appeal should be treated as a motion for a rehearing or new trial or for vacation or modification of the order or judgment complained of, as the cause may require, before another tribunal. *And corollary*,—

Upon any appeal, in any sort of cause, the court should have full power to make whatever order the whole case and complete justice in accord with substantive law may require, without remand, unless a new trial becomes necessary.

Reasons for Retaining the Death Penalty

A JUDICIAL discussion of the effect of the death penalty on homicide is given by Arthur MacDonald, Honorary President of the Third International Congress of Criminal Anthropology, in a recent number of the *American Journal of Sociology*. Mr. Macdonald considers a wide range of statistics from different countries, and his conclusion is that the death penalty has a deterrent effect on the crime of homicide and "gives a firmness to the execution of all the laws by a sort of radiation." To quote from the author's own recapitulation:—

"(1) Historically the death penalty has been enforced less and less until it has ceased to exist in many countries. (2) The importance of the death penalty has been overestimated. (3) It is important mainly because it has been made to seem so to the public. (4) From a criminological point of view it is of subordinate significance. (5) The death penalty is not a question of sentiment, but of fact. (6) Whether the death penalty lessens crime (especially murder) or not, cannot as yet be demonstrated by statistics, because: (*a*) facts as to murders are not as yet adequately collected; (*b*) and, if they were, the question could not be determined without comprehensive statistics of all forms of crime; (*c*) and, were such data obtained, it is doubtful if the question could be settled as a general proposition on account of the various conditions in different countries. (*d*) But in certain localities at certain periods the death penalty has been shown with great probability to lessen certain forms of crime and, therefore, the probability of this effect has been increased for different countries under similar conditions. (7) The fact that murders and other crimes of violence have decreased, after abolishment of death penalty, does not show that this was the cause of such decrease, for: (*a*) most murders are probably due to miserable and often desperate conditions, as shown in England; (*b*) many murders and especially crimes of violence (as certain kinds of assaults) are due to alcoholism. (8) The conclusion is that from a statistical point of view it is probable that the death penalty tends to lessen certain forms of crime. (9) As statistics are not adequate to demonstrate with certainty the influence of the death penalty, the next best source upon which to depend is the opinion of those having long experience in dealing directly with criminals. This opinion favors the maintenance of the death penalty. (10) Criminals themselves in their own organizations for plunder make death the most frequent form of punishment. (11) The most astute criminals, as robbers and bank breakers, have often said that they prefer to operate where there is no possibility of suffering the death penalty. (12) Arguments against the death penalty are generally theoretical, and frequently sentimental. (13) Such arguments have little weight from the scientific point of view. (14) But since these arguments are so frequently advanced, a few will be briefly noted: It is said the death penalty is a relic of barbarism, or a legal murder, or shock to the moral sense of the community, etc. Such objections show a disproportion in sentiment, for, while there is abundant sympathy manifested for the very few guilty murderers executed, there seems to be little or no sympathy for the hundreds of innocent victims often brutally murdered. The injustice of such sentiment is often so great as to be pathological. (15) The fact that the death penalty has gradually ceased to be executed is no reason why it should cease altogether. (16) The death penalty makes it certain that the criminal cannot take the life of another. Frequently those executed have killed more than one person. (17) The death penalty gives a firmness to the execution of all the laws by a sort of radiation. (18) Robbers, thieves, and assaulters committing crimes subject to life imprisonment (where there is no capital punishment) are encouraged to make sure of killing their victims, for this additional crime would rid them of a dangerous witness, without increasing their punishment. (19) Also a man imprisoned for life could kill his keepers without further punishment. (20) The unnecessary and injurious notoriety given to executions by the press should not be allowed, thus avoiding a serious but unnecessary objection to the death penalty."

Reviews of Books

MR. GALSWORTHY'S PLAY "JUSTICE," AND ITS CRITICISM OF CRIMINAL ADMINISTRATION

Justice: A Tragedy in Four Acts. By John Galsworthy. Charles Scribner's Sons, New York. pp. 109. (60 cts. *net.*)

WE have awaited with great interest the complete text of Mr. John Galsworthy's play called "Justice," which was first produced at Mr. Frohman's Repertory Theatre in London last winter and is credited with having made so deep an impression on the mind of Mr. Winston Churchill as to have led that cabinet minister to turn his attention to needed reforms in the English penal system. The play has now appeared in two installments in the *American Magazine*, and has also been issued in book form by a leading New York publishing firm. It is a literary masterpiece of great power and beauty, but in this particular place we are less concerned with its literary merits than with its bearing on legal problems of the day.

Stripped of sentiment and stated briefly in the baldest matter-of-fact language, the story is that of a young man of twenty-three who becomes attached to a wife and mother several years his senior, who is maltreated by a brutal husband and finds herself forced to leave him. The young man, Falder, plans to aid her to effect an escape from London. The date is set and there are no funds for the journey, so Falder out of infatuation and pity succumbs to temptation, and raises a cheque belonging to the solicitors by whom he is employed from nine to ninety pounds. The defalcation is discovered, pleas for leniency on his behalf count for nothing with the head of the firm, and he is prosecuted, convicted, and sentenced to three years' imprisonment. He emerges from prison broken in spirit, and distrusting society, and, discouraged in finding work, applies to his old employers for a position. He seems on the point of getting a fresh start, when the police come to claim him for forging a reference and for failure to report himself on his ticket-of-leave, when he hurls himself from a window and dies before the eyes of the woman to whom he has been faithful to the end.

It is possible to conceive of this play only as written with one purpose, that of arraigning the system of criminal justice as administered in England. And the question that instantly arises is whether this arraignment is fair—whether the writer has been actuated by inordinate sentimentalism, in singling out for exposure conditions wholly exceptional and not characteristic of the twentieth century, or he has simply sought to portray truthfully, with unprejudiced fidelity to facts, glaring defects in the present system of administering justice. We confess that we took up this play with suspicion, fearing that it exaggerated evils of the day and embodied little criticism of real value. But on reading it we were forced to give Mr. Galsworthy, despite the radicalism associated with some of his previous work, credit for having endeavored to be wholly truthful and sensible in the treatment of his subject.

In naming this "a story of guiltless crime," Mr. Galsworthy may be ill-advised. The altering of a cheque is a serious matter under any circumstances, and it cannot be justified even by the feeling, on the part of the culprit, that such an act is necessary for the relief of human suffering. There is nothing morally wrong in the relations of Falder and Mrs. Honeywill. That woman, if not legally divorced, has been naturally divorced by her husband's repudiation of most sacred obligations, and Falder's infatuation is not to be treated with abhorrence. But his breach of his employers' confidence is not on that account to be excused, and there is no injustice or inhumanity in their allowing the law to take its course. When all the circumstances are taken into consideration, however, Falder's offense is one calling only for a mild punishment. It was committed under the influence of a delusion which prevented him from clearly distinguishing between right and wrong, and he should not so much be punished for his wrongdoing as made to feel the arm of the law so that he will be deterred from a repetition of the offense. It is an instance not of "guiltless crime," but of petty crime, and a nominal penalty would afford all the protection that society requires. Falder, then, should have had not three years in prison, but thirty days. But Falder is at least relatively innocent, and Mr. Galsworthy cannot be charged with sentimentality in finding something of the heroic in his very frailty.

There is nothing improbable or untrue to

life in the visitation of so severe a punishment upon Falder. The court was without power to quash the proceedings or to direct a verdict of acquittal, and every possible legal defense was utilized by his counsel. Here, then, Mr. Galsworthy accomplishes his first powerful stroke. He shows the machinery of justice to be too clumsy in its construction, too far short of the perfection of a delicate mechanism, to deal out a just punishment to this offender. It is not the judge who errs but the law that falls short. The playwright has thus put his finger on one of the weakest spots in the present administration of justice, its failure to make the punishment fit the crime when the crime is an extraordinary one and calls for unusual measures.

What follows is a pitiless exposure of grave defects of penal administration. The governor of the prison is a humane man, but he is the helpless tool of a barbarous system, and he can do nothing in the way of dealing with individual cases on their merits. Even the prison physician is so much a slave of the system that he fails to see that Falder is experiencing the sufferings of an acutely nervous organization and is being destroyed in body and soul despite the fact that his weight and pulse are satisfactory. Here Mr. Galsworthy gets in his second powerful stroke. The awfulness of Falder's punishment, its inhuman brutality, make a most eloquent appeal for more scientific methods of prison discipline, for the proper classification of prisoners, and for the special treatment of first offenders and of offenders of a higher moral type. The evils portrayed may not be found prevailing in such terrible form in our more progressive institutions, but they are assuredly characteristic of a *régime* that a large part of the world still looks upon as civilized.

Mr. Galsworthy's tragic play is thus distinctly wholesome in its candor and sincerity. Its lesson, to be sure, may be misinterpreted, by some as a needlessly radical attack, by others as a basis for foolish sentimentalizing, but those who study it in a spirit of candor will find in it an accurate presentation, without exaggeration on, of glaring evils in criminal administration which cry to heaven for prompt and effective remedies.

STREET RAILWAY REPORTS

Street Railway Reports Annotated. Vol. VI; reporting the electric railway and street railway decisions of the federal and state courts in the United States. By Melvin Bender and Harold J. Hinman, of the Albany bar. Matthew Bender & Co., Albany. Pp. xxxvii + 865 + 44 (index). ($5)

THE subject of street railway law has become an important one, differentiating itself from the law of public service corporations in general, and the merit of this set of reports is generally conceded. The new volume brings the series down to date, and will be found to cover the field of important federal and state decisions with sufficient comprehensiveness, while the high standard of the copious annotations of earlier volumes seems to be well maintained. No important subjects treated in recent decisions appear to have been overlooked. The law of negligence, in its countless phases, naturally comes in for the principal share of attention, but the public obligations of street railways and the rights of passengers, the effect of municipal ordinances, and the rights acquired under franchises and leases, receive such space as they deserve. The full reports which make up the bulk of the volume are followed by a section given up to "Cases not reported in full," in which the statement of each case is extended enough to show the facts in detail and the rulings of law upon those facts. The annotations, in the form of essays on special topics appended to nearly every case reported, show the same care and utility as those of former volumes. The index-digest is a practical feature.

NOTES

The report of the twelfth annual meeting of the Colorado Bar Association, held at Colorado Springs Sept. 3 and 4, 1909, now issued, contains the following papers: President's address, by Wilbur F. Stone; "Lynching," by Charles C. Butler; "The Autonomy of Cities under the Colorado Constitution," by Henry C. Hall; and "Third Degree Outrages," by Harry Eugene Kelly.

The address delivered by W. O. Hart, Esq., of the Commissioners on Uniform State Laws from Louisiana, before the fifth annual Health Conference of his own state last June, on "Vital Statistics," has been issued in pamphlet form. It contains a strong argument for the adoption of a uniform law on the subject of the registration of births and deaths, and a draft of a model statute is appended.

The federal corporation tax law was unfavorably criticized in the address of Hon. Thomas H. Somerville, president of the Mississippi State Bar Association, at the last annual meeting, and Hon. Wilson L. Hemingway of Little Rock, Ark., in the annual address, discussed with learning and candor the relation between the powers of the state and those of the nation to regulate the problems of commerce

and business. These two able papers appear in the Report now published, which also contains these papers: "Some Suggestions as to the Propriety of Blending Law and Equity in Mississippi," by R. B. Campbell; "The Unequal Application of Our Criminal Laws," by Gerard Brandon; and "Uniformity of Legislation," by W. O. Hart of New Orleans.

BOOKS RECEIVED

RECEIPT of the following books is acknowledged:—

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.)

Review of Legislation 1907–8. New York State Library, Legislation 39. Edited by Clarence B. Lester, Legislative Reference Librarian. University of the State of New York, Albany. Pp. 465 + 9 (index). (25 cts., paper.)

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.*)

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. Pp. xxv + 427 + 23 (index). ($2.50.)

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).

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.*)

Index to Periodicals

Articles on Topics of Legal Science and Related Subjects

Anarchism. See Socialism.

Banking and Currency. "Proposals for Strengthening the National Banking System, II." By O. M. W. Sprague. *Quarterly Journal of Economics*, v. 24, p. 634 (Aug.).

Continued from article in February number (22 *Green Bag* 227). The present practice of paying interest on bankers' deposits is viewed as the fundamental cause of elasticity, and of the lack of any reserve of lending power in our banking system. An asset currency of limited volume is proposed as a solution.

Bankruptcy. See Fraudulent Conveyances, Subrogation.

Children's Courts. "Judicial Disregard of Law." Editorial. *Survey*, v. 25, p. 10 (Oct. 1).

The Chief Justice of the Court of Special Sessions in New York is criticized for having continued in the Manhattan Children's Court the system of monthly rotation of judges. The Chief Justice is charged with violation of the spirit if not of the letter of the statute (Laws of 1910, ch. 659, s. 14).

Conservation of Natural Resources. "The Public and the Conservation Policy." By J. R. McKee. *North American Review*, v. 192, p. 493 (Oct.).

This writer addresses himself to pointing out absurdities in the government's administration of its forest and water-power conservation policies. He pleads for less hysteria and more common sense in dealing with the problems of conservation. This paper was read before the National Electric Light Association at its thirty-third convention held at St. Louis, Missouri, May 26, 1910.

"How to Control Forest Fires." By Clarence T. Johnston. *Editorial Review*, v. 3, p. 988 (Oct.).

The State Engineer of Wyoming asserts that too much federal control has been inflicted upon the Western states during the last decade, and that settlement of the mountainous districts offers the only remedy, the settlers being held responsible for themselves and their property.

"Address Before the National Conservation Congress." By President Taft. *Popular Science Monthly*, v. 77, p. 313 (Oct.).

Criminal Insanity. "Tests of Criminal

Responsibility of the Insane." By Prof. Edwin R. Reedy, Northwestern University. 1 *Journal of Criminal Law and Criminology* 394 (Sept.).

This is a most satisfying review of the growth of the law of the criminal responsibility of the insane since the eighteenth century, and analysis of principles involved in current applications of the legal defense of insanity. The writer shows how the "irresistible impulse" theory has been misunderstood. Criminal intent is not a constant quantity, and mental conditions that negative criminal intent in one case may not in another. The legal inquiry should be, "Did the defendant, while suffering from this particular form of mental disorder, commit an act with the intent required by the particular crime charged?" The physician alone can determine the defendant's mental state, and the judge and jury will decide whether this mental state justifies conviction of the crime charged.

Criminal Law. See Criminal Insanity.

Criminal Statistics. "Report of Committee on Statistics of Crime." By John Koren, chairman. 1 *Journal of Criminal Law and Criminology* 417 (Sept.).

This is a most valuable report. The purpose of criminal statistics is ably set forth, and just what such statistics should show is explained with much minuteness. Recommendations for minimum requirements for court records in criminal cases and for legislation compelling returns to a central state office are offered. There is an exceedingly practical appendix summarizing, by states, the system of criminal statistics now prevailing, and succinctly pointing out their defects.

"Has Crime Increased in the United States Since 1880?" By Prof. Charles A. Ellwood. University of Missouri. 1 *Journal of Criminal Law and Criminology* 378 (Sept.).

Devoted to a close critical scrutiny of statistics from which it is not easy to draw useful conclusions. The deduction is drawn that serious crime did increase from 1880 to 1904, but that the increase apparently took place mainly before 1895. "But we are not warranted in concluding that there has been no increase since 1895, on account of the increasing use of probation and parole and on account of increasing leniency and possibly the increasing inefficiency of our criminal law and our criminal courts as instruments for the repression and cure of crime. Perhaps even more must we conclude from this study that our statistics of crime are utterly inadequate for scientific purposes, and that a first step in the study of crime in this country should be to secure the collection of more adequate statistics, either by the Census Bureau or by the Department of Justice."

Criminology. "The Habitual Drunkard." By Bailey B. Burritt. *Survey*, v. 25, p. 25 (Oct. 1).

Many evils of the present system of administering justice are pointed out. The author declares, for example, that a short sentence accomplishes nothing, and that in nearly all the states there is no provision for institutions to which an inebriate can be committed for treatment.

See Criminal Law, Criminal Statistics, Juvenile Delinquency, Penology.

Discharged Prisoners. "Treatment of the Released Prisoner." By Amos W. Butler, President of the American Prison Association. 1 *Journal of Criminal Law and Criminology* 403 (Sept.).

Treating of release and rehabilitation, and their various forms. The operation of the systems of various states is pointed out, and the chief philanthropical agencies which seek to aid the discharged prisoner are indicated. The workings of the parole system and indeterminate sentence in Indiana receive some attention. Results show that the discharged prisoner can be aided, and what is now necessary is to educate the public to appreciate how much more can be accomplished by wisely directed effort.

Equity Jurisdiction. "A Glance at Equity Jurisdiction in Certain Lines, and at the Question Whether it is Duly Appreciated." By Thomas Dent. 71 *Central Law Journal* 203 (Sept. 23).

This is a critical discussion of the case of *Strawn* v. *Trustees of the Jacksonville Female Academy*, 240 Ill. 111, involving the jurisdiction of probate and chancery courts in determining the effect of a devise in a will. The writer, urging his criticisms with admirable moderation and with a skill worthy of attention, emphasizes the importance of breadth of view on the part of chancellors in determining the bounds of a jurisdiction which local tribunals are only too apt to lop off.

Evidence. "Shall the Legal Presumption of Innocence be Regarded, by the Jury, as Evidence." By Melville Peck. 16 *Virginia Law Register* 340 (Sept.).

Greenleaf answers this question in the affirmative, Wigmore in the negative. The writer submits that "Greenleaf is right and that Thayer, Wigmore, and the Elliotts have made criticisms without sufficient foundation."

Family Relations. See Juvenile Delinquency.

Fisheries Arbitration. "The Fisheries Award." By W. T. Stead. *Independent*, v. 69, p. 699 (Sept. 29).

A lucid summing up of the main features of the award, with an interesting *résumé* of the conduct of this arbitration at The Hague.

Fraudulent Conveyances. "The Application of the Statute Against Conveyances in Fraud of Creditors to Tort Claims." By Frank C. McKinney. 22 *Bench and Bar* 96 (Sept.).

A tort claimant is found to be within the protection of the New York statute. His exact rights are considered at length. The discussion is mainly directed to the New York statute, but the doctrines laid down are prevalent in many other states.

Government. "The New Politics; the Issues." By William Garrott Brown. *North American Review*, v. 192, p. 436 (Oct.).

See p. 658 *infra*.

Egypt. "Shall Egypt Have a Constitution?" By Pelham Edgar. *Fortnightly Review*, v. 88, p. 404 (Sept.).

The writer believes that the administration of Egypt since the Earl of Cromer's retirement has been too lenient, and that Sir Eldon Gorst should be relieved of his duties and firmer measures applied.

"The British in Egypt." By Max Montesole. *Fortnightly Review*, v. 88, p. 412 (Sept.).

This author does not advocate greater firmness, as the means of allaying political unrest in Egypt, but thinks the British administration of that country should be "firm of purpose but flexible in methods, neither over-zealous or strictly logical."

India. "What Does India Want Politically?" By Saint Nihal Singh. *Fortnightly Review*, v. 88, p. 425 (Sept.).

A plea for autonomous institutions in India.

Ireland. "Nationalism and Nationality in Ireland—I." By Col. Henry Pilkington, C. B. *Contemporary Review*, v. 98, p. 300 (Sept.).

"What Ireland Wants." By John E. Redmond. *McClure's*, v. 35, p. 691 (Oct.).

Russia. "The Reaction in Russia, III, The Laws, the Courts, and the Prisons." By George Kennan. *Century*, v. 80, p. 925 (Oct.).

Treating of the deprivation of legal rights by administrative process.

See Conservation of Natural Resources, Nomination Reform, Public Health, Scientific Progress, Shipping Subsidies, Socialism.

Immigration. "What is the Matter with the Asiatic?" By J. Liddell Kelly. *Westminster Review*, v. 174, p. 292 (Sept.).

The writer answers the question by saying that nothing is the matter with the Asiatic races, on their own soil, but the English have commenced a blending process, and the Asiatic will not blend. The British battering of the walls of exclusion in Asia has led to the "yellow agony" of Australia, the Hindu nuisance in South Africa, and the Japanese menace on the Pacific coast of Canada. Anti-alien legislation is a necessity.

Insanity. See Criminal Insanity.

International Politics. "Japan's Absorption of Korea." By William Elliot Griffis. *North American Review*, v. 192, p. 516 (Oct.).

"Asia for the Japanese." By Saint Nihal Singh. *Contemporary Review*, v. 98, p. 341 (Sept.).

Interstate Commerce. See Rate Regulation.

Jury Trials. "Directing Verdicts." By Samuel C. Graham. 16 *Virginia Law Register* 401 (Oct.).

"In conclusion it may be said, with the approval of the bench, and majority of the bar, that the present practice of imposing upon the jury instructions almost without limit, often irreconcilable to the lay mind, causes more mistrials and unjust results than any other element of the trial, and more reversals, and that any legitimate act upon the part of courts that will tend to remedy this should be encouraged and upheld."

Juvenile Delinquency. "The Instability of the Family as a Cause of Child Dependence and Delinquency." By Prof. Charles A. Ellwood. *Survey*, v. 24, p. 886 (Sept. 24).

Professor Ellwood here states the results of his investigation of the relation between child dependence and divorce or desertion. He does not claim scientific value for conclusions gleamed from not altogether satisfactory data. By writing to a large number of institutions, however, he was able to secure statistics which support the belief that a very substantial proportion of juvenile dependence and delinquency is due to the destruction of homes by desertion or divorce. Inquiries sent out to reformatories, orphanages, and similar institutions showed the proportion of children with such antecedents to be somewhere round thirty per cent of the total number, and nearly as great as that of the children from homes broken by the death of one or both parents. He therefore thinks that a scientific investigation of the problem under the auspices of such an agency as the Russell Sage Foundation would be profitable.

Labor Regulation. "Compulsory Arbitration in New Zealand." By James E. LeRossignol and William D. Stewart. *Quarterly Journal of Economics*, v. 24, p. 660 (Aug.).

The practical workings of compulsory arbitration in New Zealand furnish the subject for an extended and minute study. "It is not easy to show that compulsory arbitration has greatly benefited the workers of the Colony." The workers are not entirely satisfied with the act, and some of them complain that it is administered with partiality toward the employer.

Marriage and Divorce. "Divorce for the Poor." By Stephen Reynolds. *Fortnightly Review*, v. 88, p. 487 (Sept.).

See Juvenile Delinquency.

Nomination Reform. "The Spirit of Democracy; XI, In Government—Who Should Govern?" By Lyman Abbott. *Outlook*, v. 96, p. 71 (Sept. 10).

Dr. Abbott considers the plan for nomination reform urged by Governor Hughes on the Legislature of New York State to be more likely than any other yet proposed to secure party organization and efficiency and at the same time to put nominations under democratic control.

Old Age Pensions. "Old Age Pension Schemes: A Criticism and a Program." By F. Spencer Baldwin. *Quarterly Journal of Economics*, v. 24, p. 713 (Aug.).

The writer was secretary of the Massachusetts Commission which recently, after a careful study, reported adversely on old age pensions, and he has utilized much of the material gathered by the Commission in its investigations. His legislative program contemplates: (1) the establishment of retirement systems for public employees based on the principle of contribution by such employees; (2) the institution of contributory retirement systems by corporations and large employers; (3) extension of the agencies, public and private, affording opportunity for old age insurance; (4) prevention of needless old age disability; (5) establishment of state commissions to furnish information and advice to employers and employees and to direct the appropriate agencies.

Penology. "Adult Probation, Parole, and Suspended Sentence." Report of Committee C of the American Institute of Criminal Law and Criminology, Wilfred Bolster, chairman. 1 *Journal of Criminal Law and Criminology* 438 (Sept.).

Probation methods here receive extended and illuminating discussion. The committee finds the results of such methods, "for lack of data, not yet capable of scientific and accurate statement." But the system seems to have accomplished a large saving in the cost of maintenance of penal institutions, and the prevention of waste in productive power and of the burden of supporting convicts is "of still greater economic value." The following conclusions are offered:—

"1. We approve of adult probation when coupled with thorough supervision by competent officers and when applied consistently with public safety to those cases in which there is a reasonable prospect of reform.

"2. We approve of the suspension of sentences to imprisonment when coupled with like supervision and limitations.

"3. We approve of a wider use of the suspended sentence of fine to avoid the alternative of imprisonment for non-payment.

"4. We approve of state supervision of probation and parole work.

"5. We recommend securing intensive studies of probation and parole methods and results."

"Anglo-American Philosophies of Penal Law; II, Punitive Justice." By Prof. Westel Woodbury Willoughby, Johns Hopkins University. 1 *Journal of Criminal Law and Criminology* 354 (Sept.).

This discussion, extracted from chapter X of Prof. Willoughby's "Social Justice," is very thorough in its examination of the retributive theory of punishment, and that subject has probably never been treated with keener analysis. The alternative theories, which are classed as "utilitarian," namely, the preventive, deterrent, reformative, and educative theories, are declared to overlap, and do not come in for the same minute discussion. The review of notable theories of penology is broad in its range. This production is a most valuable statement of the principles which should underlie punishment, and embodies up-to-date conclusions of penal philosophy.

"Criminal Law Reform." By Frank H. Norcross, Chief Justice of the Supreme Court of Nevada. 1 *Journal of Criminal Law and Criminology* 386 (Sept.).

The reform of criminal procedure is here viewed as a less serious problem than that of so dealing with crime that the number of those in our criminal institutions will be diminished. "We should have a uniform system throughout the country both as to criminal procedure and as to methods of dealing with offenders against the law." Till this comes about there will be a great deal of wasted effort. This writer is a firm believer in probation and parole, and he thinks that the probation system should be extended to adult offenders.

"Justice." A Play. By John Galsworthy. *American Magazine*, v. 70, p. 585 (Sept.), p. 819 (Oct.).

This is Mr. Galsworthy's play written for the purpose of illustrating the inhumanity of the prevailing system of administering the criminal law. See p. 646 *supra*.

See Children's Courts, Criminology, Discharged Prisoners.

Police Administration. "Principles of Police Administration." By Richard Sylvester, Chief of Police, Washington, D. C. 1 *Journal of Criminal Law and Criminology* 411 (Sept.).

This is an admirable presentation of what can be accomplished, aside from the mere perfunctory performance of routine duties, by the police officer with an enlightened sense of his responsibilities to society.

Probation and Parole. See Penology.

Procedure. "Some Principles of Practice Reform; Report for the American Bar Association's Special Committee." By Roscoe Pound. 71 *Central Law Journal* 221 (Sept. 30).

See p. 643 *supra.*

See Evidence, Jury Trials, Penology.

Public Health. "The Owen Bill for the Establishment of a Federal Department of Health, and its Opponents." By S. Adolphus Knopf, M. D. *Popular Science Monthly*, v. 77, p. 373 (Oct.).

A rational and vigorous defense of the proposal to establish a federal department of health. Written from a medical standpoint, it is more concerned with refuting pseudo-medical objections than with considering legal aspects of the question.

Rate Regulation. "The Mann-Elkins Act, Amending the Act to Regulate Commerce." By Frank Haigh Dixon. *Quarterly Journal of Economics*, v. 24, p. 593 (Aug.).

Minutely describing the effect of the provisions of the new act. "Surely the people of the United States have placed upon this Commission a grave responsibility. Upon its wisdom and justice the people rely for a successful regulation of the interstate commerce of this country."

"The Law and the Commuter." By William L. Ransom. *Editorial Review*, v. 3, p. 1022 (Oct.).

The author, a member of the New York legal firm headed by William M. Ivins, is counsel for several New Jersey commercial and commuters' organizations, and has gleaned his facts first hand, and expresses the opinion that the effectual differentiation of the commutation rate, by courts of law, is a task calling for new and constructive principles.

"The Shipper's Fight for Life, II." By C. M. Keys. *World's Work*, v. 20, p. 13555 (Oct.).

Dealing with the general subject of abuses of the rate-making power by the railways, and telling how special favors are still obtainable, though the rebate is officially dead.

Scientific Progress. "A Supreme Court of Science." By Prof. J. Pease Norton, Yale University. *Popular Science Monthly*, v. 77, p. 396 (Oct.).

Many issues which divide the country, says Prof. Pease Norton, are scientific in their nature. Such problems as that of vaccination can be solved only with the help of scientific experts.

"Who would not like to see a case brought against the custom of vaccination in a supreme court of science before a grand jury consisting of twenty-five scientific and engineering experts drawn from the various walks of the scientific professions? Let such a case be argued by legal counsel and all evidence introduced by experts on both sides be subject to cross-examination. In a comparatively short time and at a relatively small expense, society would be in a position to know whether in the judgment of a jury of impartial experts trained to the weighing of real scientific facts the evidence justified the position that vaccination is clearly efficacious."

Shipping Subsidies. "Our Only Constitutional Shipping Policy and the Compact for its Establishment." By William W. Bates. *Editorial Review*, v. 3, p. 1008 (Oct.).

The author contends that there was a shipping compact in the constitutional convention, and that this compact was violated by Congress by the act of 1828 "suspending" ship protection in the foreign trade. It is argued that this act was an abuse of the delegated power of Congress and contrary to the Constitution, which embodies a compact with the states for "*navigation laws.*"

Socialism. "The German Social Democracy." By John William Perrin. *North American Review*, v. 192, p. 464 (Oct.).

A short history of what "is without doubt not only the largest but the most thoroughly organized and efficiently led revolutionary body that the world has ever seen. It is a constant menace, not only to Germany but to the entire world."

(For further analysis of this movement the reader is referred to the *Quarterly Review*, v. 213, no. 424, p. 160.)

"Two Modern Social Philosophies." By Ernest L. Talbert. *International Journal of Ethics*, v. 21, p. 68 (Oct.).

Socialism and anarchism are considered in this paper, read before the Western Philosophical Association at Iowa City last March. The author considers the weakness of both doctrines to result "from their philosophical and psychological antecedents," and he advocates a consistent and comprehensive social psychology with which to combat them.

Subrogation. "Subrogation of the Surety, in Virginia." By C. R. McCorkle. 16 *Virginia Law Register* 321 (Sept.).

Awarded the Edward Thompson Company prize in a competition open to the senior class of the Law School of the University of Virginia.

Tariff. "Free Trade in its Relation to Peace and War." By the Right Hon. the Earl of Cromer. *Nineteenth Century and After*, v. 68, p. 381 (Sept.).

"Reciprocity with Canada." By Henry M. Whitney. *Atlantic*, v. 106, p. 461 (Oct.).

Uniformity of Laws. "States Declare for National Unity." *National Civic Federation Review.* Uniform Legislation Number, Sept., 1910.

In a large number of the states councils have been formed to carry on the work of the National Civic Federation. This publication furnishes detailed information regarding the movement, and prints the opinions of a large number of public men on the need of promoting uniformity in state and federal legislation.

Wills and Administration. See Equity Jurisdiction.

Miscellaneous Articles of Interest to the Legal Profession

Biography. "The Judicial Career of Mr. Justice Moody." By S. W. 14 *Law Notes* 106 (Sept.).

A review of the chief decisions of Mr. Justice Moody during his career on the bench of the Supreme Court.

"Judson Harmon." By Harry Brent Mackoy. *Independent*, v. 69, p. 694 (Sept. 29).

"Reminiscences; II, The Founding of Cornell University and Introduction to Washington Society." By Goldwin Smith. McClure's, v. 35, p. 628 (Oct.).

"King Edward VII." By Xavier Paoli. *McClure's* v. 35, p. 641 (Oct.).

Ferrer Trial. "The American Catholics and the Ferrer Trial." *McClure's*, v. 35, p. 697 (Oct.).

"An American Catholic's View of the Ferrer Case." By Andrew J. Shipman. *McClure's*, v. 35, p. 704 (Oct.).

"A Letter Regarding the Ferrer Case." By William Archer. *McClure's*, v. 35, p. 711.

These three articles review the details of this most interesting trial, and a full report of Mr. Archer's investigation is promised in the November and December numbers. Among the documents consulted by Mr. Archer is the official report of the trial, which he calls "perhaps a unique document in the history of legal procedure."

Fiction. See Indians.

History. "A Diary of the Reconstruction Period; IX, The Impeachment of the President." By Gideon Welles. *Atlantic*, v. 106, p. 537 (Oct.).

Indians. "The Law and the Indian." By Elliott Flower. *Atlantic*, v. 106, p. 483 (Oct.).

There is pathos in this story, which represents an Indian deprived of the use of his ancestral fishing grounds by the game laws. The material for the story was gathered from the official records of the state of Wisconsin.

Mexico. "The Betrayal of a Nation." By E. Alexander Powell, F. R. G. S. *American Magazine*, v. 70, p. 717 (Oct.).

Dealing with the powerful *Cientifico* group in Mexican politics and finance, and with its methods of securing special favors for its members. An utterly biased arraignment of those who are foremost in the patriotic service of Mexico.

Liberia. "The Liberian Problem." By Sir Harry H. Johnston. *Nineteenth Century and After*, v. 68, p. 558 (Sept.).

This leading authority on the African negro thinks that the best way out of the Liberian *impasse* would be by the raising of money in the United States to pay off the small Liberian debt.

Party Politics. "The Collapse of the Taft Administration." By Judson C. Welliver. *Hampton's*, v. 25, p. 419 (Oct.).

This article is a manifesto of Insurgency, plainly prejudiced in its estimates. The writer is pessimistic regarding the prospect of the conservatives being able to build up a machine to secure control of the next Presidential convention.

Pensions. "The Pension Carnival; I, Staining a Nation's Honor-Roll with Pretense and Fraud." By William Bayard Hale. *World's Work*, v. 20, p. 13485 (Oct.).

Political Corruption. "What a Few Men did in Pittsburg." By Albert Jay Nock. *American Magazine*, v. 70, p. 808 (Oct.).

The story of the uncovering and prosecution of graft in Pittsburg.

Railways. "The Paying of the Bill." By Charles Edward Russell. *Hampton's*, v. 25 p. 507 (Oct.).

A further installment in Mr. Russell's discussion of alleged domination of California by the Southern Pacific. The road is here charged with violation of the Hepburn act, and with maintenance of unfair freight rates.

Tariff. "The Mysteries and Cruelties of the Tariff." By Ida M. Tarbell. *American Magazine*, v. 70, p. 735 (Oct.).

Dealing particularly with the effect of the tariff on wool on the "ultimate consumer."

Wall Street. "It; An Exposition of the Sovereign Political Power of Organized Business; II, Wall Street on Wall Street." By Lincoln Steffens. *Everybody's*, v. 23, p. 449 (Oct.).

A biased attempt to confute Wall Street bankers by means of their own language in interviews granted the author, and to show the evil power exercised by the money trust of the United States.

Latest Important Cases

Conflict of Laws. *Domicil in Foreign Country where Americans are Subject to Laws of their Own Land—Succession.* Maine.

Henry Cunningham abandoned his domicil of origin in Waldo, Me., and made his home, established his business, and had his headquarters, from 1869 until the time of his death thirty-six years later, in Shanghai, China. The problem in *Mather* v. *Cunningham*, 74 Atlantic Reporter 809, was, Can an American under any circumstances, acquire, as a matter of law, a domicil in the province of Shanghai, a place where, by treaty, American law is substituted for Chinese local laws? Counsel contended that the term domicil necessarily implies subjection and obedience to the local laws of the domicil, and that this cannot be said to be true of a residence in Shanghai, because its laws governing American citizens are extended by treaty instead of edict.

The Supreme Judicial Court of Maine holds that as the ownership of the soil controls the establishment of all local laws, and without the consent of the sovereign no extra-territorial law can be enacted within an independent jurisdiction, or extended to it, the American law became the local law when the Emperor of China permitted Congress to extend it by treaty; that the fundamental idea of domicil does not depend upon any distinction with respect to the source of the law; that Chinese domicil gives a decedent's estate a fixed place of abode, and subjects it to the law governing the locality, and, whether American law or Chinese law, it is, nevertheless, the law of the place, as to American citizens. After a lengthy but well-reasoned and interesting opinion, the conclusion of the court is that Cunningham acquired a domicil of choice in Shanghai.

Contempt. *Conspiracy to Obstruct Administration of Bankrupt's Estate—Concealment of Assets.* U. S.

Upon examination before a referee in bankruptcy, the original testimony of a witness, a brother-in-law of the bankrupt and unsuccessful in business, that he loaned $900 shortly after the bankruptcy to his niece, the bankrupt's daughter, a girl of not more than nineteen years of age, in cash, to open a small store, was deliberately retracted at the same examination in the presence of the referee, and in answer to his questions; and on the following day, after evident pressure exerted on him during the adjournment to protect his relatives, such witness proceeded to retract his retraction of the day before, producing two checks purporting to show the payment, although he had never referred to that mode of payment previously. It was held in *Matter of Bronstein* (D. C., N. Y.), 24 Am. B. R. 524, that the inherent improbability of the first story, the conscience-stricken demeanor of the witness at his first retraction, and the pitiable exhibition which he made before the referee on his second retraction, were convincing evidence of a conspiracy to obstruct the administration of the Bankruptcy Act, and his conduct was punishable as a contempt of court.

Husband and Wife. *Foreign Contracts Enforceable in Country of the Forum When Not Against Public Policy—Negotiable Instruments.* Wis.

A note signed by a married woman as accommodation maker for her husband, which is valid in the place where made, is held in *International Harvester Co.* v. *McAdam* (Wis.) 26 L.R.A.(N.S.) 774, to be enforceable against her in the courts of another state, although if made in the latter state it would have been void,—especially where the legislative policy of the forum negatives the idea that the granting to a married woman of full rights to contract involves anything inherently bad, since it is held that foreign contracts, to be unenforceable in the country of the forum, must be injurious to the public welfare in the judgment of the courts thereof, or must have been prohibited by its legislature as pernicious.

Juries. *Juror Individually Responsible for Determination of Questions Submitted—No Duty to Make His Cojurors' Opinion His Own.* N. Y.

In *People* v. *Faber*, decided by the New York Court of Appeals Oct. 4, judgment of conviction of murder in the first degree was reversed on the ground of misdirection of the jury. The trial court refused to give the

instructions asked for on behalf of the defendant:—

"Defendant's Counsel: I ask your honor to charge the jury that while it is the duty of each juror to discuss and consider the opinion of others, he must decide the case upon his own opinion of the evidence and upon his own judgment.

"The Court: I shall not tell them that. I shall tell the juror that he should join with his cojurors and should make in some respect their opinion his own.

"Defendant's Counsel: I except.

"The Court: If, after discussing with his fellow-jurors, he changes his mind, it is just what he ought to do if he can. I shall not advise a juryman to make himself a standard for everybody else. You never could accomplish anything that way.

"Defendant's Counsel: I except to the refusal of the Court to charge as requested and to the charge as made."

The Court of Appeals sustained the exceptions, its opinion being rendered by Chase, J. To quote:—

"Urging a jury to an agreement contrary to the individual opinion and judgment of one of the jurors may be coercion. The verdict of a jury should not be the general average of the views of its individual members, but the consensus of individual judgment. Every juror takes an oath that is individual, and that puts upon him as an individual the responsibility of correctly determining the matters submitted. He is a member of the body of twelve men, but he acts individually and is alone answerable to his conscience.

Brewer, J., in *State* v. *Dydee* (17 Kansas 462), was quoted as expressing the same thought: "A verdict is an expression of the concurrence of individual judgment rather than the product of mixed thoughts." (Reported in *N. Y. Law Jour.*, Oct. 11.)

Marriage and Divorce. *Nevada Divorce Invalid in New York—Jurisdiction—Domicil.* N. Y.

Mrs. Marion Briggs Catlin married George L. Catlin in 1900 in Jersey City. In August, 1909, she was advised by her doctor to go to some higher climate for her health. She had made up her mind previously to go West and get a divorce and went to Reno, Nevada, in November, 1909. The Nevada statute requires six months' residence, and she commenced suit May 16, 1910, obtaining judgment by default on July 25, 1910. She thereupon left Nevada with no intention of returning. In *Calin* v. *Catlin*, decided by the New York Supreme Court early in October, she sought to have the Nevada decree giving her the custody of her two children enforced.

In his decision in the New York Supreme Court, Justice Whitney said: "The Reno divorce, even if the relator obtained a domicil there, was void for want of jurisdiction. But I do not think that her residence there amounted to a domicil." The Court held that the relator was still the wife of the respondent, and that her Reno divorce was invalid in New York State.

Newfoundland Fisheries Case. *Modification of Treaty Provisions by Local Legislation—Signatories Cannot Determine Reasonableness of Regulations—The Three-Mile Marine Territorial Limit—Measuring from Entrances of Local Bays.* Hague Tribunal.

Of the two principal points decided by the award of the Hague Tribunal in the *Newfoundland Fisheries* case it is difficult to tell which is the more important. That decided in Question 1, however, is likely to possess broader bearings from the standpoint of international law. The full text of the findings not being accessible, we confine our observations to matters appearing in the text of the award.

Question 1 dealt, in its essence, with the existence of any right in a British colony to modify the provisions of a treaty between Great Britain and the United States. On this subject three alternative views were advanced: (1) that the right of fishing on the treaty coasts is subject to reasonable municipal regulation by the colony owning such coasts; (2) that the reasonableness of regulations affecting the exercise of treaty privileges may be determined only by common accord of the signatories of the treaty; (3) that the reasonableness of such regulations may be determined only by an impartial authority. Neither of the first two of these propositions, those of Great Britain and the United States respectively, was satisfactory to the Tribunal, which substituted a third view of its own. The result could scarcely be called a victory for either party.

It is interesting to take the contention of the United States, as summarized in the

award, and state it affirmatively rather than negatively, without changing its substance. Then, if we substitute determination of the reasonableness of the regulations by impartial authority for determination by common accord, and leave out the American demand for the concurrence of the United States in their enforcement, the contention would assume the following form:—

"The exercise of such liberty is subject to such limitations or restraint by Great Britain, Canada, or Newfoundland as are appropriate and necessary for the protection and preservation of the common rights in such fisheries, and as may be reasonable in themselves and fair as between local fishermen and fishermen coming from the United States, and not so framed as to give an advantage to the former over the latter, and in so far as their appropriateness, necessity, reasonableness, and fairness may be determined by an impartial authority."

Such, in substance, is the actual ruling of the Hague Tribunal on Question 1.

The other important point, that in Question 5, relating to the three-mile territorial limit, was decided in favor of Great Britain, along the lines of the construction repeatedly insisted on by that power. The holding is: "The tribunal decides and awards that in case of bays the three marine miles are to be measured from a straight line drawn across the body of water at the place where it ceases to have the configuration and characteristics of a bay. At all other places the three marine miles are to be measured following the sinuosities of the coast." And recommendations are offered, "for the consideration and acceptance of the high contracting parties," that the straight line shall be drawn at the point nearest the entrance to the bay where the width does not exceed ten miles, and that in certain cases the line be drawn between specified headlands recognizable as the limits of the bay under average conditions.

The other points decided were the following: Question 2, the United States has the right to employ others than citizens or residents of the United States in the fisheries; Questions 3 and 4, United States fishermen are exempt from inconvenient or discriminatory lighthouse dues to the Newfoundland government, or obligations to enter at custom houses in Labrador and Newfoundland; Question 6, the words "bay, harbors, and creeks" in the treaty referring to Labrador apply equally to the treaty coasts of Newfoundland; Question 7, inhabitants of the United States are entitled to commercial privileges on treaty coast accorded by agreement or otherwise to United States trading vessels generally, when the treaty liberty of fishing and the commercial privileges are not exercised concurrently.

Respondeat Superior. *Liability of Religious or Charitable Corporations for Torts of Their Servants—Analogy of Private Trust Estates Affords No Foundation for Doctrine of Immunity.* N. Y.

A journeyman mechanic brought suit against the Salvation Army for personal injuries occasioned by the defective condition of a staging belonging to the defendant, which argued that being a religious or charitable corporation it could not be held liable for the torts or negligence of its servants or agents. The New York Court of Appeals, however, declined to accept this view, and unanimously gave judgment sustaining the plaintiff's right of action. Chief Judge Cullen in his opinion reviewed the authorities at some length, and declared:—

"In many jurisdictions the immunity [*i.e.*, that of religious and charitable corporations from the operation of the rule *respondeat superior*] is unqualified, existing in all cases, but the extent of the immunity and the grounds on which it rests are the subject of very diverse judicial views. Where the doctrine that the immunity is universal obtains, it is rested on the proposition that the funds of the corporation are the subject of a charitable trust, and that to suffer a judgment to be recovered against the corporation, and to subject its property to the judgment would be an illegal diversion and waste of the trust estate. This doctrine has been asserted in Pennsylvania (*Fire Ins. Patrol* v. *Boyd*, 120 Pa. St. 624), Maryland (*Perry* v. *House of Refuge*, 63 Md. 20), Tennessee (*Abtsein* v. *Waldon Academy*, 118 Tenn. 24), Kentucky (*Williamson* v. *Louisville Mission, etc., School*, 95 Ky. 251), Illinois (*Parks* v. *Northwestern University*, 218 Ill. 385), and Missouri (*Adams* v. *University Hospital*, 99 S. W. Rep. 453). . . In Massachusetts the exemption of certain hospitals from liability seems by the opinions of the Supreme Court to have been based rather on the theory that those institutions were governmental instrumentalities than on their character as public charities, though

they were recognized as such (*McDonald* v. *Boston Gen. Hospital*, 120 Mass. 432; *Benton* v. *Trustees of City Hospital*, 140 *id.* 13). . . .

'In several jurisdictions, however, the immunity of charitable corporations for the torts of their trustees or servants has been made dependent on the relation the plaintiff bore to the corporation. In all it is recognized that the beneficiary of a charitable trust may not hold the corporation liable for the neglect of its servants. This is unquestionably the law of this state (*Collins* v. *N. Y. Post-Graduate Med. School*, 39 App. Div. 63; *Joel* v. *Woman's Hospital*, 89 Hun. 73; see also *Pryor* v. *Hospital*, 15 N. Y. Supp. 622, and *Haas* v. *Missionary Soc'y*, 26 *id.* 868). It is also the law in this state that there is similar immunity from liability in the case of a charitable institution of a quasi-penal character, as against an inmate committed to it for punishment or reformation (*Corbett* v. *St. Vincent's Industrial School*, 177 N. Y. 16). . . . On the other hand, in *Rector, etc., of Church of Ascension* v. *Buckhart* (3 Hill 193) a recovery against a religious corporation by a person injured by the falling of a church wall was upheld. The authority of this case has never been questioned, and the decision is conclusive against the doctrine of total immunity. . . .

"So much for authority. If, however, we are to consider the question of the liability of the defendant an open one despite the decision in *Rector, etc., of Church of Ascension* v. *Buckhart* (*supra*), we feel clear than on reason and principle the defendant's claim of immunity should not prevail. In the case of *Powers* v. *Mass. Homœopathic Hospital* (47 C. C. A. 122) and in the case we have cited from the courts of Michigan [*Bruce* v. *Cent. M. E. Church*, 147 Mich. 230] there will be found not only an elaborate review of the authorities, but an exhaustive discussion of the grounds on which the claim of universal immunity is sought to be sustained. In the earlier case Judge Lowell, of the U. S. Circuit Court, shows that the analogy of the immunity of private trust estates does not support the doctrine."

The Court expressed concurrence in the reasoning of Judge Lowell and of Judge Carpenter in the two cases last cited. *Hordern* v. *Salvation Army*, decided Sept. 27, reported in *N. Y. Law Jour.* Oct. 6.

Workmen's Compensation. *New York Act Constitutional—Fourteenth Amendment Not Violated—Liability without Fault.*

N. Y.

The constitutionality of the New York workmen's compensation act amending the labor law affecting workmen's compensation in certain dangerous employments, which became effective September 1, has been upheld by Justice Pound of the New York Supreme Court in *Ives* v. *South Buffalo Railway Company*. The plaintiff showed that he was a switchman and was injured while on duty. He did not claim that there had been negligence on the part of the defendant, but he established the fact that there had been no "serious or willful misconduct on his part."

The grounds on which the law was attacked were thus stated by the Court:—

"Defendant maintains that under our system of constitutional government the incorporation into our law of the English law of workmen's compensation is beyond the powers of the Legislature. First, because the act in question deprives the defendant of liberty and property without due process of law, and denies it the equal protection of the laws in contravention of the Fourteenth Amendment of the United States Constitution, and Artcile 1, section 6, of the constitution of this state. Second, because it violates the right of trial by jury guaranteed by Article 1, section 2, of the constitution of this state. Third, because it limits the amount recoverable in actions to recover damages for injuries resulting in death in contravention of Article 1, section 18, of the constitution of this state."

The Court quoted an opinion by the Supreme Court of the United States to the effect that the federal Constitution should not be so construed as to deprive the states of the power to amend their laws as they may deem best for the public welfare. "It is established that statutes applicable solely to railroads do not deny to railroads the equal protection of the laws," and it also said that a classification of "dangerous employments" for the purposes of the act must be upheld. "That the Legislature," it said, "had the power to deal with the question of employers' liability on a basis other than fault is not clear beyond peradventure, but every presumption is in favor of the constitutionality of the act."

The Editor's Bag

THE "NEW POLITICS"

THAT the United States is in a stage of transition, and that a great change in economic conditions is forcing the American people, at the beginning of the twentieth century, to face new social and political problems in a constructive spirit, is the theme of William Garrott Brown's article in the *North American Review* on "The New Politics." Mr. Brown opens with two striking quotations, one from James Bryce, the other from Macaulay. Mr. Bryce predicted twenty years ago that with the disappearance of the Western frontier and the expansion of American industry to fill up fields not yet occupied, the price of food would come to advance, pauperism and unemployment would become more prevalent, and the ills of European society would appear on our soil. Over eighty years ago Macaulay wrote that as this country became older, and the great majority of its population came to live from hand to mouth, vast wealth being concentrated in the hands of a few, the populace would be much more strongly tempted to spoliate the rich than under a simpler, more primitive *régime*. In Mr. Brown's opinion, the time to which Mr. Bryce and Lord Macaulay looked forward is already upon us, and we are taking up new problems, new issues, all of them at bottom economic in their nature.

The particular issue on which we can get the most guidance from the experience of Europe, he says, is that of conservation. Germany and France have furnished the object-lesson of scientific forestry, and Switzerland has shown what can be done in the national conservation of water-power, a great part of the light, heat and power used by the Swiss people being furnished by the government from this source. There really is not any question here:—

> No one, I suppose, would have the hardihood to affirm that we ought to waste our patrimony instead of husbanding it, or that we ought to consume those natural resources which, like the forests and the soil's energy, are capable of self-maintenance and of increase, faster than they can be restored. The only question should be of ways and means.

Is, then, the only question of conservation one of ways and means? In our judgment, Mr. Brown greatly underrates the difficulty of this problem. For the discovery of the most desirable "ways and means" itself involves the settlement of momentous issues. Are the forests and water-powers to be preserved as a part of the public domain, or are they to be allowed to pass into the possession of private interests under an adequate system of public regulation? The vast issue clumsily termed that of "democracy *vs.* privilege" is involved. But this is not the only momentous problem to be faced. Shall the future of the forests be determined by the people of the United States or by the people of the separate states; shall local autonomy be sacrificed to the centralizing tendencies of the American nation? These are surely not mere questions of "ways and means," for they affect the very warp and woof of American political and economic institutions.

Passing from the issue of conservation, Mr. Brown next considers that presented by the suppression of competition by the growth of powerful industrial combinations. This he considers the chief of the new issues. To quote:—

> We are confronted, let us say, with the problem of adapting the democratic principle to conditions that did not exist when our American democracy arose in the world: that is to say, to a field no longer unlimited, to opportunities no longer boundless, and to an industrial order in which competition is no longer the controlling principle, an industrial order which is, therefore, no longer democratic, but increasingly oligarchical,-which may even become, in a way, monarchical, dynastic. To save itself politically, democracy must therefore become aggressively industrial; it must somehow extend itself into that field. Plainly, therefore, "*laissez-faire*" can no longer be its watchword. That was the watchword of the *régime* of competition. De-

mocracy's task is twofold; it must secure for the state, the public, the people, some kind of effective, ultimate control over the natural sources of all wealth; and it must also secure, in an industrial system no longer controlled by competition, protection and opportunity for the individual.

Mr. Brown here contents himself with indicating the issues of the new politics. His analysis, however, leaves something to be desired in the way of penetration. Without the aid of the principle of free competition, the industrial combinations could never have intrenched themselves in their present powerful position, and it is by virtue of that principle that they maintain their supremacy, for it is by underselling competitors that they thrive, rather than as the beneficiaries of special favors from the government. Repeal of the tariff law might weaken monopoly, but could not abolish it. The popular demand is not so much for the extirpation of powerful combinations as for social amelioration, and it would be difficult to prove that the lot of the ordinary workingman has deteriorated rather than improved during the past century; his demand for social amelioration, in fact, has largely been created by that improvement in his lot which has already come about through industrial expansion. The special privileges derived from monopoly may present a serious problem, but that problem can scarcely be called the chief one now facing American society. The workingman has already come to long for much more than perfect freedom of competition, with the inequalities naturally attendant upon it in every stage of economic history. Mr. Brown's diagnosis of social ills is thus superficial, and he fails to prescribe suitable remedies for those ills, or even to suggest sound statesmanlike policies for the "New Politics" of which he writes.

HE MADE A SLIM LIVING

ONE of the prominent attorneys having charge of the Western Union Telegraph Company was up in Cape Breton fishing, when he asked a raw-boned old man who had charge of the lines of the telegraph company about the fishing places and how the people got along financially.

The old man replied, "Well we climb poles in sleet and bad weather up here, fish a little, hunt some, and all in all we make a slim living. We do not make much, it is true, but we get along, that is about all. Our living is not exactly fattening, it is filling."

The attorney was a very corpulent person, and laughed till his sides ached, and he replied, "I am one of the directors of this company you are working for, and shall see what can be done."

Sure enough, it was not long before the old employee was pensioned on full pay.

SIMPSON'S ARTIFICIAL POSE

THE late Chief Justice Fuller used to delight in telling a story about a lawyer he remembered as a boy at Augusta, Maine.

"It was back in the days when portraits in oil were the fad," said the Chief Justice, with that familiar merry twinkle in his eye, "and Lawyer Simpson, the town's Daniel Webster, had his painted in his favorite and characteristic attitude, standing with one hand in his trousers pocket. His friends and clients all went to see it, and everybody remarked on its wonderful likeness.

"But there finally came one, an old farmer, who dissented. 'Tain't like Simpson,' he said dryly. 'No tain't.'

" 'Tain't like?' cried those present. 'Just show us wherein tain't like!'

" 'Tain't like,' repeated the old man, shaking his head. 'Simpson's got his hand in his own pocket. 'Twould be more natural if he had it in somebody else's.' "

A LEGAL DEFENSE OF THE DOG

THE Ohio Humane Society has made public an interesting case of the legal defense of the dog.

As they tell the story, Senator Vest had been "retained as the attorney of a man whose dog had been wantonly shot by a neighbor."

"It is said the plaintiff demanded $200.

"When Vest finished speaking, the jury awarded $500, without leaving their seats. The speech in full, is as follows:—

" 'Gentlemen of the Jury:—

" ' The best friend a man has in this 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 man can have in this selfish world,—the one that never deserts him,—the one that never proves ungrateful or treacherous is the dog.

" 'Gentlemen of the jury, a man's dog stands by him in prosperity and in 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, and 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. Whenever 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 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 grave side will be found the noble dog, his head between his paws, his eyes sad, but open, in alert watchfulness, faithful and true even to death.' "

PROHIBITION IN KANSAS

A KANSAS City lawyer sends in the following anecdote in order to show how thoroughly the prohibition law is enforced in Kansas:—

The train was flying rapidly through prohibition Kansas. It had passed Dodge City, when a man came rushing into the Pullman car and shouted, "Has any gentleman in this car got any whisky? A lady in the chair-car has fainted."

Seventeen men bent over, opened their grips and raised the substance in sight. The man grabbed the nearest flask out of the hand of the nearest passenger, raised it to his lips and drank rapidly. As he quit, he said, "It's just terrible. It breaks me all up to see a woman faint."

Thereupon the other sixteen fellows leaned back, took a drink, and said, "What a shock this is to a man's nervous system!"

ONE ON THE DECEASED

ONE George Wilson, a lawyer who had much litigation, nearly all in which he was personally interested as a party or as trustee, finally passed away, and a short funeral sermon was delivered by a member of the bar in the presence of a few old personal friends. The lawyer told how the old man had been abused and maligned often, and that in fact he had helped the poor and unfortunate frequently and was not a bad man.

On returning from the services an old lawyer was asked about the services and what was said. The old lawyer replied, "For once old George could not file a demurrer or motion to any of the proceedings which had taken place."

The old person who made the inquiry replied, "Well this must be the first time George did not move for arrest of judgment."

HANDCUFFS

IN Virgil is to be found the first recorded instance of the use of handcuffs, for the poet tells us that Proteus was thus fettered and rendered powerless by Aristius, who apparently knew that even the gods themselves were not proof against this form of persuasion.

In the fourth century B. C. an army of victorious Greeks found several chariots full of handcuffs among the baggage of the defeated Carthaginians, and it is highly probable that the ancient Egyptians had some contrivance of the kind. The word is derived from the Anglo-Saxon "handcop," whence comes evidently the slang term "copper."

In earliest Saxon days "hand cops" were used for nobles, and "foot cops" for kings, but in the 14th and 15th centuries the words were supplanted by the terms "shack bolt" and "swivel manacle," and the instruments were as cumbersome as the names by which they were known.

Up to the middle of the last century there were two kinds of handcuff in general use. One, known as the "flexible," was very like those which are still used; the other kind,

called the "figure eight," were used to restrain violent prisoners. It was so fashioned that the captive could not move his hands, and was universally dreaded, for the pain caused by a limb immovably confined is almost unbearable.

A simple but powerful device for securing prisoners was the "twister," now abolished owing to the injuries it inflicted. It consisted of a chain with handles at each end. The chain was put around the wrists, the handles brought together and twisted until a firm grip was obtained. The least struggle on the part of the captive and the chains bit deep into his wrists. Of the same nature, but made of wire, is "la ligote," while in an emergency whipcord has proved perfectly satisfactory.

The handcuff used in some parts of Eastern Europe is most primitive. It consists of a V-shaped piece of metal, in which the wrists are inserted, the open ends being then drawn together by means of a cross hook, which must be kept taut the whole time.

—London *Globe*.

DID NOT EXPECT IT

AN attorney in New York, the bulk of whose business is collections, had an account against the president of a Young Men's Christian Association in a town in Illinois. Thinking that correspondence might bring results without forwarding the claim he wrote the young man and pointed out the error of his ways.

He got a prompt response and a promise that the debt would be paid at the end of that month, when the debtor said his salary would be due.

As usual the end of the month came without the promise being kept. The attorney wrote the individual and in response received a letter reading in part: "I had the money all put aside to send you, but when I got home that night I found that my wife had given birth to a child and I was obliged to use the money for expenses which I had not anticipated, as I *had no idea that anything of the sort was expected.*"

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

USELESS BUT ENTERTAINING

. . . There were two prisoners in jail. One was in for stealing a cow; the other for stealing a watch. Exercising in the courtyard one morning the first prisoner said, tauntingly, to the other: "What time is it." "Milking time," was the retort. —*Central Law Journal.*

The jury was made up entirely of negroes, it being a case of one negro charged with stealing from another.

The jury retired. An hour passed. The judge could stand it no longer, and went in person to the room to see what was delaying the verdict. He found each of the jurymen crawling around on the floor, peering under chairs and tables, and also into corners.

"Here," he thundered, "what are you niggers doing?"

The foreman arose, and, making humble obeisance, answered:—

"Yo' honah, tain't no use; we jes' kaint find no vuddict in his here room. Fact is, yo' honah, I doan b'lieb dere's a vuddict in here no how." —*The Brief.*

A story, said to be characteristic, is told of an Arkansas judge. It seems that when he convened court at one of the towns on his circuit, it was found that no pens, ink, or paper had been provided, and upon inquiry, it developed that no county funds were available for this purpose. The judge expressed himself somewhat forcefully; then drew some money from his own pocket. He was about to hand this to the clerk, when a visiting lawyer, a high priced, imported article, brought on to defend a case of some importance, spoke up in an aside plainly audible over the room:

"Well," he remarked, with infinite contempt, "I've seen some pretty bad courts, but this—well, this is the limit."

"You are fined $5 for contempt, sir! Hand the money to the clerk," he said, and when the pompous visitor had humbly complied, he continued:—

"Now, Mr. Clerk, go out and get what pens, ink and paper the court may require, and if there is any left over, you can give the gentleman his change." —*Central Law Journal.*

As a prominent member of the American Bar Association was leaving one of the meetings at Chattanooga this summer he met one of his colleagues who asked him what was going on in the meeting. The prominent member answered that Judge Blank had been talking for over an hour. In reply to the question of the other prominent member, "On what subject?" he replied, "The judge didn't say." —*Chicago Legal News.*

Henry E. Dixey was offered a cigar by a young lawyer.

"It is easy to see," said Mr. Dixey, examining the cigar, "that you are not married, but only engaged."

"I am engaged. But how did you know? It's a secret," cried the lawyer.

"I knew," said Mr. Dixey, "because you have frequently offered me a cigar from your vest pocket, and it has always been broken."

—*Boston Globe.*

Eminent lawyers are frequently amazingly ignorant on all subjects other than law. A good story is told of a judge who once interrupted a well-known patent counsel. "I am sorry to stop you, but while I understand the term 'eccentric' when applied to persons, I must confess that I am quite at a loss to appreciate its meaning when applied to things." The learned counsel looked a little puzzled for a moment and then, amid considerable merriment evoked by his reply, said: "An eccentric, my lord, is a circle whose centre is not in the centre." And a precious good rough-and-ready definition too.

—*Law Notes* (London).

The Legal World

Important Litigation

The American Sugar Refining Company has brought an action against the Commonwealth of Massachusetts to have the excise tax exacted from it adjudged illegal, as a tax on its interstate business, amounting to a taking of its property without due process of law.

The federal grand jury which had been investigating Chicago packers returned indictments against ten high officials of the Swift, Armour and Morris concerns, Sept. 12 at Chicago. There are three indictments against each. The first charged a combination in restraint of interstate trade in fresh meats. The second charged conspiracy. The third charged monopoly of the trade in fresh meats by unlawful means. The investigation was the second started by Judge Landis within a year. On Jan. 20, he ordered a grand jury inquiry which on March 20 resulted in the indictment of the National Packing Co. and ten subsidiary concerns.

The prosecution of Governor Haskell and other defendants in connection with alleged land frauds in Oklahoma, which has already cost the Government large sums of money, came to a sudden end Sept. 29, when the Government announced that under the restrictions laid down by the court it would be unable to make out its case. United States Judge John A. Marshall ruled that under a recent Circuit Court of Appeals decision, rendered in the *Lonabaugh* case, the prosecution would have to prove conscious participation by Haskell with the other defendants during the three years prior to the return of the indictment, which was in May, 1909. He said that the decision was in some points at variance with his own views, but he had no alternative. S. R. Rush, special assistant to the Attorney-General, said as the alleged conspiracy had taken place in 1902 much of the evidence secured by the Government related to acts committed before the Statute of Limitation as fixed by the court. The Government, therefore, asked that the case be nol-prossed.

Charles R. Heike, former secretary and treasurer of the American Sugar Refining Company, who had been called "the man higher up" in the Sugar Trust, was sentenced Sept. 19 at New York City by Judge Martin, in the United States Circuit Court, to serve eight months in the New York Penitentiary on Blackwell's Island and pay a fine of $5,000 on conviction of conspiring to defraud the United States Government by the underweighing of sugar. Judge Martin granted a stay of execution of the sentence pending an appeal to the United States Circuit Court of Appeals. John B. Stanchfield, Heike's counsel, gave immediate notice that an appeal would be taken. In imposing sentence Judge Martin said that as Heike had only been convicted on one count of the indictment charging him with aiding the conspiracy, instead of all six counts, as the other defendants had been, and taking Heike's age (sixty-six years) and his accustomed mode of life into consideration, he would be inclined to suspend sentence altogether. But as punishment must be inflicted as an example, he could not follow his personal inclination.

Personal

Judge John H. Light of Hartford, Ct., has been appointed Attorney-General of Connecticut to fill the unexpired term of Judge Marcus H. Holcomb.

Gordon E. Sherman, an associate editor of the Bulletin of Comparative Law of the American Bar Association, has been appointed Assistant Professor of Comparative Law in the Yale Law School.

Lord Halsbury celebrated his eighty-fifth birthday on Saturday, Sept. 17. He has only three predecessors among the Lord Chancellors of the Victorian era who attained a greater number of years. Lord St. Leonards died at ninety-three, Lord Lyndhurst at ninety-one, and Lord Brougham at eighty-nine.

The oldest living college graduate in the United States is believed to be William Rankin, who was graduated from Williams College in 1831 and who on Sept. 15 was one hundred years old. Mr. Rankin was a lawyer of distinction until he retired some years ago. He was also, for many years, treasurer of the Board of Foreign Missions of the Presbyterian Church.

Dr. Woodrow Wilson, president of Princeton University, was nominated for Governor of New Jersey at the Democratic state convention meeting at Trenton Sept. 15. Dr. Wilson was nominated on the first ballot and received forty more votes than the requisite number. His nomination was brought about by the efforts of the Democratic state leader and of a number of independent Democrats.

Henry L. Stimson, whose work as the government prosecutor of the sugar weighing frauds in New York forced him into national prominence, was nominated for Governor of New York at the Republican Convention held at Saratoga late in September. Dean Ezra R. Thayer of the Harvard Law School, who knew Mr. Stimson during his two student years in Cambridge, has paid an interesting tribute to Mr. Stimson, for whom he finds it hard to find words of praise too strong to do him justice. Mr. Thayer has said: "Other prosecuting officers have deservedly enjoyed great national prominence as the result of achievements not to be compared with what Mr. Stimson personally accomplished in the Sugar Trust cases. In that matter, as in others, his conduct of his office stands as a model for the future, and the wisdom which he showed in choosing his associates, as well as the quiet and effective despatch of business during his administration, may be taken as earnest of his capacity for executive office. In the light of his character and equipment, and his record as a man and a lawyer, it is not too much to say that he would be a worthy successor to Governor Hughes."

Judge Baldwin Nominated

Ex-Chief Justice Simeon E. Baldwin of New Haven was nominated by acclamation for Governor of Connecticut at the state Democratic convention Sept. 8. Judge Baldwin was nominated by Dean Henry Wade Rogers, his colleague on the faculty of the Yale Law School. Dean Rogers made an eloquent political speech the course of which was frequently interrupted by rounds of applause.

In accepting the nomination, the learned Professor of International and Constitutional Law at Yale made a characteristic speech extracts from which, as reported by the newspapers (the diction will hardly be recognized as Judge Baldwin's own), are as follows:—

"This is the first time for nearly eighteen years that I have had an opportunity to speak my mind at a political gathering.

"We have the old-fashioned notion in Connecticut that a judge should be kept out of politics, and while on the bench it was my endeavor to follow that rule, and content myself with casting a silent vote, now I have recovered the privilege of free speech, and I am glad to use it before this convention, which has done me today so great an honor.

"It is, I believe, an hour of opportunity for the Democratic party, the country over. The people are tired of the Republican party,—tired of its sweet content in living on the canned reputation of what it was half a century ago.

"All the power of the federal Government is given in the Constitution of the United States and strictly defined by the Constitution of the United States. It can be increased through executive or legislative or judicial action, by usurpation of what belongs to the states or by usurpation of what the people have reserved to themselves, and in no other way. We of the Democratic party are against such usurpation,—against a policy of imperial centralization."

At the conclusion of the speech there was long and loud applause.

Miscellaneous

An innovation is likely to be attempted this winter by the Superintendent of Documents at Washington, in response to the demand for printed copies of laws enacted by Congress immediately after that passage. A circular will be sent out inviting subscriptions for the ship laws, as they are called, and if a sufficient number of subscriptions are received to warrant the expense of undertaking the printing of the federal laws in this manner, they will be mailed with promptness after their passage to the subscribers.

The International Maritime Conference, sitting at Brussels in September, after prolonged discussion reached an agreement on the extremely difficult questions of salvage and collision. Draft treaties on these subjects were unanimously agreed upon, and the

signing of them will only be a matter of days. The nations represented at the Conference were Great Britain, France, Germany, Austria-Hungary, Italy, Russia, Belgium, Holland, all the other European nations, the United States, most of the South American republics and Japan. There was an attendance of sixty-four delegates.

The quinquennial report of the Harvard Law School Class of 1905 contains interesting figures regarding the earnings of over 150 members. The average monthly earnings of these men over office expenses were $216. The lawyers, however, are earning considerably less than those of the class who have deserted the practice of law and gone into business. The eleven men who have done this are earning an average of $334 a month above expenses. Of those practising law, the men on the Pacific coast are doing the best financially, their average earnings being $308 a month. Those in New York city come next with an average of $267, while those in Massachusetts are lowest with an average of only $167 a month.

The International Conference on State and Local Taxation met in Milwaukee the first week in September. The resolutions adopted condemned the general property tax, so far as it applies to personal property, as unjust and inequitable, and from the testimony given it appeared that none of the states that had repudiated this system had any desire to return to it. The conference recommended an investigation by a committee of the International Tax Association of the question of a practical substitute for the personal tax as well as the methods of administering taxation laws generally in the several states and provinces. The papers and addresses dealt largely with the taxation of corporations and the administration of tax laws by state commissioners.

The Columbia Law School opened its regular term this fall in a new building given by an anonymous donor and known as Kent Hall. It stands at the northwest corner of Amsterdam avenue and 116th street, and has a well-equipped library, extraordinary in size and completeness. The shelf capacity is 25,000 volumes, and there are tables and chairs for about 335 students. On the floor below the library at the street level modern and well-lighted locker rooms, social and moot court rooms have been constructed. The completion of the law building marks an epoch in the history of one of the famous law schools of America. Although Columbia, as King's College, established the first professorship of law in America back in 1773, the law school, as such, has been in a temporary home.

As members of the Railroad Securities Commission created by Congress to investigate the issuance of railroad stocks and bonds and secure data bearing on alleged overcapitalization, President Taft has appointed the following: Arthur T. Hadley, President of Yale University, chairman; Frederick Strauss of the New York banking firm of Seligman & Co., vice-chairman; Frederic N. Judson, the eminent lawyer of St. Louis; Walter L. Fisher of Chicago, expert in traction matters and vice-president of the National Conservation Commission; and Professor B. H. Meyer of the department of political economy in the University of Michigan, chairman of the Wisconsin Railway Commission. President Hadley has appointed as secretary of the Commission William E. S. Griswold of the New York City bar.

A party of one hundred and fifty delegates to the International Prison Congress made its tour of the United States, by a special train of Pullman cars, September 18–28. Nearly fifty countries were represented, the hundred foreign delegates being entertained at the expense of the Government. The itinerary was from New York to Chicago and then by way of Indianapolis and Louisville to Washington, penal institutions everywhere along the route being visited, including Blackwell's Island, the New York State Reformatory at Elmira, the New York State Prison at Auburn, the State Agricultural and Industrial School at Industry, N. Y., the State Reformatory at Mansfield, O., the Indiana Women's Prison, the Indiana Girls' School, the Indiana Boys' School, and the Indiana State Reformatory at Jeffersonville.

The National Civic Federation has effectively organized a movement to establish permanent councils in each state to carry on the work for uniformity in legislation. With the assistance of Governors of States and leading business men, councils have been organized in the following states: Maryland, Connecticut, Ohio, Indiana, Illinois, Missouri, Kansas, Nebraska and Wisconsin. A department of the Civic Federation for New England was formed in Boston Sept. 23. By November the Civic Federation expects to have formed organizations in every state in the Union, and to have agreed on the bills now under discussion throughout the country so that they may be presented to every state legislature in the coming winter. Some of the questions on the list for the coming campaign are, conservation of natural resources, divorce, regulation of railroads and *quasi*-public utilities, good roads and automobile regulation, reform in legal procedure, pure food and drugs, and compensation for industrial accidents.

Two new laws went into effect in New York City on Sept. 1st, that establishing a Domestic Relations Court, with jurisdiction over all cases involving discord between husband and wife, such as abandonment, non-support, or cruel and abusive treatment, and that dividing the Night Court into two

branches for the two sexes. On September 1 Magistrate Cornell opened the Domestic Relations court in Yorkville and Magistrate Barlow opened the Night Court for Women in Jefferson Market. The object is to secure greater dispatch and uniformity of adjudication, as it is expected that the magistrates will become specialists in the class of cases coming before them. The Domestic Relations court will enable women to avoid exposing themselves and their children to contact with the type of criminal coming before the district courts, and the Night Court for Women will more fully protect the community by providing means for more effectually dealing with the social evil, one of the new features of the law being compulsory examination by a physician of all women convicted of soliciting and their removal to a hospital if necessary. The Night Court is said to be the first law court exclusively for women ever created.

The sixteenth conference of the Inter-Parliamentary Union for the Promotion of International Arbitration opened at Brussels, Belgium, August 29, with three hundred delegates present. Auguste M. F. Beernaert, the Belgian Minister of State, presided. In his opening address M. Beernaert said that despite the rapid progress of the cause of arbitration and mediation the world was living in a *régime* of armed peace, with 14,000,000 men under arms at a cost annually of $1,000,000,000. The conference avoided direct action upon Secretary Knox's proposition to confer the powers of a Court of Arbitral Justice upon the International Prize Court, because the convention creating the latter on Oct. 18, 1907, has not yet been ratified. Instead the conference unanimously adopted a resolution which, while "rendering homage to the sentiments which inspired the American proposition," simply urged the powers to ratify promptly the treaty "independently of any question concerning the organization of a permanent court of arbitral justice." The resolution introduced by Congressman Richard Bartholdt of Missouri, chairman of the American delegation, instructing each national delegation to urge its respective Parliament to pass resolutions in favor of a third Hague Conference in 1915, was adopted.

Necrology—The Bench

Baker, Duncan J.—At Charleston, S. C., Sept. 1, aged 39.

Baxter, Edwin.—At Los Angeles, Sept. 7, aged 79. Formerly probate judge at Grand Haven, Mich.

Carr, Arthur.—At Hyattsville, Md., Sept. 1, aged 74. Was considered the oldest justice of the peace in Maryland in point of service.

Hart, William N.—At Nashville, Sept. 4. Was the county judge who presided over the trials of the Coopers for killing ex-U. S. Senator Carmack.

Hartkoff, Clarence R.—At Hamilton, O., Sept. 11, aged 35. Probate judge; former city solicitor.

Merritt, Samuel A.—At Salt Lake City. Last Justice of the Supreme Court of the territory of Utah; appointed by President Cleveland; served for years as Democratic national committeeman from Utah.

Scott, J. B.—At Cordele, Ga., Sept. 24. Member of the Georgia constitutional convention of 1877.

Sullivan, Theodore L.—At Troy, O., Sept. 28, Judge of State circuit court.

Teall, George C.—At South Haven, Mich., Aug. 31, aged 70. For fourteen years judge of Eau Claire county, Wisconsin.

Wachenheimer, Lyman W.—At Sandwich, Mass., Sept. 21. Former police judge and prosecuting attorney.

Necrology—The Bar

Abbott, Nathaniel Thurston.—At Sanford, Me., Oct. 4, aged 38. Professor of Equity in Boston University Law School since 1902, in which year he was graduated from that institution at the head of his class; representative in legislature in 1903.

Additon, Benning C.—At Bangor, Sept. 18, aged 64.

Ambrose, John L.—At Philadelphia, Sept. 19, aged 66. Clerk of the Middlesex county courts in Massachusetts for forty-one years.

Andrews, William H.—At Durham, Conn., Sept. 6, aged 62. Graduated from Columbia Law School in 1867; for twenty years a law partner of the late Charles T. Wilson of New York City; retired five years ago.

Barron, Jacob T.—At Kansas City, Mo., Sept. 16, aged 56. Member of the firm of Barron, Moor & Barron, Columbia, S. C., and counsel for the Pullman Company, American Bridge Company and the Atlantic Coast Line; prominent Freemason.

Bennett, Charles G.—At Middleton, N. J., Sept. 8, aged 60. With legal department of the Pennsylvania Railroad.

Bergstresser, James Calvin.—At Fountain Springs, Pa., Sept. 28, aged 59. Editor and proprietor of the *Insurance World*.

Berry, Cabell R.—At Franklin, Tenn., Aug. 27, aged 62. Three times Mayor of Franklin; former speaker of Tennessee senate; Confederate veteran.

Boyd, Archibald, C.—At Chicago, Sept. 11, aged 44. Professor in the Boston University Law School since Oct., 1904; was graduated from Dartmouth with honors, and from law school of University of Minnesota; former member of staff of West Publishing Co. and later chief reviewing editor of the American Law Encyclopedia; author of several legal works, and taught criminal law, partnership and wills and administration.

Branch, Austin.—At Augusta, Sept. 4, aged 30. Brilliant young lawyer of Georgia; recently elected representative in the legislature.

Brayton, Gen. Charles R.—At Providence, Sept. 23, aged 70. Known as "blind boss" Brayton, he was the controlling force in the Republican party for forty years; "Braytonism" was long an issue in his own party; had brilliant war record.

Brown, Julius L.—At Atlanta, Ga., Sept. 5, aged 63. Graduate of Harvard Law School in 1871; former railroad counsel; succeeded in establishing right of a railroad in Georgia to separate its passengers of different races.

Crowley, Thomas H.—At Providence, Aug. 30, aged 53. Actively interested in town of Bristol, R. I., where he practised.

Fife, Clayton B.—At Philadelphia, Sept. 4, aged 67. Lawyer and former reporter of legal news for the Philadelphia newspapers.

Fraser, Duncan Cameron.—At Guysboro, N. S., Sept. 27, aged 65. Lieutenant-Governor of Nova Scotia; representative in legislature; member of the House of Assembly and the Canadian House of Commons.

Fry, Charles.—At Bar Harbor, Sept. 3, aged 60. Had practised law in Boston since 1885; native of Philadelphia and old resident of Bar Harbor.

Gillette, John.—At Canandaigua, N. Y., Aug. 31, aged 76. Railroad and insurance attorney.

Gilpin, Hood.—At Media, Pa., Sept. 13, aged 57. Former assistant United States Attorney; son of a former mayor of Philadelphia.

Gleason, John J.—At Flushing, L. I., aged 64. Was graduate of Columbia Law School and member of New York County Lawyers Association.

Hanaford, Francis W.—At Plainfield, N. J., Aug. 30, aged 62. Patent lawyer in New York for nearly twenty-five years.

Harder, Edson R.—At Valatie, N. Y., Sept. 14, aged 61. Prominent in Democratic politics.

Hatch, Charles S.—At Perry, N. Y., Aug. 27, aged 56. Former assistant District Attorney and clerk of the Supreme Court in Erie county.

Hoyt, Benjamin L.—At Peen Yan, N. Y., Sept. 12, aged 92. Said to be oldest practising attorney in the United States.

King, Henry W.—At Cambridge, Sept. 3, aged 54. Graduate of Harvard Law School; had large practice in Worcester, Mass.

Kingsbury, Frederick J.—At Litchfield, Ct., Oct. 3, aged 87. Lawyer and banker of Waterbury, Ct.; writer on Colonial history; former member of the Yale Corporation.

McFadden, Harry A.—At Hollidaysburg, Pa., Sept. 15, aged 49. Prominent attorney and journalist; author of "Rambles in the Far West."

McNeil, H.—At Indianola, Ia., Sept. 23, age 74. Brilliant Iowa lawyer; assisted the state in the Hossack murder trial.

McPherson, William J.—At Rochester, Aug. 23.

Munn, Henry B.—At Washington, D. C., Sept. 1, aged 84. Member of the Wisconsin legislature in 1859; one of the organizers of the Princeton Alumni Association; former patent lawyer in Washington.

Naphtaly, Joseph.—At San Francisco, Aug. 29. Was graduated from Yale in 1863; for years a partner of Judge J. B. Crockett in San Francisco.

Oates, Gen. William C.—At Montgomery, Ala., Sept. 9, aged 75. Former Governor of Alabama; member of Congress from the forty-seventh to the fifty-third session; champion of the Torrey bankruptcy bill; in 1888 kept the House in a deadlock for eight days by leading the filibustering against the direct tax bill; conducted the investigation into the Homestead troubles of 1892, as a member of the Judiciary Committee.

Paddock, George L.—At Chicago, Sept. 11, aged 77. Lawyer of fifty-one years' practice.

Peak, John L.—At Kansas City, Sept. 24, aged 71. Appointed Minister to Switzerland by President Cleveland in 1895.

Plank, Charles M.—At Reading, Sept. 17, aged 50. Prominent Republican; county chairman for several years.

Proctor, Frank W.—At Franklin, N. H., Sept. 21, aged 60. Practised for two years in Kansas; later member of Boston firm of Upham & Proctor; cousin of Edna Dean Proctor, the writer.

Ritter, Alfred.—At Frederick, Md., Sept. 22, aged 54. Justice of the peace; former secretary of state senate.

Roddy, George B.—At New Bloomfield, Pa., Sept. 5, aged 48. Graduate of Princeton, where he won a scholarship at University of Berlin; held chair in Princeton Theological Seminary for a time; admitted to bar about ten years ago.

Rowlands, Orville L.—At Carbondale, Pa., Aug. 30. Former district attorney; brother of Senator Miles Rowlands.

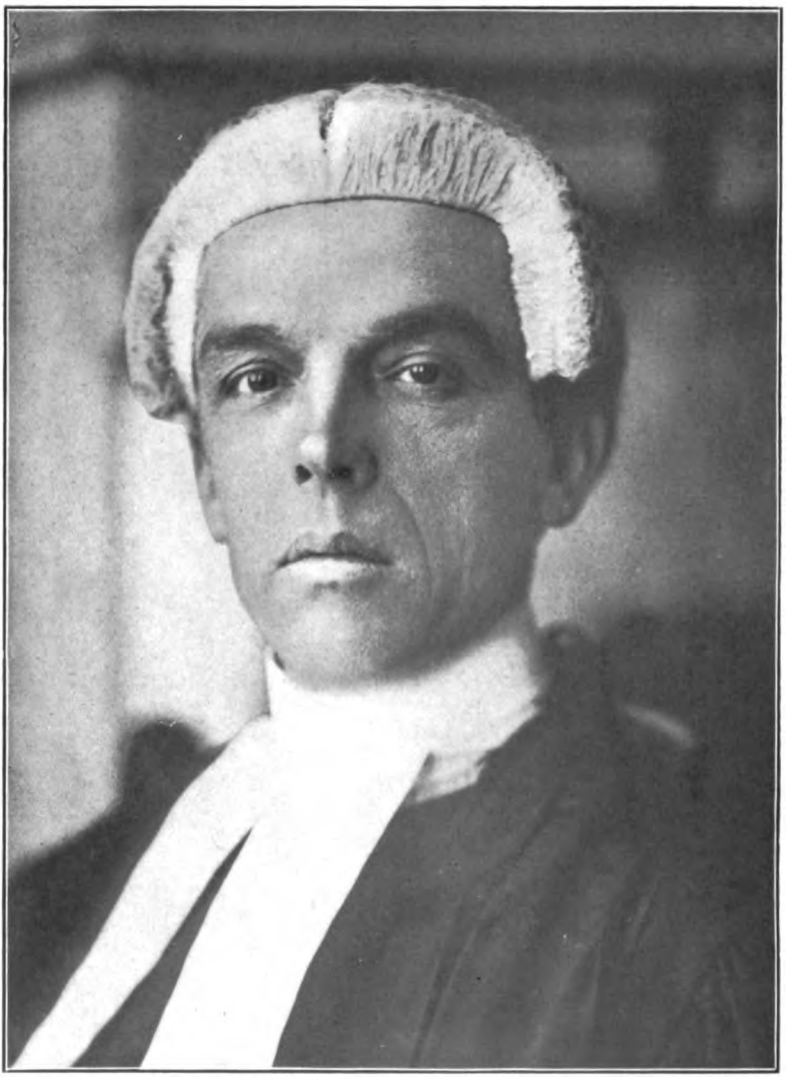
Scott, Kidder M.—At Genesee, N. Y., Aug. 23, aged 70. Graduate af Yale; practised at Genesee and entered Assembly; introduced bill that created State Board of Charities.

Sweeney, Edward D.—At Rock Island, Ill., Sept. 14, aged 77. Corporation lawyer and financier; United States commissioner.

Updegraff, Thomas.—At Dubuque, Ia., Oct. 4, aged 76. Former state representative; later Congressman for several terms from fourth Iowa district.

Walker, Edwin.—At Wequetonsing, Mich., Sept. 2, aged 78. Dean of the Chicago bar; prominent corporation lawyer; special counsel for the United States in the conspiracy case against Eugene Debs arising from the great railroad strike of 1894.

Williams, Charles H.—At North Adams, Mass., Oct. 2, aged 73. Prominent New York corporation lawyer; reorganized several large corporations; once employed as a surveyor for the Union Pacific; nephew of the late United States Senator Dawes.



HON. SIR CHARLES JOHN DARLING

OF THE KING'S BENCH DIVISION OF THE ENGLISH HIGH COURT OF JUSTICE

(Photo. by Elliott & Fry)

The Green Bag

Number XXII December, 1910 Number 12

Mr. Justice Darling

A BARRISTER was once conversing with that brilliant head of the bar, Sir Richard Bethell (afterwards Lord Chancellor Westbury), when Bethell remarked that the world was made up of but two classes, the foolish and the designing. "Where then are you and I to be placed?"

"My dear sir," replied the future Lord Chancellor, with his winning smile, "the simplicity of your inquiry assures me that we should not go into the same lobby."

In England the Judges of the High Court (as well as many subordinate judges and masters) are nominated by the Lord Chancellor. This is as much a perquisite of his office as the salary he draws. No one questions his right. The power is cloaked in decent constitutional language as is usual in England. "Her Majesty has been pleased to approve the appointment of Mr. C. J. Darling, Q.C., to be one of the Judges of the High Court." The steel gauntlet of the Lord Chancellor is concealed under Her Majesty's velvet glove. There are many currents in public thought and life, which tend to make the system work for the benefit of litigants. In the first place the Lord Chancellor has not risen to be the foremost man in his profession without learning the lesson of *noblesse oblige*. Then (as sometimes happens) when a political appointment is made and one of Westbury's designing (or foolish) persons is nominated, the bar come to the rescue and teach him his duties.

The relations of judge and bar in England are so close that a virtual partnership exists between them—a partnership largely for the public good. We have heard a cynic apostrophize our judicial bench as Bar & Co.—a firm in which the bar are the senior partner. Much depends on the judge. With a strong judge, like Lord Mansfield or Lord Blackburn, the bar play a secondary part in the drama of the court, but with a weak judge the positions are reversed. It is a healthy tradition of the bar that the judge represents the King while seated on the bench. All in court rise to their feet when the judge enters the court, and again when he leaves; this is a mark of respect not to the man, but to the principle of the subordination of all to the law. A disrespectful word to the judge is a slight to that invisible spirit of justice, which should be enthroned in the hearts both of kings and of their subjects; such thoughts as these have a restraining influence even on a domineering counsel and induce him to treat the presiding judge at least with outward respect. It can be well understood that with an able bar practising before him, a judge (if not absolutely incom-

petent) becomes a fair lawyer after reaching the bench, and in a few years is regarded as one of the good bargains of the state.

The greatest Liberal lawyer from the second to the third Premiership of Mr. Gladstone (1880–95) was Sir Charles Russell. He was never Lord Chancellor, because the woolsack, like the throne of the United Kingdom, is closed to Roman Catholics. In 1885 Sir Charles Russell was the Liberal candidate for South Hackney. Russell was not to be allowed a walkover, but the difficulty was how to find an opponent of first rate ability who was willing to fight a hopeless seat. Such a candidate was found in a young barrister, not overburdened with professional work, of the name of Charles Darling. To make him at least the professional equal of his redoubtable opponent, Lord Halsbury made him a Queen's Counsel. Equipped with a silk gown and with brains of a high order, Mr. Darling, Q.C., stepped into the South Hackney arena to oppose Sir Charles Russell, Q.C. The conferring of silk gowns on stuffed gownsmen (*i.e.* Junior Counsel) is another prerogative of the Lord Chancellor. He can confer or withhold "silk" entirely as he thinks fit. Lord Westbury refused "silk" to Mr. George Jessel (afterwards Master of the Rolls) as long as he remained in office. The present Lord Chancellor (all of whose appointments have been made with a single eye for public ends) has scruples about conferring "silk" for fear of flooding the Inner Bar and thus working an injustice to existing K.C's.

To return to South Hackney, in 1885 Sir Charles Russell was returned to Parliament. Mr. Gladstone introduced his first Home Rule Bill in 1886, and its rejection by the House of Commons was followed by another general election. Mr. Darling again opposed Sir Charles Russell and was again beaten. In February, 1888, Mr. Darling was elected Conservative M.P. for Deptford and represented that suburban constituency until his promotion to the bench. He continued his pleasant recreations of writing, speaking, hunting, and painting, but it may be fairly said that he was not often seen in the law courts. However, there was a providence in the person of the Lord Chancellor Halsbury "sitting up aloft," who, as Dibdin expressed it, was "looking after poor Jack."

Mr. Darling was a delightful companion, brightening up any subject, however abstruse and learned, with his wit and fancy. His letters to the *Times* were always worth reading. In October, 1897, he wrote to the *Times* about a curious French coin. A week later he wrote a letter, attacking Mr. John Morley (lately the Secretary of State for India). "The insincerity of the whole manœuvre [*i.e.* Mr. Morley's speech to his constituents about the taxation of ground rents] is made plain when one reflects that did Mr. Morley and his friends really wish, on their return to office, to tax ground rents, nothing is easier. The Chancellor of the Exchequer could do it in his money bill—*which the Lords could not touch.*" Subsequent events have made interesting the *obiter dictum*, which we have underlined. We also quote the words to show that Mr. Charles John Darling belonged to that band of intellectual gladiators which from the times of Canning and Disraeli have been retained by the Tory Party.

On October 28, 1897, Lord Chancellor Halsbury appointed Mr. Darling a Judge of the High Court. England is a conservative country. When a judicial job is perpetrated, it is received with disapprobation, but with silent dis-

approbation. It is extremely rare that the dissatisfaction appears in print. What cannot be remedied had better be endured. On the occasion however of Mr. Darling's appointment to this high office, the disapproval of the public found voice in a leading article in the *Standard*, the most conservative of Conservative papers. As far as we know, no judicial appointment had ever been unfavorably commented on by the press during Queen Victoria's reign except in the case of Colin Blackburn, afterwards Lord Blackburn.

Blackburn (unlike Mr. Darling, who was educated privately,) was at Eton and Trinity College, Cambridge. He (unlike Mr. Darling) was neither a literary man, nor a politician, nor a witty speaker. He had reported in the Queen's Bench with Macaulay's devoted friend Thomas Flower Ellis, and had written a book "On Sales" which was the standard work until superseded by that of Mr. Judah T. Benjamin, K.C., formerly Minister of War for the Confederates. Thus it will be seen that Mr. Haldane, K.C., is not the first lawyer of eminence who has filled the post of War Minister. Blackburn had had some commercial practice in Liverpool, but after twenty-one years at the bar he was still a Junior, when in 1859 to the amazement of every one he was appointed a Puisne Judge of the Queen's Bench.

Lord Campbell was then Lord Chancellor. While presiding over the Queen's Bench Lord Campbell had discovered the merits of his fellow Scot. It is indeed said that Mr. Blackburn wrote out some of Lord Campbell's judgments, just as Francis Hargrave (the counsel in the *Habeas Corpus* case of *James Sommersett*, the negro) is admitted to have primed Thurlow with authorities and arguments for his judgments as Lord Chancellor.[1] "Who is the new Judge? Who is to take the place of Mr. Justice Erle? He is a certain Mr. Colin Blackburn. Everybody has been going about town asking his neighbor, Who is Mr. Colin Blackburn? . . . The only reason that can be assigned for this strange freak of the Chancellor is that this new Puisne Judge is a Scotchman." (The *Times* for June 29, 1859.) As results proved, never was a more competent lawyer appointed to the bench than in the person of Mr. Colin Blackburn.

He presided with conspicuous fairness at the trial of the Manchester Fenians (1867), and charged the grand jury on the trial of John Edward Eyre, Governor of Jamaica. He died many years afterwards, having won a higher place in the judgment both of lawyers and of the public even than Lord Campbell himself. History repeats itself. The appointment of Mr. Justice Darling was regarded at the time (1897) as a political job. As a matter of fact and as results have proved, a better appointment could not have been made. Mr. Justice Darling becomes every day more indispensable as a public servant. It would be difficult to replace him. In many respects he is one of the best common law judges we have. The first case in which his name appeared in the *Times* was a registration appeal—a point turning on election law—in which the two former political opponents in South Hackney agreed in their judgment. The third judge of that court was the late Mr. Justice Wright (a man sincerely regretted), who had been a Liberal candidate in a neighboring constituency to South Hackney. Politics are a power in England, but happily an English judge puts away politics with other childish things.

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[1] Lord Chancellor from 1778 (with breaks) to 1792.

There are two sides to our common law courts. One side deals with the loosening of legal knots and the other with the loosening of human knots. The issues of one arise out of commercial transactions and contracts; the issues of the other out of slanders, libels, and torts. If you wished to see the late Lord Blackburn at his best, you would have visited his court during a legal argument without a jury; if you desired to see Mr. Justice Darling at his best, you would visit his court when witnesses were giving evidence in a libel, slander, or running-down case.

It is a curious fact that the average layman, on hearing that A has said that B has had a child before her marriage, utters a horrified exclamation. It does not occur to him to require convincing evidence that A ever made such a statement. Unfortunately a jury occasionally take the bit in their mouth, and seem to fix the measure of damages first and to consider the strength of the plaintiff's evidence next.

There can be no doubt that nature made Mr. Justice Darling a defendant's judge. His mental bent is to look with healthy scepticism on the statements of a plaintiff who has brought an action for compensation for alleged injuries against a railway or omnibus company. Every lawyer knows what a cloud of perjurers often darkens the court on the hearing of such a case. It requires all the acuteness of a judge and all his tact with the jury to present the commission of some grave act of injustice. Exaggeration and false sentiment poison the air of the court. It is then that the alertness and keenness of Mr. Justice Darling's intellect delights all in court—except the plaintiff. He points out discrepancies in the evidence of the plaintiff's witnesses, which even the defendant's counsel have overlooked, and in his summing up directs the jury clearly, but never in an overbearing manner. He knows the difference between riding on the snaffle rein, and needlessly using the curb.

There is another aspect of the English law which should be briefly referred to. England, unlike France, possesses no code. Certain branches of English law have been codified by four statutes, *viz.* the Bills of Exchange Act, 1882; the Partnership Act, 1890; the Sale of Goods Act, 1893; and the Marine Insurance Act, 1906. But important as these branches are, they are but four streams which feed the immense ocean of English litigation. The greater part of English law remains uncodified, and a great part of English law is as much judge-made today as in the days of Lord Chief Justice Holt. It necessarily follows that while a careful and painstaking man might prove an excellent mouthpiece of the Napoleonic Code, much more than an ability to take pains, important as that is, is required of a man who aspires to be a good English judge. He is part of a living system, which grows and develops and which is not mummified in any code. He must himself be a living man, with his mind growing like Goethe's to the last hour of his life. Even the statutes of the realm have to be construed by the judge. In common parlance no man in England has more hourly need of his wits than one of His Majesty's judges. We may apply to Mr. Justice Darling the words of the *Times*, written on English judges generally. He is a man "like ourselves, who moves with the times, and is sensibly affected by the ways of looking at things which happen to be in fashion among thoughtful or influential persons. Thus the law is always reflecting the tendencies of the age, and maintains

its majestic supremacy, because it is based upon the people's will."

Mr. Justice Darling is of extremely youthful appearance, and possesses a mind as active as his body. He belongs to that limited number of judges who temper their knowledge of law with knowledge of human nature and letters. First and foremost comes Lord Bacon, whose genius did not stand in need of posterity robbing Shakspere of his laurels to add to his; then Lord Mansfield, of whom Pope wrote,—

> How sweet an Ovid was in Murray lost;

Lord Brougham, of whom a cynic remarked that if Brougham had known a little law he would have known a little of everything; Lord Campbell, who by his Lives of the Lord Chancellors added a new terror to death; Mr. Justice Talfourd, the friend of Charles Lamb and the author of "Ion," who died on the bench at Stafford just after addressing the grand jury:

> Gone to its God was the soul—and borne back a corpse to the Lodgings.
> Naked the one as it came; robed the rest in the scarlet and ermine.[2]

The late Lord Justice Bowen, the translator of "Virgil," was the greatest of all our literary judges. William Wilberforce wrote of Lord Kenyon[3] that he brought cases home, as another man would crack walnuts when sitting *tête-à-tête* with Lady Kenyon after dinner. Lord Mansfield, in spite of his literary tastes, used to look up cases while his guests were playing cards. "I play my rubbers at this work," he once remarked. Mr. Justice Darling is too catholic in his tastes and too sensible to be blind to the uses of leisure. In his "*Scintillæ Juris*," written by him while still a Junior, he gives us a clue of his favorites among judges. In a chapter on "Judges" he quotes the judgments *in extenso* of Lord Coleridge, Lord Justice James, and Chief Baron Kelly.

Lord Coleridge's[4] judgment in a case where the defendant had called the plaintiff a villain is a model of irony. We can only quote the concluding sentence: "The defendant must have judgment with costs, if he can get them." "My dear Garrick," said Lord Mansfield to his friend, the actor, "a judge on the bench is now and then in your whimsical situation between tragedy and comedy: inclination drawing one way, and a long string of precedents the other." We never felt the truth of these words more forcefully than in reading the judgment of Lord Justice James *re* John Sinister, deceased. This fine judge was of the Falstaff physique, and so far as humor went of the Knight's mind. As a member of the Judicature Commission he urged the total abolition of pleadings. The facts *in re* Sinister were extremely simple, though out of the common. William Saltire had a natural son, called John Sinister. John Sinister made his will, leaving certain property to "my father." John Sinister died, leaving William Saltire him surviving. Litigation arose as to whether William Saltire, was entitled to the bequest as the "father" of John Sinister. Mr. Vice Chancellor decided in favor of William Saltire. The other side appealed and in the Court of Appeal Lord Justice James delivered the judgment of the Court, allowing the appeal and disallowing the claim of William Saltire. His judgment is a model of perspicacity and pathos. "It is gratifying, most gratifying to know," concludes Lord

[2] The house in which the Judge is lodged when traveling on circuit is called his Lodgings. "On the Oxford Circuit," by Mr. Justice Darling.

[3] Lord Chief Justice of England from 1788 to 1802.

[4] Lord Chief Justice of England and father of the present Lord Coleridge, a Judge of the High Court.

Justice James, "that John Sinister has found the conclusion to the long dilemma of his life, and that now after the close of his isolated existence he at last reposes in the arms of his only legitimate parent—his mother Earth."

There is only one occupant of the English bench of today who could deliver a judgment with the qualities of Lord Justice James's judgments, and that is Mr. Justice Darling. Long may he sit on the bench, and wage war against perjury and false sentiment.

The Disagreeing Jury Failed to Disagree

By Judge A. G. Zimmerman.[1]

It was a score of years ago, more or less, when United States District Attorney Harold Brown leisurely sauntered into the law offices of his friend Jim Johnson.

The two had been associate law clerks of a distinguished Senator in those same offices some seven or eight years before. Brown, however, then had about completed his legal novitiate, and since had been quite successful at the bar and in politics, as his honorable official position so early in his career indicated. Johnson, on the contrary, found himself obliged to rehabilitate his finances by going back to teaching for a time, before completing his course and engaging in the practice of law. His legal career was therefore mostly before him as yet, and his time not especially valuable.

"How are you, Jim? Pretty busy this morning?" said the District Attorney, as he glanced into the private office.

"Oh hello, Harold! Come in. Never too busy to talk to you. Pull up that swivel chair there.

"Fact of the matter is," continued Johnson, smilingly, after the two lawyers were familiarly settled, "I'm not especially rushed, and am simply 'copying pleadings.' "

This was a standing joke between them since student days.

It seems that when Johnson first became junior law clerk as a sort of fag to the senior, Brown one day gave the newcomer a complaint to copy. Johnson went faithfully to work, and being an ex-school teacher thought he could improve on the phraseology and thus make the "copy" read more smoothly than the original. He accordingly made his "improvements" and proudly exhibited his work when completed to his immediate superior.

Brown looked at the new clerk disgustedly, and impressed upon him his first legal lesson by saying:—

"You darn fool, don't you know enough to know that a copy means a copy, even to the crossing of the *t's* and dotting of the *i's*?

"Besides," he added, "you're not supposed to know about pleadings, but you are presumed to have common sense. As old Dean Sloan would say, I guess that is 'a violent presumption' in your case."

After some reminiscent conversation concerning student days, the government

[1] Of the Dane County Court, Madison, Wis.

attorney informed his friend that on his suggestion the federal judge had appointed Johnson to act as counsel for an indigent prisoner who had been indicted for burglarizing a post-office in an adjoining county.

"There isn't anything in it for you except the advertising, but that doesn't amount to much," proceeded the attorney. "The fact is, the scamp is as guilty as he can be, and I have a dead-open-and-shut case against him, but he obstinately refuses to plead guilty and I've got to try him."

"But say, Harold, I don't know a thing about federal criminal procedure, and I've never even been inside of a United States court room. Besides," he continued ruefully, "I'd cut a pretty figure if you've got the cards all stacked up against me. You say there's no money in it, and I don't want that kind of advertising. I don't believe I'll take the job."

"Oh, yes you will. As a member of the bar of the federal court you're an officer of it, and when the judge orders you to defend a prisoner you've got to do it, whether you want to or not. Anyway, you owe it to yourself as a reputable lawyer not to turn down an accused man and deprive him of a defense simply because he has no money. But you are only talking now to get up your nerve."

"Well," slowly replied Johnson, "I suppose I'll have to take hold of the matter whether I want to or not. You don't mean to say that Uncle Sam expects a lawyer to carry out for him the constitutional provision about the accused's right to have the 'assistance of counsel for his defense,' and do it without any pay whatever, do you?"

"That's just it precisely," answered Brown, emphatically. "It isn't exactly a square deal, but there is no provision in the federal law compensating attorneys for defending indigent prisoners, and lawyers are expected to faithfully uphold the Constitution in this regard, gratis, and to be more patriotic and humane than Uncle Sam himself."

"Even the state law makes a provision of fifteen dollars a day for the defense of a poor prisoner. Why didn't this particular scoundrel have sense enough to rob a cigar store, or a saloon, or even a news stand, if he wanted pennies, instead of a two-for-a-cent post-office, then I might get something for defending him. You see, I need the money," added Jim, with a smile.

"You probably can induce him to plead guilty, and give you the eleven dollars and some cents he robbed the post-office of," replied Harold, facetiously. "He's got it somewhere sure, because he didn't have a chance to spend it. By the way, if you'll come over to the federal building, I'll show you the grand jury testimony and everything else I've got, and after you've digested that I'm satisfied there won't be any trial. There isn't a ghost of a show for him, and he'll likely believe you."

"When does the case come on?" inquired Johnson.

"Next Saturday at ten o'clock. It's the last case of the term and if we have to try it we can probably get all through by noon. You'll have three days to get ready in, but three hours is about all you will need. If you want any other witnesses, I'll get an order for the marshal to subpoena them for you. But you won't find any that I haven't already got. So long, and good luck to you," concluded the District Attorney with a quizzical smile as he left the lawyer's office.

The conference ended, and Jim Johnson found himself unwillingly drafted

and retained to uphold the Constitution of the United States of America, and give A. Vagabond, from nowhere in particular, indicted burglar of post-office funds, the constitutional "assistance of counsel for his defense."

After a careful examination of the record in the case, and especially of the testimony taken before the grand jury, which was quite full and complete, Johnson interviewed his precious client at the county jail.

He somehow expected to find in A. Vagabond a green alien with a limited knowledge of the English language. He found a young man of about twenty-two, with flaxen hair and blue eyes, but no other foreign indication except an accent with a slight rising inflection, and an unmistakable name which surely was not written "Amos Vagabond" in his baptismal record, whatever name this record may disclose.

It seems that Amos Vagabond was of the second generation, native-born, and spoke English better than his father's tongue. It developed that he was short on relatives but had a mother somewhere who no doubt still prayed for her "wandering boy." He was just an average clodhopper from the country, a ne'er-do-well, not particularly bright, a vagabond who wandered from place to place.

He worked at farm labor, frequently changed employers, and at this time was "broke" and literally without friends. He was possessed of a certain cunning, and his bump of obstinacy was most abnormally developed. It is probable that he never was caught or accused before, and this was evidently his first serious lapse.

He had become accustomed to jail life, having had six months of it awaiting his "speedy trial" which the Constitution guarantees him.

The evidence was wholly circumstantial.

The accused strenuously insisted that he was not guilty, and seemed especially confident of his innocence because the government had been unable to produce a witness who had actually seen him take the money or enter the building.

His story was just sufficiently plausible to make it safe to put him on the stand as a witness in his own defense. There was a chance to argue his possible innocence, by resolving all doubtful and contradictory evidence in his favor. There was a bare possibility of his innocence, but hardly a reasonable probability.

The community surrounding the Slabtown post-office and church where the robbery occurred was against Amos Vagabond to a man. Everybody was satisfied of his guilt and felt outraged at the notoriety and disgrace he had brought upon them. There were no witnesses to be had that would help him on the facts.

The one point in his favor was that he had been in that particular locality six or eight months stopping with various people, and no charge of wrong-doing had ever been brought or suggested against him.

The fact that he was only derelict in the neighborhood, and practically the only member of the community who was not attending religious services at the near-by church that Sunday morning when the robbery took place, first caused suspicion to point his way. Then it developed that he was seen loitering near the post-office during church time.

Slabtown consisted of but two houses and their appurtenances. There was the church and the combination post-office and preacher's residence. The dispenser of letters and gospel was one

and indivisible. For some six weeks, up to a few days before the burglary, Amos Vagabond had been a sort of choreboy to the minister, and thus knew all the ins and outs of the ministerial household.

He knew, for instance, that the government funds were kept in a little tin box, and just where that box was kept. He probably knew also, that when the family all went to church, it was customary, after carefully locking up, to place the key on a little ledge just above the door.

There were new and strange footprints observed in the snow leading to and from the house. When a couple of officious inhabitants surreptitiously sequestered one of the suspect's Sunday shoes, and placed it in the snow-prints, the accuracy of the fit seemed unquestionable. The fact that many other male neighbors wore number nine shoes of similar pattern, was not considered sufficiently extenuating to exculpate the one derelict toward whom all eyes were directed.

That the eleven dollars and indefinite cents were there in the tin box before this particular Sunday service, was evidenced by the fact that the mistress of the house had sold a postage stamp and made change just as she was going to church. After returning, the box and money were gone and neither were ever re-discovered, unless some twenty odd pennies found in the vagabond's vest pocket were part of the hoard. He insisted not and nobody could prove that he was wrong in his statement. Still this circumstance was looked upon askance.

Aside from those pennies, the only funds found upon the culprit's person or among his effects when apprehended, was a fifty-cent piece, and the minister's wife had given him seventy-five cents a few days before. He apparently needed the post-office or other money.

Jim Johnson had several times indicated to his client the difficulty of making a successful defense, and suggested that a plea of guilty would likely materially reduce the coming sentence. But Amos Vagabond would not consider such a thing and insisted on his innocence.

After a thorough investigation of the situation, it appeared to the lawyer that his whole defense opportunity lay in a prospective hopeless cross-examination of a lot of honest witnesses, and in putting on the stand a half-dozen reluctant farmers to swear, in effect, that so far as they knew the prisoner's reputation in the matter of robbing post-offices before this particular occasion was good.

The vagabond's own testimony would count for little, no matter how smooth or plausible a story he told. There was no chance for an *alibi*.

It was a hopeless situation. The District Attorney was correct in saying that he "had a dead-open-and-shut case" for the government.

The day before the trial Johnson again interviewed the prisoner with the view of insisting on a plea of guilty.

"See here, Amos. Do you realize that you are absolutely up against it? You are practically certain of being convicted, and after a fight you'll be sure to get several years in the penitentiary at hard labor. If you plead guilty I can probably get the District Attorney and the judge to let you off with six months in the House of Detention."

"Well, I don't care. I didn't do it, and I won't plead guilty," decided the accused, adding, "I'm going to take a chance."

"You've got about as much chance

before a jury as a snowstorm would have in Hades," responded the lawyer disgustedly. "I don't want to go into court and make a fizzle of it, if you do. You'd better confess up and end this thing. Take your medicine now like a man, and it won't be so bad. They're all against you. You haven't got a soul to help you but me. Be square with me anyway."

But the prisoner obstinately refused to plead guilty, even if deserted by his attorney.

"Well, then, I can't drop it. If I could, I would. I'll make the best fight I can, and they'll at least find me on the job. By the way, Amos," slyly continued the lawyer, "you might as well tell me where that eleven dollars is. That'll help some."

But Amos refused to bite.

"I tell you I never took it. Honest to God! I haven't got any money."

So the lawyer prepared as best he could to fight a hopeless case.

He became haunted with the idea that his obstinate client might possibly be innocent. He determined to act on that theory and battle with all his might. The fact too, that the accused was wholly abandoned by his acquaintances, and that only an old unknowing mother still had faith in him, appealed to his sympathies.

It was the case of *Sixty-five Million People* v. *A. Vagabond*, indicted burglar.

The trial duly commenced Saturday morning. The presiding federal judge was from abroad taking the place of the regular sitting judge. He was anxious to rush matters and get away that day. But lawyer Jim Johnson was not going to be hurried. He had enlisted for a battle and not for a skirmish.

It is needless to go into detail. The federal judge evidently soon became convinced of the accused's guilt, and made this opinion clearly apparent to the jury. It became clear, too, that the entire Slabtown community was against the vagabond.

But the trial was not going to end right away. The court became irritated by the attorney's persistent and prolonged cross-examination. Jim Johnson calmly continued his desperate fight and gradually gained the sympathy of at least part of the jury.

The trial dragged through the day, the following Monday, and part of Tuesday before the arguments to the jury were closed.

The charge of the court fully reviewed the facts as well as the law, and could leave no doubt of the court's opinion on the question of guilt. This was rather astonishing to the young lawyer, who knew that in the state courts the judge always carefully refrained from indicating an opinion as to guilt or innocence.

The next morning the jury was still out. Before noon the jury reported a hopeless disagreement. They were sent back with the suggestion that there was nothing to disagree about, and they must agree.

They reported again later in the day that they would never agree no matter how long out.

The court finally discharged the jury and angrily ordered the case to be immediately retried before a new jury.

This was extraordinary and most unusual. The newspapers had printed full accounts of the first trial. Most of the remaining jury panel had been in and about the court room listening to and discussing the first trial. It seemed impossible to get an impartial jury at this term.

But Jim Johnson protested in vain. The court was now firmly convinced

of the prisoner's guilt and determined on conviction.

The next day, after considerable difficulty, a new jury was impaneled, and the second trial proceeded part of two days with a re-hash of the first.

It was a continuation of the organized contest of sixty-five million people against a lone friendless vagabond, indicted burglar, with only Jim Johnson, lawyer, standing in the breach, retainerless and at his own expense, upholding the federal Constitution and honor of the profession.

Jim Johnson again made his desperate plea that while the testimony indicated the *probable* guilt of the vagabond, yet he consistently *may not be guilty*, and is there not a reasonable doubt of guilt? Is Amos Vagabond not entitled to the benefit of his chance of innocence?

A second time the case was given to the jury, after the brilliant and high-minded government attorney had made his closing argument, and after the convinced court had again made its argument in the charge.

Again the jury reported a hopeless disagreement. They were admonished for their pertinacious obstinacy and sent back for further deliberation. This was late Friday afternoon.

But Jim Johnson had now gratuitously given ten laborious days to the preparation and trial of this case. He had an important engagement out of town and must leave that evening, unless it was imperative that he stay. He was assured by both judge and District Attorney that he could do nothing further for his client, and could honorably leave.

There could be no retrial at this term. The District Attorney agreed with him that it was probable that the defendant would later be discharged and not again tried, in case of disagreement again, which seemed certain. There was nothing more he could do.

So Jim Johnson went away with a consciousness of a duty well performed without hope of reward.

The next morning the jury again came in and substantially the following occurred:—

"Gentlemen," said the Court, "have you agreed upon a verdict?"

"We have not," reported the foreman of the jury; "but we have agreed to disagree, and cannot get together."

"Now, gentlemen," proceeded the Court, "this case has been on trial for a full week at great expense and great inconvenience to many of us. There is really nothing to disagree about here. The defendant has had two fair and impartial trials, has been ably defended, and the matter should be concluded. The evidence is most clear and conclusive.

"The Court can see no ground for any reasonable doubt and wishes to end the matter. The defendant has already been in jail about six months awaiting trial. If this jury disagrees, he will most certainly be held for trial again. It will be about six months until the next jury term of court, so he will be kept in jail that much longer anyway, whether he is then found guilty or not.

"On the other hand, if you should agree on this case now and find the defendant guilty, the Court will sentence him for only six months in the House of Detention. It is for you to determine now what is best for the prisoner under the circumstances.

"I send you back for further deliberation and trust you may agree."

There was nothing Harold Brown as government attorney could say in the premises, whatever he may have thought.

And lawyer Jim Johnson was a hundred miles away!

Under the circumstances, naturally

the jury brought in a verdict of guilty.

Again naturally, the case of *Sixty-five Million People* v. *A. Vagabond*, indicted burglar, came to an end with a sentence of six months in the House of Detention for the vagabond.

And that was how the disagreeing jury failed to disagree.

At the House of Detention, Amos Vagabond vehemently protested his innocence and he was sympathetically given generous jail liberties. However, the deputy warden and the jailor differed in their views as to his honesty.

To decide a wager on the question, the officers instituted a "frame-up," giving the prisoner abundant opportunity to appropriate a small sum of money where detection seemed impossible.

The wager was satisfactorily determined.

The question as to whether or not Amos took the money will be left with the reader to consider as an interesting sociological speculation, along with the—

Query: Was the accused tried and convicted by the jury, or by the federal judge?

The Case of Josiah Phillips

By William Romaine Tyree

of the Halifax County Bar of Virginia

IN glancing over the files of Colonial legal records, one is struck with the severity of punishment meted out to the prisoner of that period. In those early days of the commonwealth, grand larceny and horse-stealing, with murder and robbery, were punished with death; and rarely were there interposed obstacles of the sentiment which pervades the criminal annals of today. Such a state of the law governing crimes as we find in America in our own generation, can only be charged to the lax system of criminal procedure which protects those of wealth and influence, and sends too swiftly to the gallows, the chair, or a nearby limb the unfortunate wretch who is unable to make a satisfactory defense—thus balancing delinquencies of one day with the undue severity of another.

But to leave this grave fault of our modern civilization, and to turn to those of interest of Colonial days, is only a step of a few years to one who follows the legal maxim *stare decisis*.

For instance, there comes to light the case of one Josiah Phillips, "late of the parish of Lynhaven, in the county of Princess Anne," for long a scourge to the neighborhood in which he practised his crimes, and who was indicted by a grand jury of the General Court of Virginia on the 9th of May, in the year 1778, for *robbery*, tried, found guilty and hung.

Were this all of the *Phillips* case, the order entered by the court would be lost in oblivion among the many records of forgotten causes; but it is given prominence by reason of its being, as far as I can ascertain, the first, if not the only,

bill of attainder passed in America, and which produced much censure upon Mr. Henry, whose connection with the affair he negligently vindicated. Such adverse criticism has only been removed by the lapse of time and his biographers (more particularly, William Wirt), the truth of this singular case becoming known. Mr. Randolph's subsequent attitude, however, was a most unusual one, insomuch as he raised no objection to the apprehending of Phillips under the attainder, but prepared the indictment under which he was found guilty of *robbery;* he represented the commonwealth, then, after Phillips had been found guilty and executed for robbery, he turned to attack Mr. Henry's position with regard to this case in a debate before the Convention of 1788.

The facts of the *Phillips* case are these: Phillips, in the summer of 1777, was the leader of a band of banditti which was just commencing a series of crimes in the counties of Norfolk and Princess Anne, these counties lying in the extreme eastern section of Virginia, where were resident many Tory families. This band spread terror and consternation on every hand.

Availing himself of the disaffection which prevailed in that quarter, and taking refuge from occasional pursuit in the fastness of the Dismal Swamp, he carried on a species of warfare against the innocent and defenseless, at the bare mention of which humanity shudders. Scarcely a night passed without witnessing the shrieks of women and children, flying by the light of their own burning houses, from the assaults of these merciless wretches; and every day was marked by the desolation of some farm, by robberies on the highway, or the assassination of some individual whose patriotism had incurred the displeasure of this fierce and bloody leader of outlaws. Every attempt to capture Phillips and his associates in crime seemed of no avail, for after every deprivation they would take to their boats and soon be lost to all those who searched so diligently the numerous bays, inlets and swamps with which this section of the state abounds, with the additional aid, also, of those who still adhered to the Crown.

At last, Governor Henry received a letter from one Col. John Wilson, who, it seems, was then in command of the militia in the lower counties, which communication gave additional proof of the obstacles to be overcome before capturing Phillips, also of the disaffected state of the neighborhood:—

Norfolk county, May 20, 1778.

Honorable Sir:—

I received your letter on the 14th inst., of the 12th April, respecting the holding of the militia in readiness, and my attention to the arms and accoutrements, which I shall endeavor to comply with as far as in my power: that much, however, may not be expected from this county, I beg to observe, that the militia, of late, fail much in appearing at musters, submitting to the trifling fine of five shillings, which, they argue, they can afford to pay, by earning more at home, but I have reason to fear, through disaffection. With such a set of men, it is impossible to render any service to country or county. A few days since, hearing of the ravages committed by Phillips and his notorious gang I ordered fifty men to be raised out of four companies, consisting of upward of two hundred: of those only ten appeared, and it being at a private muster, I compelled twenty others into duty, putting them under the command of Capt. Josiah Wilson, who immediately marched after the insurgents; and that very night one-fourth of his men deserted, Capt. Wilson still pursuing but to no purpose. They were either taken to their secret places in the swamps, or concealed by their friends, that no intelligence could be obtained. He then returned, his men declaring they could stay no longer on account of their crops. I consider, therefore, that rather than that they should wholly desert,

it might be better to discharge them, and wait the coming of the Housemond militia, when I trusted something might be done: but of those men I can hear no tidings; and unless they or some other better men do come, it will be out of my power to effect anything with the militia of this county; for such is their cowardly disposition, joined to their disaffection, that scarce a man, without being forced, can be raised to go after the outlaws. We have lost Capt. Wilson since his return. Having some private business at a neighbor's, within a mile of his own house, he was fired on by four men concealed in the house, and wounded in such a manner that he died in a few hours; and this will surely be the fate of a few others, if their request of the removal of the relations and friends of those villains be not granted, which I am again pressed to solicit for, and in which case neither assistance, pay, nor plunder, is expected; conceiving that to distress their supporters is the only means by which we can rout those wretches from us, and thereby establish peace and security to ourselves and families, etc.

Upon the receipt of this, seeing the gravity of the situation, Governor Henry immediately enclosed Col. Wilson's letter to the House of Delegates, with the following communication: that though he was unwilling to trouble the General Assembly with matters which seemed of little consequence, yet, in view of the insurrection which prevailed in Princess Anne and Norfolk counties and the serious nature of the then existing state of affairs in this section of the commonwealth, he thought it should be brought to their attention. That, from time to time, he had given orders to the commanding officers to draw from the militia a force sufficient to quell these disturbances, but that such officers had complained of the non-support and disaffection both of their own men and the inhabitants of the neighborhood. That he had ordered one hundred men to be drawn from the Housemond militia, but their total want of discipline had rendered all efforts unavailing; furthermore, that Col. Wilson's opinion was that removal of such families as were in league with the insurgents was absolutely necessary.

The Executive, admitting his own inability to cope successfully with the situation, continues: "But thinking the executive power not competent for such a purpose, he submitted the entire matter to the General Assembly, as he deemed it his duty to do so."

This letter was sent to the House on the 27th day of May, 1778, and was immediately referred to a Committee of the Whole House on the State of the Commonwealth. This committee was at once formed; but not having the time to consider the subject, had leave to again sit. The next day, the House resolved itself into a committee of the whole and, after some time, the Speaker resumed the chair, Mr. Carter reporting on the subject of Phillips, as follows:—

Information being received, that a certain Phillips, with divers others, his associates and confederates, have levied war against this commonwealth within the counties of Norfolk and Princess Anne, committing murders, burning houses, wasting farms, and doing other acts of enormity, in defiance of the officers of justice—

Resolved, That in the opinion of this committee, if the said . . . Phillips, his associates and confederates, do not render themselves to some officer, civil or military, within this commonwealth, on or before . . . day of June, in this present year, such of them as fail so to do, ought to be *attainted* of *high treason;* and that, in the meantime, and before such render, it shall be lawful for any person, with or without orders, to pursue and slay, or otherwise to take and deliver to justice, the said . . . Phillips, his associates and confederates.

On the same day, pursuant to a resolution to that effect, Mr. Jefferson, Mr. Smith and Mr. Tyler were appointed and did bring in a bill, which was read for the first time. On the two succeeding

days, it was read a second and third time, and thus regularly passed through the forms of the lower house.

It was communicated by Mr. Jefferson to the senate on the 30th day of the month, and returned, passed by them without amendment on the 1st day of June, which was the last day of the session.

The Act, as it stands upon the statute-book of the session, is as follows:

Whereas, A certain Josiah Phillips, laborer, of the parish of Lynhaven and county of Princess Anne, together with divers others, inhabitants of the counties of Princess Anne and Norfolk, and citizens of this commonwealth, contrary to their fidelity, associating and confederating together, have levied war against this commonwealth, within the same, committing murders, etc. . . ., and still continue to exercise the same enormities on the good people of this commonwealth; and whereas, the delays which would attend the proceeding to outlaw the said offenders, according to the usual forms and procedures of the courts of law, would leave the said good people, for a long time, exposed to murder and devastation,—

Be it therefore enacted by the General Assembly, that if the said Josiah Phillips, his associates and confederates, shall not, on or before the last day of June, in the present year, render themselves to the Governor, or to some member of the privy council, judge of the General Court, justice of the peace, or commissioned officer of the regular troops, navy or militia of this commonwealth, in order to their trials for the treasons, murders, and other felonies by them committed, that, then, such of them, the said Josiah Phillips, etc. . . ., as shall not so render him or themselves, shall stand and be convicted and attainted of high treason, and shall suffer the pains of death, and incur all forfeitures, etc. . . .; and that execution of this sentence of attainder shall be done, by order of the General Court, to be entered so soon as may be conveniently, after notice that any of the said offenders are in custody of the keeper of the public jail. And if any person committed to the custody of the keeper of the public jail, as an associate or confederate of the said Josiah Phillips, shall allege that he hath not been of his associates or confederates, at any time after the first day of July, in the year of our Lord one thousand seven hundred and seventy-seven, at which time the said murders and devastations were begun, a petit jury shall be summoned and charged, according to the forms of law, to try, in the presence of the said court, the fact so alleged; and if it be found against the defendant, execution of this Act shall be done as before directed.

And that the good people of this commonwealth may not, in the meantime, be subject to the unrestrained hostilities of the said insurgents:

Be it further enacted, That from and after the passage of this act, it shall be lawful for any person, with or without orders to pursue and slay the said Josiah Phillips, and any others who have been of his associates or confederates, at any time after the said first day of July aforesaid, and shall not have previously rendered him or themselves to any of the officers, etc. . . . *Provided*, That the person so slain be in arms at the time, or endeavoring to escape being taken.

Such was the Act that was passed by the Virginia Assembly; and which, even in those days of internal discord, called forth much censure. Still, in reading further, we will see the peculiar turn which the merits of this case of Phillips' took.

Phillips' was apprehended in the course of the autumn, and indicted by Mr. Edmund Randolph, then Attorney-General, for highway robbery alone. On this charge he was tried at the October term of the General Court, convicted and executed. So, in this manner, the act of attainder was never brought to bear upon him at all, and it is for posterity to say whether Mr. Henry deserves censure in communicating to the General Assembly the letter of Col. Wilson, or whether the legislature was unduly harsh upon such a wretch as Phillips.

Be this as it may, the justice and expediency of the attainder were afterwards debated with considerable heat, in Richmond in the Convention of 1788, which convened for the purpose of dis-

cussing the fruits of the Constitutional convention which, a short time before, had met at Philadelphia. In the former Mr. Henry took a leading part as an advocate of the rights of the state of Virginia with reference to the union of the thirteen colonies then forming a federation, in which he was opposed in debate by Mr. Randolph; and in the course of that debate occurred one of the most singular instances of the fallacy of human memory, namely, relative to the *Phillips* case, ten years before. Mr. Randolph, in answer to Mr. Henry's eulogies upon the constitution of his own state, brought to the fore that case in the following manner:—

> There is one example of this violation [of the state constitution] in Virginia, of a most striking and shocking nature; an example so horrid, that if I conceived my country would passively permit a repetition of it, dear as it is to me, I would seek means of expatriating myself from it. A man, who was then a citizen, was deprived of his life thus: From a mere reliance on general reports, *a gentleman in the house of delegates informed the house*, that a certain man [Josiah Phillips] had committed several crimes, and was running at large perpetrating other crimes; he, therefore, moved for leave to attaint him; he obtained that leave instantly; no sooner did he obtain it, than he drew from his pocket a bill ready written for that effect; it was read three times in one day, and carried to the senate; I will not say it was passed the same day through the senate, but he was attainted very speedily and precipitately, without any proof better than vague reports! Without being confronted with his accusers and witnesses, without the privilege of calling for evidence in his behalf, he was sentenced to death, and was afterwards actually executed. Was this arbitrary deprivation of life, the dearest gift of God to man, consistent with the genius of a republican government? Is this compatible with the spirit of freedom? This, sir, has made the deepest impression in my heart, and I cannot contemplate it without horror.

Now, by turning to the facts of the *Phillips* case, as the reader will see from the record, there is not one word of this eloquent invective that is consistent with facts. What makes this case still more strange is that Mr. Randolph, at the happening of the occurrence to which he refers, held both the position of clerk of the house, and Attorney-General of the commonwealth; in the first character, he had, only ten years before, been officially informed that the bill of attainder had not been founded on report, but on a communication of the Governor, enclosing a letter of the commanding officer of the militia in the section which was being devastated by Phillips; that that letter in proper form had been referred to the Whole House on the State of the Commonwealth, whose resolutions led to the bill in question; and that the bill, instead of being read three times in one day, had been regularly, and according to the forms of the House, read on three several days; while in his character as Attorney-General he had himself drawn the indictment and prosecuted Phillips for highway robbery—confronted him with the witnesses, whose names are given at the foot of the indictment, indorsed in Mr. Randolph's own handwriting; *convicted him on that charge*, on which charge alone Phillips was executed.

In justice, however, to Mr. Randolph, it behooves me to say that not only he, but others connected with the case in various capacities, even Mr. Henry, proceeded in their several criminations and defenses upon the admission that Phillips had fallen a victim to the bill of attainder. Therefore, it is extraordinarily singular that such a lapse of memory, of the principal participants in the proceedings and trial of one of the most noted cases of that day, should have prevailed.

The chairman of the committee to which the bill was referred says:—

> The case of Josiah Phillips I find strangely represented by Judge Tucker and Mr. Edmund Randolph, and very negligently vindicated by Mr. Henry . . . Judge Tucker, instead of a definition of the functions of bills of attainder, has given a just diatribe against their abuse. [Giving a definition and proceeding with:] The court refused to pass sentence of execution pursuant to the directions of the Act.

In this manner, it was made to appear that the Assembly had transcended its powers, if we are to believe the statements of Judge Tucker and Mr. Randolph, when, as a matter of fact, Phillips was never tried under the attainder at all but only for robbery, as subsequent newspaper reports of the times will disclose.

Mr. Randolph's supposed utterances with reference to this case are excused by his charitable critic under the guise of the indulgence accorded orators when pressed by powerful adversaries in the ardor of conflict, losing sight of a close adherence to facts, permitting their imagination to be distorted and colored by the views of the moment.

His critic continues:—

> He [Randolph] was Attorney-General at the time, and told me himself the first time I saw him after the trial of Phillips, that when taken and delivered up to justice, he had thought it best to make no use of the Act of attainder, and to take no measure under it; that he had indicted him at the common law, either for murder or robbery (I forget which, and whether for both), that he was tried on this indictment in the ordinary way, found guilty by the jury, sentenced and executed under the common law; a course which everyone approved, because the first object of the act of attainder was to bring him to a fair trial. Whether Mr. Randolph was right in this information to me, or, when in the debate with Mr. Henry, he represents this atrocious offender as sentenced and executed under the act of attainder, let the record of the case decide.

It seems strange that Mr. Randolph, who surely to some extent acquiesced in the act of attainder, certainly sufficiently, as he says, "to bring him to a fair trial" (meaning Phillips), should afterwards have been so severe in censuring this Act of the Assembly; and in his reference, in the debate, to the case, "without being confronted with his accusers and witnesses, without the privilege of calling for evidence in his behalf, he was sentenced to death, and afterwards actually executed," Mr. Attorney-General must have been unduly anxious for a debate with Mr. Henry or, to use a modern phrase, "he was playing to the gallery." I take it to be the former.

One can hardly believe that in the then enlightened state of the law in Virginia, even at that early period, at whose bar were practising some of the most profound lawyers of the colonies, and whose Assembly was composed of as cultivated men as could be found in any succeeding generations, there could have occurred such a mockery of justice as Mr. Randolph would have us believe. If there had been such, why did the Attorney-General propose and permit it? But if he only meant that Phillips had not the advantages of confrontation and evidence in his behalf on the passage of the bill of attainder, how absurd to charge the Assembly with the omission to confront Phillips with his witnesses, when he was standing out in arms, and in defiance of their authority, and their sentence was to take effect only on his own refusal to come in and be confronted. Mr. Randolph must have known that the prisoner was tried and executed under the common law; and yet, according to his own words in his debate with Mr. Henry, he rests *his* defense on a justification of the Act of attainder, only.

At last, to eliminate any doubt with

reference to the controversy, we have the following order against Josiah Phillips entered by the General Court:

Virginia,

In the General Court, 20th October, 1778.

Josiah Phillips, late of the parish of Lynhaven, in the county of Princess Anne, laborer, who stands *indicted for robbery*, was led to the bar in custody of the keeper of the public jail, and was thereof arraigned, and pleaded not guilty to the indictment, and for his trial put himself upon God and the country. Whereupon, came a jury, to wit: James Letate, Thomas Stanley, Gilliam Boothe, etc. . . ., that the said Josiah Phillips is guilty of the *robbery* aforesaid in manner and form as in the indictment against him is alleged, etc. . . .

October the 27th, 1778.

Josiah Phillips, etc. . . ., who stands *convicted* of *robbery*, was again led to the bar, etc. . . . Therefore, it is considered by the court, that he be hanged by the neck until he be dead.

Thus Phillips by the above order and arraignment was convicted and sentenced to be hung for robbery along with the following offenders for crimes, such as horse-stealing, grand larceny, etc.:—

October 28, 1778.

John Lowry, John Reizen, and Charles Bowman for murder, *Josiah Phillips*, James Hodges, Henry McLalen and Robert Hodges for *robbery*, James Randolph for horse stealing, Joseph Turner, otherwise called Joseph Blankenship, for burglary, and John Highwarden for grand larceny, being under sentence of death by the judgment of the court yesterday passed against them for their said offenses: It is awarded etc. . . . by the sheriff of York county, on Friday the fourth day of December next, between the hours of ten and twelve in the forenoon, at the usual place of execution.

Copies-Teste, Peyton Drew, C. S. C.

Though the press of the colony was just coming into existence, nevertheless, it seems alive to passing events, as the following extract from Dixon and Hunter's paper, published in Williamsburg, Va., October 30, 1778, will attest:

Williamsburg. At a general court, begun and held at the capitol the 10th instant, the following criminals were condemned to suffer death: Charles Bowman, from Prince George, for murder; John Lowry, from Bedford, for ditto; *Josiah Phillips*, James Hodges, Robert Hodges, and Henry McLalen from Princess Anne, *for robbery;* John Highwarden, from Fanquire; for grand larceny; Joseph Turner, alias Joseph Blankenship, from Albemarle, for burglary; and James Randolph, from Culpeper, for horse stealing.

And from an extract from the same paper, dated December 4, 1778, there is an account of the execution of Josiah Phillips and those sentenced to death under the same order entered by the General Court. We can see that the death penalty was rather overdone in the case of minor offenses, public sentiment not having arisen to the plane it now enjoys at the horror of corporal punishment. And so ends the case of Josiah Phillips, around whose conviction hangs a peculiar state of lapsed memory on the part of those, with the exception of the principal actor, who were most interested.

Houston, Va.

"WE know that the science of law has for its purpose a contribution to an existence and expression of law which will satisfy human interests and necessities as they appear here and now. It is delightful to soar in the ether of pure reason, but it is better to labor for the welfare of mankind." *Windscheid.*

Remarks on the History of Forensic Medicine from the Renaissance to the Nineteenth Century

By Charles Greene Cumston, M.D.[1]

HISTORIANS generally consider the promulgation of the Criminal Constitution of Charles V, otherwise termed the Caroline Constitution, as a decisive foundation of the development of legal medicine in Europe. This constitution was voted at the Diet of Ratisbon in 1532, as a law of the empire. Without doubt it would be an exaggeration to attribute to the Caroline Constitution a revolution or an impulsive initiation in forensic medicine, because, as I shall point out, with reference to visits and expert work by physicians and surgeons, as well as the necessary information to be obtained from them on those questions of their art which could be used for evidence, this code simply was in conformity with the old practices observed before its promulgation in various jurisdictions, although it generalized them. It is well known that in 1507, John of Schwarzenberg, chancellor of the Bishop of Bamberg, had drawn up an ordinance for this prince (which later on served as a basis for the Caroline Constitution) in which the work to be done by physicians in medico-legal practice was regulated. It should also be noted that in the articles relating to rape, abortion, infanticide, and poisoning, or dementia of the accused, absolutely nothing is said of verification or medical reports from physicians, although such reports seem indispensable in the majority of cases, but it is an undoubted fact that many years before the German judges had recourse to them.

The following are the only articles of the Caroline Constitution in which recourse to physicians or midwives is rigorously specified. I would draw particular attention to the last two, as they show a tendency to the performance of autopsies.

Art. 35.—If a girl is suspected of having been delivered of a child in secret and of having killed this child, one should in the first place ascertain if she had been seen in a very apparent condition of pregnancy, and this pregnancy having diminished, whether or not she became pale and weak. If these kinds of signs and indications are met with and the woman is such that she may be suspected, it is proper to proceed still further and have her secretly examined in private by reliable and experienced matrons. If this examination confirms the suspicion, and she nevertheless will not declare the crime, she may be put to the torture.

Art. 36.—When the child is killed only a short time before, the mother will not have lost her milk, so that the milk may be drawn from the breast, and if it is good and perfect, this would be a strong and evident presumption to cause her to pass through the torture. Nevertheless, since some physicians teach that occasionally from natural causes milk may occur in a girl who has never been pregnant, if such a fact is invoked, a more ample verification must then be made by the midwives.

Art. 147.—If a person who has been struck and wounded, dies at the end of a certain length of time in such a manner that it makes it doubtful whether or not the blows or wounds have been the cause of death, experienced surgeons should be consulted, who will know whether the death occurred before the blows and wounds were received, and if this is not the case they can indicate how long the person has survived after receiving them.

[1]Honorary Member of Surgical Society of Belgium, Ex-Vice-President of American Association of Obstetricians and Gynæcologists, Member of the Medical Historical Society of France, etc.

Art. 149.—Finally, so that as little needless work as possible may be done in the above mentioned cases before inhumation has taken place, in the examination and appreciation of lesions and because of the wounds, the judge, accompanied by one or several surgeons who have already taken oath, should proceed diligently with the inspection of the corpse before burial has taken place and to make note of, and very exactly describe, all wounds, cuts, marks, or contusions which may be found so that each one will have its own indications.

It cannot be denied that the Caroline Constitution had a very considerable influence on the development of forensic medicine. In the first place, this code regulated the legislation in all the countries of the empire, that is to say, the larger portion of civilized Europe. Then again, the promulgation was made during a remarkable phase in the history of the medical sciences, when the Renaissance was at its full development, at a time when anatomy, the only true foundation of modern medicine, was being founded by the efforts of Ingrassius, Eustachius, Fallopius, Varolius, Arantius, and above all Vesalius, who, in 1543, gave to the world the first description of the human body made after nature. It should also be recalled that in Germany the great importance of experts was understood at a very early date. Consequently the office was only confided to men having a recognized morality and superior knowledge, and they alone were specially appointed experts to the courts of justice. The decisions of the experts, particularly when the case was one of a capital offense, were submitted to discussion at the universities; the faculty would make commentaries on all the resources that the medical knowledge of the time could furnish, and they published them, periodically so to speak, having in mind a branch of teaching which had been recognized as necessary. In point of fact, the professorship of forensic medicine was created early in the seventeenth century in all the German universities, while it was only in the year III of the Republic that legal medicine was taught in France.

In 1603, Henry IV ordered his first physician, Jean de la Rivière, to appoint by a commission "in all the good cities of the Jurisdiction of the Kingdom, composed of two persons belonging to the art of medicine and surgery, possessed of the best reputation, probity and experience, to make visits and reports in justice." An exception was made for the sworn experts attached to the Chatelet; these were appointed by the King himself. Very much later, in August, 1670, the Criminal Ordinance of Saint Germain en Laye, an appendix to the Code Louis, confirmed and regulated the already existing condition of affairs, and I will here give the articles of this ordinance which concern forensic medicine:

TITLE V—ON REPORTS OF PHYSICIANS AND SURGEONS

Art. 1.—Wounded people may be examined by physicians and surgeons, who will state their true condition; this will also be done in cases where death results and the report will be admitted at the trial.

Art. 2.—The judges may order a second visit to be made by the official physicians and surgeons, who shall take oath, and after their visit they shall write out and sign the report on the spot, which will at once be transmitted to the court and added to the documents of the prosecution.

Art. 3.—We command that in all reports ordered to be made by Justice, at least one of the surgeons appointed by our first physician be present at the place where it is made, otherwise the report will be considered *nil*.

In Title VI, Art. 23, it is stated that "if any woman, before or after having been condemned to death, appears to be or declares herself pregnant, the judges shall order her to be visited by matrons appointed for the purpose, who shall

make their report in the form prescribed for experts. If she is found pregnant, execution will be deferred until after delivery." In 1692, a regulation was issued describing the form to be given to the reports. For autopsies, it ordered a delay of twenty-four hours in winter and twelve hours in summer. The report should indicate the number, direction and depth of the wounds, likewise their breadth, precise location and their lethality; the expert was also instructed to state with what instrument or arms the wounds had been inflicted, and whether or not the victim would remain a cripple from the effect of the wounds, or, on the other hand, how long it would take for a cure to be complete.

From a small but interesting work entitled *Doctrine des Rapports*, by Nicholas de Blégny, Surgeon to Monsieur, I will quote some supplementary information relating to the organization of the medico-judiciary personnel of the seventeenth century:—

> Sworn surgeons have been appointed in order to prevent the abuse which might accrue if all surgeons were allowed to make reports in Justice; because the incapacity of some and the infidelity of others would be powerful obstacles to truth. . . . There are two sworn experts in every city possessing courts bishopric . . . and one in all the other towns or places. They bear the title of ordinary councilor physicians to the King, or sworn surgeons. They take oath before the officers of the court; they conjointly or separately occupy themselves with the reports to the exclusion of all other masters. The judges cannot receive any other report unless signed by them. They are charged with the inspection of all the surgeons of the cities in which they reside and of the cities or places belonging to their district. They examine the candidates for the mastership in surgery and the midwives and give them their diplomas.

The reports made out by the experts were of three kinds: (1) *accusation reports*, delivered upon a simple request of the parties to the litigation by any surgeon who had been sworn; (2) *provisional reports*, made upon the demand of the judge by the sworn surgeons of the jurisdiction in which the trial took place; (3) *mixed reports* which were delivered on the simple requisition of the parties to litigation by sworn surgeons alone.

Besides the above reports, experts were also obliged to make two other types of juridical papers, namely, the *essoin* and *estimates*. There were three types of *essoins:* (1) the *ecclesiastical essoin*, which was an exemption of conventual and monastic vows; (2) the *political essoin*, which related to the health of soldiers and those in service of the royal houses; (3) the *juridical essoin*, which was required in order to postpone a trial when one of the parties could not appear on account of illness. The report of estimation was the valuation of the cost of operations and dressings when this cost was contested by the patient.

I have now reviewed the principal medico-legal ordinances promulgated in Europe during the Renaissance and the seventeenth century, and will now examine what scientific occurrences took place relative to forensic medicine during this period. In the first place, the first work dealing with the subject appeared in 1575. The father of modern surgery, Ambroise Paré, is the author, and from this fact he should also be called the father of Legal Medicine. His writings on the subject are represented by a few pages which precede the twenty-seventh book of his surgical works. They represent the first steps in medico-legal science. Paré says that the young surgeon should be instructed in the art of making out a report, when he shall be called upon by the courts, either on the death of the injured, resulting impo-

tency, or the loss of some part. He points out that he should be particularly careful and alert in his prognosis because the ultimate outcome of certain wounds and injuries is very uncertain. He also says that the foremost and principal quality for the surgeon is that he shall have a pure soul, fearing God and never reporting a small wound as a large one nor *vice versa*, because the jurisconsults will be guided in their decision by the report.

From this time on works on forensic medicine were published in large number. In 1597, Baptista Condronchi, a physician of Imola, published a work entitled *Methodus testificandi, in quibusdam casibus medicis ablatis*. Here he studies the principal legal questions brought up in cases of disease and wounds, sudden death, poisoning, puberty, virginity, pregnancy and labor. The work ends with a few samples of reports bearing on facts which occurred in his practice and which are modestly signed: "I, Condronchi, the most humble of physicians and philosophers of Imola." In 1602 Fortunatus Fidelis, a physician of Saint-Philip of Agirone, published a book entitled *De relationibus medicorum in quibusdam ea omnia quæ in forensibus ac publicis causis medici referre solent plenissime traduntur*.

The most important and complete work of the epoch is without doubt the *Quæstiones medico-legales*, published in a fragmentary way from 1621 to 1658 by the Italian physician, Paul Zacchias, physician of the States of the Church. The author received great and enthusiastic praise from both physicians and theologians of his time and the authority of this work was maintained for nearly two centuries. In this book, which bristles with erudition, is to be found a quantity of medical questions studied from the viewpoint of the canon law, and in reality it belongs more to the confessional than to the courts of justice. Conjugal duty, miracles, fastings and other religious rites, stigmates of sorcerers, monachal claustration, in the medical aspect, find considerable space. However, all these things would naturally be treated by a physician of Innocent IV, at the time when the canon law held a prominent place.

In France we have the treatises of Gendry, of Angers, of de Blégny, of Lyons, in 1684, and particularly *L'Art des Rapports*, published by Devaux in 1708. The latter remained the *vade mecum* of the sworn surgeon for an entire century. In 1598, Séverin Pineau, a student of Ambroise Paré, published a book entitled *De virginatis notis*, which contained the results of his researches relative to the existence of the hymen, a very much discussed question of the time. In 1611, Vincent Tagareau attacked the peculiar custom of the Congress in his *Discours sur l'Impuissance*.

And lastly, forensic medicine became enriched at the end of the eighteenth century by a capital discovery, because in 1663 Bartholini studied hydrostatic pulmonary docimasia, which had already been foreseen by Galen, and John Schreyer, a physician of Silesia, applied the method for the first time in juridical matter in a case of infanticide.

Without entering into detail I would like to indicate the character of these early works on legal medicine. If one simply goes over the index of the treatises by Fidelis and Zacchias, one will at once perceive the *ensemble* of the problems which presented themselves to these early medico-legal specialists in the application of medicine to canon law, civil law, and criminal law. The following are the subjects which are more particularly studied from the medico-legal standpoint: the classification of ages.

sterility in the female, impotency in man, the signs of virginity, pregnancy and labor, the duration of gestation, irregular parturitions and the birth of monsters, hermaphrodites, obsessions, sorcery, demoniacal possession, philtres, the simulation of diseases or infirmities, contusions and wounds, accidental death or by violence, miracles, resurrections, etc. Among these questions there are some which have still remained and will continue to remain, in the decision of which the courts will always resort to medical science for information. Others have disappeared with the fall of the canon law and the change in customs. Then again, others which owed their existence to the imperfect knowledge of the time, the love of the marvelous and superstitions, little by little fell by the wayside as the scientific mind became developed.

The Renaissance and the seventeenth century consequently mark the commencement of the scientific period of forensic medicine. Like all other branches of medicine this one received a remarkable impulse, and although the latest born, it very soon occupied a very large place in the history of medicine.

As has been pointed out, Germany, from the Caroline Constitution, was the first to outline a criminal procedure and to form an excellent organization of forensic medicine. A special and competent personnel, the teaching of the subject in the universities, combined with a regular and extensive observation, were all conditions which assured a remarkable development of legal medicine in this country. Beginning with Zacchias, one will find a large number of periodical publications and general treatises in which the most interesting cases have been collected and commented upon. Among the principal works I would mention that of Welsch, which appeared in 1660, in which he considers the fatality of wounds, and advises the performance of autopsies. The book is entitled *Rationale vulnerum lethalium judicium*. In 1689, Bohn treated the same subject much more deeply in a work which possesses considerable authority, entitled *De renunciatione vulnerum*.

In the eighteenth century we find the *Pandectæ medico-legales* by Michel Bernhardt Valentin. It is a collection of medico-legal questions asked by the German courts during the seventeenth century and discussed in the universities. This example was followed by Zittmann in 1706; Alberti, in 1725; Loew, in 1725. Richter, in 1731, gave a collection of decisions rendered by the universities and the civil and ecclesiastical courts. The general treatises which hold a prominent place in medico-legal literature should also be mentioned. Teichmeyer's treatise, published at Jena in 1722, entitled *Institutiones medicinæ legalis vel forensis in quibus practituæ materiæ civiles, criminales, et consistoriales traduntur*, is of great importance. Then come those of Goelicke, in 1723, Eschenbach, in 1746, F. Hoffmann, in 1746, and the classical treatise by Hebenstreit, in 1753, entitled *Anthropologia forensis sistens medici circa rempublicam causasque dicendas officium*. And lastly, the works of Daniel and Plouquet on pulmonary docimasia, of Heister, in 1727, on precocious and tardy births. The great men of medicine, van Swieten, Haller and J. P. Franck, are also associated with legal medicine of the time.

France was far from being so richly endowed in works on forensic medicine, but there were, however, some very important cases which occupied the attention of physicians and resulted in important researches. Thus, Lecat, in 1750, put forward his singular theory of

spontaneous combustion, a theory which was so greatly credited in popular imagination and which was even accepted for a certain time by scientists. Then Lorry discusses the questions of survival.

In 1765, tardy birth was the object of very bitter discussion among Bertin, Lebas, Bouvard, Petit and Antoine Louis. The latter, in his *Lettres contre la légitimité des naissances prétendues tardives*, raises his voice against the guilty indulgence of the courts who declared legitimate births occurring after twelve or even thirteen months, basing their opinion on a very old belief accepted not only by the people, but by the majority of physicians. It was also Louis who, by his memoir read at the Academy of Surgery in 1764, contributed to rehabilitate the memory of Calas. In 1775, he was ordered to make an expert examination which saved the life of two accused persons. The circumstances are briefly as follows. On June 14, 1775, an inhabitant of Montbrison, by name Jean Chassagneux, fell and fractured his head. This fall was accidental, but public rumor made it appear that a crime had been committed by the son and daughter-in-law of the victim. The first physician consulted concluded that the accused were guilty, but Louis was called in on the case and demonstrated beyond a doubt that the facts collected were insufficient and that the examinations made would not allow one to pronounce judgment against the accused. Upon this report, Parliament dropped the procedure.

Louis also demonstrated juridical errors in the cases of Montdailly, Syrven and Baronnet, in very important reports to the courts in which he unceasingly protested against the insufficiency of the medico-legal organization in France, also the incompetency of the experts selected by the magistrates.

We should also mention Lafosse, known by his critical examination of the Calas case, which resulted in a friendship between himself and Voltaire; and Chaussier, who in 1783, in a memoir which has remained celebrated, shows the great importance of legal medicine and draws attention of the courts to the inconveniences resulting from the system employed at that time. Forensic medicine was, in point of fact, arrested in its development by numerous causes which can be classified under two heads, namely, the imperfection of criminal law and the bad organization of medicine at the time.

The principle of the necessity of a confession in order to pronounce a sentence in capital cases had been introduced a long time since with the ecclesiastic law, but it was only tutelary in appearance. In point of fact, this confession was above all obtained by odious means, namely, the preparatory, ordinary and extraordinary question. And still more, the trial was conducted behind closed doors and in many cases the accused had no lawyer for his defense. The magistrates were possessed of full power, which if necessary could be given to extraordinary commissions. Finally, under the empire of the Criminal Ordinance of 1670, the most pitiless repression was exercised to such an extent that the sentence of death was rendered in one hundred and fifteen cases in that year, this often being accompanied by torture. On the other hand, on account of the defective organization of the medical corps forensic medicine was in the hands of illiterate and insufficiently educated surgeons. The judges, not appreciating the importance of this science, were of the opinion that a little practical knowledge of anatomy and surgery was sufficient to make an expert. Occasionally they even made an appointment outside of the

medical corps, and thus in the Calas case the expert selected was the executioner. I would also add, that the old Faculty of Medicine of Paris was far more occupied in maintaining its rights than in contributing to the progress of science, and consequently offered no course of instruction in legal medicine.

But towards the end of the eighteenth century, a series of occurrences of a political and social order changed the legislation and resulted in the introduction of a great many things favoring the development of forensic medicine. The abolition, by Louis XVI, of the preparatory question in 1773, and of torture on May 13, 1778, was the premonitory sign of a change which would take place in the criminal legislation in France, and it is well known that the Revolution precipitated the event.

In 1797, Fodéré published the first treatise on forensic medicine which appeared in France. This book, which was at the same time both philosophical and practical, was the foundation of modern legal medicine in France, just as the work by Zacchias had been in Germany the starting point of the development of this science. With the advent of Fodéré, forensic medicine became definitely engaged in a scientific direction, and at the same time completed and extended its domain, passing by successive phases until at the present time it comprises all the branches of the science of medicine. Thus, in the first place it was only based on anatomical knowledge, but later on chemistry entered for a large share, particularly in toxicology. The important branch of mental disease was developed by the magnificent work of Pinel, Esquirol, and their successors. Later on forensic medicine came into possession of new arms—we refer to the microscope and spectroscope, which developed the almost certain detection and the nature of spots and stains—and finally thanatology made its appearance. In 1821, Orfila contributed very greatly to the progress of toxicology by his experiments and judicious criticism, while Devergie (1798–1876), by the precision of his researches made a great step towards certainty in the practice of forensic medicine. From 1818 to 1879 the great Tardieu developed a large number of medico-legal questions, and his teachings had an immense influence on the development of medico-legal studies throughout the world. These have been continued and developed in Germany by Casper, Machska, Eulenberg, Liman, and Kraft-Ebing; by Hoffmann of Vienna; in England by Thompson, Guy, Taylor and Christison, while prominent in the modern Italian school I would particularly recall the names of Cresshio, Tamassia, Morselli, Tamburini, Zino and the regretted Lombroso.

Boston, Mass.

Some Defects in a Criminal Code

AT the annual meeting of the Missouri Bar Association held last July, North T. Gentry of Columbia, Mo., read an able paper on "Some Defects in Our Criminal Code and How to Remedy Them." The following extracts are given:—

"First. The first defect to which I would call your attention is that of requiring indictments, especially in cases of homicide, to be so lengthy. . . . Our courts have often held that the *probata* must agree with the *allegata*, and many have been the cases where reversals have been had because there was no such agreement. Yet no one ever heard

of the prosecuting attorney attempting to prove, or being required to prove, that the pistol with which the homicidal act was committed, was discharged and that the bullet left said pistol by reason of the force of the gunpowder aforesaid, nor that the ball struck against the body of the deceased, and, by reason of the force of the gunpowder, and by reason of it being shot out of the pistol aforesaid, penetrated the body of the deceased. Neither is any prosecuting attorney ever required to prove that the grand jurors that returned the indictment were duly impaneled, charged and sworn, although the indictment must contain that allegation in two places; nor is he required to prove that the man whose name is attached to the indictment, as prosecuting attorney, was in truth and in fact the duly qualified prosecuting attorney, nor that the man who signs as foreman was in truth the foreman of said grand jury. . . .

"Second. In the case of *State* v. *Miller* (162 Mo. 253) our Supreme Court held that the wife of David Miller was improperly convicted of conveying weapons to her husband, who was a prisoner in jail. . . . The wife was indicted, tried and convicted, . . . but her case was reversed by the Supreme Court on the ground that she being the wife of David Miller was under his influence, and acted under compulsion of her husband, and was therefore not responsible for any crime that she was thereby compelled to commit. . . . In this day and age, when women have more rights than men, when a woman can contract and be contracted with, can sue and be sued, and when the woman is so many times *the* head of the household, it is difficult for lawyers, as well as laymen, to understand how a woman could act under compulsion of her husband, when he was in as helpless a condition as he could well be, and she was living in a house some three-fourths of a mile away from the jail. . . .

"Third. Our law is too strict in requiring petit jurors to return the verdict in legal form. Where there are several degrees of the offense, I admit that the jury should state the degree of which they intend to convict the defendant. But where there is only one degree, only one count in the indictment, and the jury are not concerned with any other case against the defendant, it does seem to me that our law is too strict in the matter of requiring the verdict to be so technical. . . .

"Fourth. Another serious defect in our criminal code is the abuse of the law on the subject of continuances, and on the subject of change of venue. It often happens, indeed in some counties it is the practice, for the defendant in a criminal case, who is out on bail and who is interested in dodging a trial, to procure as many continuances from the regular judge as possible, and when his last application for a continuance is overruled, to ask for a change of venue on account of the prejudice of the judge, and thereby secure another delay. After the new judge is called in, another delay is asked for on the ground that the defendant has just then discovered that the inhabitants of the county are so prejudiced against him that he cannot have a fair and impartial trial. . . .

"Fifth. Every defendant is entitled to know what is the charge pending against him. But it has been held by our courts of last resort that the record of the circuit court must show that the defendant has been arraigned, or must show that he has waived formal arraignment, and that the failure of the record to so show is error, and may be taken advantage for the first time in the higher court. (*State* v. *Sanders*, 53 Mo. 234.) . . .

"Sixth. Our statutory requirement for the qualifications of jurors is unreasonable and is in conflict with the original theory upon which jurors are selected. Law writers tell us that originally twelve men of the county were selected to try a defendant because of their acquaintance with the defendant and all of the circumstances connected with his case. Now, jurors must know nothing about the case, and our law is fast going in the direction of requiring jurors never to have read or heard of the case before. . . .

"As stated, the law on the subject of continuances has been abused more than any statute, perhaps, on our statute books. A defendant should not be allowed to use that law as a trial dodger, as too often occurs. If the state is required to give the defendant a speedy trial, the defendant should be required to submit to a speedy trial. No good can result from long delays, that is, no good to the state, but the defendant hopes, by reason of said delays, to receive benefit, and always does receive benefit thereby. A military gentleman once said to me: 'I believe that there is more substantial justice

in a military trial than in any criminal trial I have ever witnessed in our state courts. Before the witnesses have an opportunity to forget what was really done, before they have an opportunity to leave, and before other witnesses have an opportunity to make up evidence favorable to the defendant, the military tribunal try the defendant, and either acquit or punish him for his conduct.' In Missouri, the defendant has the benefit of hearing the evidence produced before the coroner, and he has the benefit of hearing the evidence produced before the justice of the peace some days later. He has the benefit of hearing the evidence produced by the state at the trial in the circuit court, some months and even years later. The defendant's attorney is and should be entitled to time in which to prepare for trial; and the defendant should have a continuance for good cause shown, but only for *good cause*. One noted criminal case, to which I might refer, was delayed for seven years by reason of the absence of a witness who was alleged to have existed, but who was never seen *by any one, save the defendant*. At the final trial, on account of the death of two important witnesses for the state, and the insanity of a third witness, the state had great difficulty in proving that the deceased was ever killed."

The International Prison Congress

THE three most important bodies, in the eyes of the American lawyer, which are assisting the progress of criminal law and science in this country and elsewhere, all held meetings at Washington, D. C., early in October. First came the annual meeting of the American Prison Association, which listened to many important addresses. This meeting, held on Sept. 30 and Oct. 1, was followed by the second annual conference of the American Institute of Criminal Law and Criminology, the important reports of which will be published in the *Journal* of that organization. The Institute elected as its new president, succeeding Professor Wigmore, Hon. Nathan William MacChesney of Chicago, of the Commissioners on Uniform State Laws.[1]

These two meetings were followed by the quinquennial meeting of the International Prison Congress, which is in a sense an offshoot of the American Prison Association. This body observed a more elaborate program than that of the preceding sessions, and as its resolutions are shaped in actual debate instead of being referred to committees the proceedings are of particular interest.

President Taft welcomed the delegates of the two prison associations at the White House, stating his impression that the American prisons were apt to be stronger in theory than in practice, and Attorney-General Wickersham addressed the International Prison Congress on its opening day. The delegates present included many of the most eminent penologists and prison administrators of Europe. Professor Charles R. Henderson of the University of Chicago presided. The most notable result, doubtless, of this year's Congress was the adoption of a resolution favoring the indeterminate sentence. This action was remarkable in view of the conservative attitude shown by the foreign delegates.

The deliberations of the International Prison Congress covered a broad field, including theories of punishment in general, probation and parole, juvenile delinquency, prison methods, convict labor, and other subjects of equal importance. Unusually stimulating and profitable discussion was elicited on these topics.[2]

While there was much to indicate a belief that this country has made much progress in penological methods, as shown, for example, at the New York State Reformatory at Elmyra, still, there was an evident disposition

[1] For reports of the meetings of these two bodies, see *The Survey*, v. 25, pp. 129, 132 (Oct. 22).

[2] For an excellent review of the proceedings of he Congress, see *The Survey*, v. 25, pp. 187–224 Nov. 5). This issue also contains the addresses delivered by Sir Evelyn Ruggles-Brise and Dean George W. Kirchwey.

on the part of some foreign observers to criticize this country as more backward than other lands. Thus Thomas Holmes, secretary of the Howard Association of London, found the iron-grated cells at the Elmyra Reformatory demoralizing, and J. S. Gibbons, chairman of the Prison Board of Ireland, said:—

I tell you what I think you lose sight of in this country—that all these splendid reformatories deal with merely a drop in the ocean compared with the county and city jails to which your thousands of prisoners go and where many are manufactured. We were exactly in the same condition up to 1877, when we brought county and city jails out from under local authorities in the United Kingdom. We found the antecedent to all reform was state centralization. . . . In that way we were able to close about half. . . .

I am full of admiration for what the New York prison authorities have done for improving the Tombs, putting in windows and tinkering here and there. But they ought to pull the thing down.

Other tendencies in American prison administration which were criticized were that to put more than one prisoner in a cell, and that to build larger prisons than a system of proper classification would show to be expedient.

The first section of the Congress, which dealt with penal law, gave more attention to the indeterminate sentence than to any other subject. The following resolutions were adopted after much debate, in which the Latin delegates, particularly, showed themselves cautious about departing from old-established principles:—

The Congress approves the scientific principle of the indeterminate sentence.

The indeterminate sentence should be applied to moral and mental defectives.

The indeterminate sentence should also be applied, as an important part of the reformatory system, to criminals (particularly juvenile offenders), who require reformation and whose offenses are due chiefly to circumstances of an individual character.

The introduction of this system should be conditioned upon the following suppositions:—

1. That the prevailing conceptions of guilt and puishnment are compatible with the principle of the indeterminate sentence.

2. That an individualized treatment of the offender be assured.

3. That the board of control or conditional release be so constituted as to exclude all outside influences, and consist of a commission made up of at least one representative of the magistracy, at least one representative of the prison administration, and at least one representative of medical science.

The second section, that on prison administration, concerned itself with the problems of prison labor, the parole system, and reformatory methods. Important resolutions on each subject were adopted,[8] those on conditional liberation on parole being as follows:—

Accepting the principle of conditional liberation on parole as an indispensable aid to the reformation of the prisoner, the Congress approves the following resolutions:—

1. Conditional release should be given not by favor but in accordance with definite rules. Prisoners of all classes, including workhouse prisoners, should be eligible for conditional release after serving for a definite minimum period.

2. Conditional liberation should be given on the recommendation of a properly constituted board, but reserving always the control of the government. This board should have the power of recalling the prisoner in case of unsatisfactory conduct.

3. The duty of caring for conditionally liberated prisoners should be undertaken by state agents, by specially approved associations or individuals who will undertake to befriend and help them and to report on their conduct for a sufficiently long period.

4. Where the ordinary rules for parole are not applicable to life prisoners, their cases should be dealt with by the supreme government as a matter of clemency.

The third section, on prevention, adopted resolutions favoring the remuneration of prisoners according to their industry and distribution of relief to their dependents, the classification and separate treatment of habitual drunkenness, vagrancy, and mendicancy, and the extension and proper supervision of probation work.

The fourth section, on children and minors, went on record as favoring a system of detention and trial for juvenile delinquents wholly independent from that for adults, a scientific investigation of the problem of mentally defective young delinquents, measures to prevent habits of vagrancy and idleness, and legislative and philanthropic action for the protection of illegitimate children.

Sir Evelyn Ruggles-Brise, K.C.B., president of the English Prison Commission, was elected president of the Congress, which will hold its next meeting in London in 1915. Prof. Simon Von Der Aa of Holland succeeds Dr. Guillaume of Switzerland as general secretary.

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[8] *Ibid.*, pp. 217–8.

Status and Contract

THE strong reared of their strength a mighty state
And each to bend it to his will did try,
Until it seemed about to crumble dry
To dust,—alack, freedom of contract's fate!
Anon the weak rose up, made mad by hate,
Joined forces and reknit the feudal tie,
Down with the great, long live the mob! their cry,
The people's voice the voice of God! their prate.

At furies such the very heavens frown;
No hope where natural friend is legal foe,
Nor where flame fires of greed that never cool.
Combine, then, strong and weak, not to tear down
But to upbuild, for parity spells woe,
And only by obedience shall ye rule!

Reviews of Books

CHIEF JUSTICE PIGGOTT'S WORK ON CONFLICT OF LAWS

Foreign Judgments and Jurisdiction. Part II, "Judgments *in Rem*—Status." 3d ed. By Sir Francis Piggott, Chief Justice of Hongkong. Butterworth & Co., London. Pp. x, 550+appendix and index 45.

IT is difficult to form a satisfactory judgment of an elaborate treatise of the character of Sir Francis Piggott's "Foreign Judgments and Jurisdiction" by an examination of only one part, particularly as he states that his purpose was to write "a series which should treat comprehensively the position of British subjects beyond the realm, with reference to the law of England."

Part II of this work, however, covers a large field, and some judgment may be formed of its intrinsic merit, though it would be impossible to estimate the place it fills in the whole work. In reference to Part II, Chief Justice Piggott says that he has "attempted to follow the struggles of the law as it grapples with the problems which arise out of the essential intercourse of a British subject with foreigners, his birth, his marriage and his death in foreign lands; . . . problems somewhat over-complicated by the theory of a fictitious state of being called domicil, which at times threatens to become unmanageable." As may be judged from the statement last quoted, the author does not believe in the doctrine of domicil as affecting status in cases arising in conflict of laws. He concludes "that the doctrine rests on no such stable foundation as the common consent of nations, and that it is unsound to its derivative, the Roman law, is illogical and anachronous, and it is, from its studied abandonment of British subjects, unworthy of this imperial age." He states that the Continental law knows nothing of our doctrine of domicil, and that the standard common to the Continental nations is the doctrine of nationality.

Sir Francis Piggott's book is intended as an argument against the doctrine of domicil and in favor of the doctrine of nationality. Being Chief Justice of Hongkong, and, as such, coming in contact with persons subject to many and varied systems of law, the author is perhaps not so strongly prejudiced in favor of the doctrine of domicil as men trained under and practising under the Eng-

lish common law. There are, however, many arguments against the use of national law as a general rule, which Sir Francis Piggott in his zeal for his thesis does not notice. It cannot be denied that the English law as to marriage and divorce and succession to property is not in as well settled a state as lawyers might reasonably desire and expect. But it would be more correct to say that its present state is due to a confusion, from time to time, of the law which governs acts and the law which governs status, rather than to the application of the doctrine of domicil instead of the doctrine of nationality. With this, however, Sir Francis would not agree. He says: "Of the pitiable plight into which the international law of marriage and divorce has got itself *Ogden* v. *Ogden* stands as a witness and a warning. In the important and less sentimental question of international succession there are three cases, *re Trufort*, *re Martin* and *re Johnston*, which are examples of the tangle into which the doctrine of domicil has succeeded in raveling not very complicated facts. It is a wonder that foreigners should ever enter the wide open door we boast of, with these cases to warn them of the uncertainty which will harass their wives and children should they die leaving property in England."

The author's style is somewhat involved and discursive, which to some extent interferes with a satisfactory analysis and arrangement of the material. The book contains a discussion of all the leading English cases dealing with questions of status and with judgments *in rem*, in the field of private international law. There are, however, only nine American decisions cited, four French and one Hongkong, so that except to English lawyers the book would not be of any considerable use in practice. It is, however, suggestive and is well worth study and consideration by those interested in conflict of laws.

TIFFANY'S LANDLORD AND TENANT

The Law of Landlord and Tenant. By Herbert Thorndike Tiffany, author of the Law of Real Property, Lecturer on Real Property in the University of Maryland. Keefe-Davidson Co., St. Paul. 2 v. Pp. xxiv, xxiii+2136+145 (table of cases)+61 (index). ($13 delivered.)

THE author of this exhaustive and invaluable treatise needs no introduction to readers of this magazine. His treatise on real property has been in active use in American law schools and is known to lawyers as a valuable work of reference. In this new work he finds freer scope for his unusual powers than in the former, where he was dealing with general principles, and his clearness and vigor of thought show themselves in the most admirable light.

Mr. Tiffany modestly offers in his preface something like an apology for expressing his own opinions when they happen to differ from those adopted by courts of high standing. Readers, however, will be grateful to him for expressing his own sensible views, and for the clarifying effect of intelligent observations that help to make complicated matters more easily understood.

The treatise is one of marked erudition, citations from the Year Books rubbing elbows with those of current authorities, and the subject being treated in its historical development from its earliest beginnings to its latest phases. Mr. Tiffany needs to offer no excuse for failing to note the provisions of all the latest statutory enactments. The lawyer will use this work to ascertain the law as expounded by American courts, and can readily examine the latest statutes of his own state for himself.

The work is masterly in arrangement, accurate in details, and admirable in style, and reveals so high an order of juristic ability as to be distinctly a credit to American scholarship. Evidently no pains have been spared to make it supreme in its field, which it is likely to remain for a long period.

HALL'S INTERNATIONAL LAW

A Treatise on International Law. By William Edward Hall, M.A. 6th edition, edited by J. B. Atlay, M.A., of Lincoln's Inn, Barrister-at-Law. Oxford University Press, New York, Toronto, and London; Stevens & Sons, Ltd., London. Pp. xxiv, 743+table of cases and index 25. (£1, 1*s. net.*)

THERE is not much left to say in praise of Mr. Hall's Treatise on International Law, which has now reached its sixth edition. It is generally recognized as being the leading English treatise on international law. The present editor, whose own contributions to legal literature are well and favorably known, had charge of seeing the fourth edition of this work through the press after the death of Mr. Hall, and edited the fifth edition as well as this one.

The arrangement of the work has not been changed, and the editor confined himself strictly to bringing the treatise up to date.

The results of, and suggestions to be drawn from, the Geneva Convention of 1906, the conference at The Hague in 1907, and the conference in London in 1908, have been considered by the editor, as well as the questions raised by the Russo-Japanese War and the more recent events in the Balkans. By reason of skillful editing and typographical arrangement, the bulk of the book has not been increased by reason of the additions.

STEPHENSON'S RACE DISTINCTIONS

Race Distinctions in American Law. By Gilbert Thomas Stephenson, A.M., LL.B. D. Appleton & Co., New York. Pp. xiv, 362+table of cases and index 26. ($1.50 *net*.)

THE value of this important contribution to the study of race problems is derived from the industry with which a vast amount of information has been gathered and the impartiality with which it is presented. The book is for the most part concerned with facts rather than with reflections. Only in the final chapter does the author undertake to present his own views on the negro problem.

Written for a wide public, avoiding a technical method, and keeping citations of authority in the background at the end of each chapter, the book is essentially an epitome of the history of legal distinctions against the negro race since 1865, with reference to constitutional and statutory provisions and the decisions of courts of law. Throughout the author is careful to differentiate race distinctions from race discriminations. So long as equality of opportunity for the two races in recognized by law, and the distinction need not involve any inferiority on the part of the negro race, Mr. Stephenson maintains that there is no discrimination. Thus at the outset defining terms in a way to avoid any confusion, he proceeds to set forth, in separate chapters, such subjects as the "Black Laws" of 1865–8, marital relations, intermarriage and miscegenation, civil rights of negroes, separation of the races in schools, "Jim Crow" legislation, the negro in the court room, and negro suffrage. The inquiry is not confined to the South but embraces all the states. Interesting facts are brought out. Thus the term "Jim Crow" car, as applied to a public conveyance exclusively for negroes, was first used in Massachusetts. The first leading case involving the legality of separating white and colored passengers arose in Pennsylvania. The effect of the Civil Rights Bills of 1866 and 1875 on the legislation of the states is traced, and the whole subject of federal and state law is exhaustively treated.

In the concluding chapter Mr. Stephenson offers his own solution of the negro problem. He is evidently disposed to discount the value of idealistic theorizing about the duty of the white man to the negro. Race distinctions he deems to be necessary, to minimize friction between the two races, at least for many decades to come. He therefore pleads for a spirit of liberality in the discussion of the negro problem. Race distinctions have not been confined to the South, he points out, but exist to a greater or less degree in every state, nor are they confined to the negro race. Instead of denouncing them, therefore, we should seek the best way to get along under them, and a platform should be devised, if possible, on whose principles all may unite. He thinks that such a platform is to be found in the idea that it is best to tolerate race distinctions where the negro makes up a substantial part of the population and they are necessary to enable the two races to get along comfortably side by side. Under such conditions he considers them to imply no race inferiority, being purely a matter of racial consciousness, and they may be administered in a manner which need not deprive negroes of their equal rights as citizens. So long as race distinctions, rather than race discriminations, are dealt with by the law, and the law is enforced without the discrimination to which it has too often been subject, such distinctions offer a practical solution of the problem of the negro.

This solution, if not profound, probably embodies a great deal of good sense. Mr. Stephenson will be conceded to have provided, through his assiduously gathered mass of data, a useful tool for future inquiry.

SECRET LIENS AND REPUTED OWNERSHIP

A Treatise on Secret Liens and Reputed Ownership. By Abram I. Elkus and Garrard Glenn, of the New York bar. Baker, Voorhis & Co., New York. Pp. xxx, 183 + index 11. ($3.50.)

THIS book treats of a phase of the law of bankruptcy which is of growing importance, the more so because the subject of secret liens has received comparatively scant attention, and the doctrine of reputed ownership, though necessary for the full

protection of the interests of creditors, has not received frequent application by American courts. The authors show their appreciation of the confusion that has surrounded the subject by going back to the statute of James and presenting a historical account of the growth of the doctrines they are considering, in English as well as in American jurisprudence. The discussion is lucid and able. The distinction between the doctrine of reputed ownership and that of fraudulent conveyances is pointed out, the former being designed for the protection of subsequent creditors, the latter for that of existing ones, and the foundation of the reputed ownership doctrine in estoppel is made clear. Authorities from American courts which have considered the question of secret liens serve to illustrate the propositions advanced, the topics of cases under recording acts, floating charges in mortgages, consignment arrangements, and trust receipts being discussed. The treatment is scholarly, logical, and thorough.

THE SCIENCE OF POLITICS

Human Nature in Politics. By Graham Wallas. Houghton Mifflin Co., Boston. Pp. xvi, 296, index. ($1.50 *net.*)

The Development of the State: Its Governmental Organization and Its Activities. By James Quayle Dealey, Ph.D., Professor of Social and Political Science at Brown University. Silver, Burdett & Co., New York, Boston and Chicago Pp. 326+index 18. ($1.50.)

THE author of "Human Nature in Politics" is one of the best-known members of the English "Fabian Society," noted for its dissemination of socialistic theories, and is of long experience as a political and social worker among London working men. In view of these antecedents the American reader who is unfamiliar with the value of Mr. Wallas's real contributions to the science of politics is likely to assume that this is a radical book. It is therefore with pleasure that one finds oneself on reading it forced to change this impression. Mr. Wallas's opinions are distinctively conservative. He treats his subject in a scientific spirit, and while he declares that it is inconceivable that men will long continue to live side by side in huge cities without growing more sensitive to the anomaly of too marked a contrast between the lot of more and less favored classes, and will come to demand more and more of social equality, he clearly sees the folly of discarded types of political thought, and eloquently pleads for a theory of democracy based upon the facts of the social order and cognizant of the actual inequalities of human nature.

Mr. Wallas seeks to apply a psychological method in his discussion, and the book is essentially a not particularly formal or technical monograph on the psychology of politics, written by an intelligent observer in sympathy with the spirit of modern scientific investigation, who is also able to enliven his arguments by countless illustrations drawn from an unusually rich and varied experience as a political canvasser and practical politician. It is not often that the political theorist is also versed in practical politics, and much of the value of a distinctly serviceable if not elaborate work is derived from this fact.

Neither the methods nor the conclusions of the book, in the main, challenge criticism. If the inquiry is not exhaustive enough to set up a noteworthy theory of the state, it is well conducted so far as it goes, and its author deserves gratitude for many illuminating observations and suggestive deductions. In his remarks about the prospect of some such progress in politics from qualitative to quantitative methods as has taken place in economics, and in his conjectures as to whither the abandonment of the intellectualist position of the early nineteenth century writers will eventually lead, he is particularly stimulating. His unfavorable comments on proportional representation, which he considers a phase of outworn dogmatism, are worth reading, and his discussions of popular elections and of the relation of the government to the electorate are sensible and useful. The literary style of the book is marked at all times by clearness and directness, and often by eloquence or humor. Such a combination of seriousness of matter with lightness of form is rare, and it is hard to say whether the book will be prized the more for its soundness or for its readableness.

A work of less merit, whether judged with reference to keenness of thought or charm of literary style, is Professor Dealey's general survey of what he somewhat vaguely regards "The Development of the State." The book has certain good qualities, as a convenient collection of general information on the principal topics of political science, and as an introduction and guide to the more profound study of subjects that have elsewhere been more ably handled. It is, however,

mainly a mingling of historical outlines of the growth of political institutions with a general summing up of political theories which may be considered fairly well to have stood the test of time. The author makes no claim to originality, and can certainly not be accused of it. There is nothing of the acute analysis which has come to be associated with the latest noteworthy investigations in this field. The author, however, cannot be accused of handling his task in an unscholarly or unscientific manner. He indicates where recent important researches may be drawn upon, and if somewhat lacking in imagination and subtlety he does not fall into the sin of reproducing discredited, outworn theories. We have not noted any serious faults of perspective, and the only grave defect of the book is perhaps its failure to realize the fact that political definitions cannot be too exact nor terminology too precise for the purposes of clear, logical exposition of the structure and functions of the state. Compressing the treatment of so vast a subject within so small a compass, the author cannot be condemned for those defects which are faults of omission only, and the success with which he has carefully avoided dealing with controversial matters is strongly in his favor.

FEDERAL SAFETY APPLIANCE ACTS

An Index-Digest of Decisions under the Federal Safety Appliance Acts, together with relevant excerpts from other cases in which the acts have been construed. Prepared by Otis Beall Kent, by direction of the Interstate Commerce Commission. Government Printing Office, Washington. Pp. xvi, 294. (70 cts. cloth, 40 cts. paper.)

THE federal statutes digested in this practically designed manual are of importance greatly exceeding their bulk, all the statutory provisions being comprised in one short chapter, 27 Stat. L. 531, as amended by 29 Stat. L. 85 and 32 Stat. L. 943. This digest recognizes the importance of the subject by acknowledging the extent to which the character of interstate commerce and the limits of federal power have been considered in the decisions construing the act, and by giving due representation to rulings on the broader aspects as well as on the more purely technical phases of the law. The book is primarily useful to railroads, but will also be of service to the general profession on account of the frequency of the cases arising under section 8, subjecting railroads to liability for injuries received by employees due to defective appliances.

The classification is so minute and complete as to include a profusion of sub-topics, and the material is rendered easily accessible by clear arrangement and elaborate cross-indexing. Rules of law are briefly stated in prominent type, followed in each case by the citation and by a quotation from the opinion of the court. Opinions *contra* are cited at the end of the topic in small type.

All reported decisions rendered before January 1, 1910, have been digested, and there is an appendix in which cases unreported February 24, 1910, are fully stated.

JEWETT'S ELECTION MANUAL

Jewett's Manual for Election Officers and Voters in the State of New York; containing the new consolidated election law, as amended to date, with annotations, forms and instructions. By F. G. Jewett. 18th edition, revised and enlarged by Melvin Bender and Harold J. Hinman, of the Albany bar. Matthew Bender & Co., Albany. Pp. xxii+288 (election law)+271 (constitutional and statutory provisions, forms, etc.)+83 (index). (Cloth, $4; paper, $3.50.)

THIS new edition of a standard manual of the New York election law, the 18th, does not differ to any very marked extent from the 17th, which included the consolidated election law of 1909. The law, however, was amended by the Legislature of 1910 in important respects, and these amendments appear in the edition, bringing the work fully up-to-date. Among the Amendments of 1910 are those relating to corrupt practices at primaries, etc., to registration of voters, publication of constitutional amendments, designation of places for registry and voting, miscellaneous provisions as to inspectors, watchers, challengers, etc.

NOTES

Matthew Bender & Co. of Albany, are issuing a new eighth edition, 1910, of that standard authority, Collier on Bankruptcy, which contains the important and radical amendments to the bankruptcy law passed at the last session of Congress, as well as the decisions to date.

A Decennial Digest Calendar for 1910–1911, in the form of a practical and useful desk pad, has been issued by the West Publishing Company, with a leaf for each week of the year. After the date of each day is the number of that day in the year, which makes it convenient for dating ahead memoranda. A short paragraph on current legal questions from the Decennial itself is inserted beside each day, which should make the calendar interesting and useful to the bar.

Admirers of the late General Lew Wallace, whose number is legion, will take great interest in the tributes to the memory of this noble man delivered at the dedication of the monument in Statuary Hall, in the national Capitol, last January. The proceedings at the unveiling, and in the House and Senate, have been attractively printed under the authority of Congress, and include the addresses of William Allen Wood, Governor Marshall, Senator Beveridge, Rustem Bey, and W. H. Andrews, and a poem by James Whitcomb Riley, not to speak of several eulogies pronounced in the Senate and House.

BOOKS RECEIVED

RECEIPT of the following books is acknowledged:—

Four Hundred Good Stories Collected by Robert Rudd Whiting. Baker & Taylor Co., New York. Pp. 262 (index). ($1.)

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.)

The Public Domain and Democracy; a study of social, economic and political problems in the United States in relation to Western development. By Robert Tudor Hill, Ph.D., Sometime University Fellow in Sociology. Columbia University Studies in History, Economics and Public Law, v. 38, no. 1. Pp. 240 + 9 (bibliography) + 3 (index). ($2.)

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.)

Index to Periodicals

Articles on Topics of Legal Science and Related Subjects

"American Corpus Juris." "The American *Corpus Juris* Project: Its Relation to a Foundation for the Advancement of Jurisprudence and to the Future of American Law." By Joseph I. Kelly, of the Illinois and Louisiana bars. 5 *Illinois Law Review* 129 (Oct.).

This is an attempt, perhaps the first serious attempt that has yet been made, to review the "Corpus Juris" project impartially and argumentatively and to expose its supposed weaknesses in a spirit of candid investigation. This seems to have been the spirit with which the author set about his task, but it is to be feared that as he progressed the zeal of the advocate asserted a degree of control over his better judgment, for he has made rather too free use of the weapon of sarcasm, and has seen fit to debate some of his propositions with what looks like an excess of partisan energy.

Careful scrutiny of Mr. Kelly's erudite paper—we say erudite because he shows much familiarity with legal history and because he has collected his ammunition from far and wide—leads to the conclusion that he has failed to make out a good case against an expository codification of American law. His argument that no parallel exists between the proposed undertaking and the labors of Justinian is irrelevant, and it is not easy to see the bearing of the historical evidence on which he lays such stress on the problem in hand. The strength of the article resides not in its argument against such a work as that proposed, but solely in its criticism of the personal side and administrative details of the project. In these matters he gives his readers something to ponder over.

It will probably be impossible to determine exactly what weight should be imputed to Mr. Kelly's objections, on these particular points, before additional light has been thrown on the administrative side of the project by its sponsors. The most serious of the objections would seem to be the one that the executive board of three would be able to dominate the editorial board of seven, committing it to a system of classification which may be undesirable and warping its disinterested aloofness from commercial considerations. Inasmuch as Mr. Alexander's Memorandum conveyed the impression that the executive board would not interfere in editorial matters, this objection can probably be met.

Comparative Jurisprudence. "A Decade of Juridical Fusion in the Philippines." By Judge Charles Sumner Lobingier. 17 *Case and Comment* 215 (Oct.).

A brief summary, reprinted from the annual bulletin of the Comparative Law Bureau of the American Bar Association.

"Americanizing an Old System of Law."

By Judge George V. Dominguez. 17 *Case and Comment* 218 (Oct.).

A very short account of the rapid assimilation of the Spanish jurisprudence of Porto Rico to the new needs of a people who are bound to become in time thoroughly Americanized.

Copyright. "Copyright Law Reform." *Quarterly Review*, v. 213, no. 425, p. 483 (Oct.).

An able critical review of the objects of the English Copyright Bill of 1910, and of the significance of its leading provisions.

"It is notorious that the manufacturing requirements of the American law, already very unfair, have been rendered more stringent by the Act of 1909; so that now not only the type-setting and printing of books, but also the binding, have to be done in the United States, in order to secure copyright. Moreover, this requirement applies only to books in the English language, and not to those in other languages, and therefore amounts to a direct discrimination against this country. The position will be a delicate one, owing to the importance of the American market to British authors; but it is difficult to see how a continuance of the present state of affairs could be regarded as amounting to reciprocity, and it is to be hoped that the authorities will take advantage of the new Act to secure some relaxation of the onerous requirements of the American law before extending the benefits of British copyright to American citizens."

"The Copyright Question." *Edinburgh Review*, v. 212, no. 434, p. 310 (Oct.).

An outline of the provisions of the British Copyright Bill, the passage of which, in a form that will satisfy conflicting interests, the author advocates.

"Imperial Copyright." By G. Herbert Thring. *Fortnightly Review*, v. 88, p. 688 (Oct.).

"Taking the Bill as a whole, it must be said, in justice, that if it is passed intact as a non-party measure, it ought to bring great order into the existing chaos. . . . It brings all forms of copyright property into line one with the other. It is clear in its draftsmanship, and as little complex as it is possible to make such a difficult subject, and lastly, if the colonies are willing, it will give a copyright to the British author which is practically world-wide."

Corporations. "Limitations on the Powers of Common Law Corporations." By Percy T. Carden. 26 *Law Quarterly Review* 320 (Oct.).

The case of *British South Africa Co.* v. *De Beers Consolidated Mines Ltd.* ([1910] 1 Ch. 354) involved questions of the validity of a mortgage stipulation possibly acting as a clog on the equity of redemption, and of the validity of a contract granting a monopoly. The article is not concerned with these questions, however, so much as with the general powers of common law corporations to make contracts of a kind expressly forbidden by their charters.

"The Rules which Determine the Validity or the Invalidity of Voting Agreements of Corporate Stock." By Walter K. Tuller. 44 *American Law Review* 663 (Sept.–Oct.).

A valuable article, marked by intelligent generalization from a mass of carefully studied precedents.

See Interstate Commerce, Monopolies.

Cost of Living. "A Cost-of-Living Report." Editorial. *Journal of Political Economy*, v. 18, p. 637 (Oct.).

The view is here expressed that the report summarizing "the hasty and inadequate sessions of the Lodge Cost-of-Living Committee . . . is disappointing in that it draws but slightly upon new data for the basis of its conclusions. . . . Naturally the majority report minimizes the effect of the tariff upon prices. . . . The minority report is confessedly a political document written in partisan style, and accepting some of the 'causes of higher prices' assigned by the majority report, but laying great stress upon the tariff and the 'trusts' among such causes. Neither document justifies the hopes that were expressed concerning this investigation, or does much more than confirm the belief in the entire insincerity with which the problem has been handled."

See Economics.

Criminal Law. "The Police Judge and the Public." By George W. Alger. *Outlook*, v. 96, p. 356 (Oct. 15).

This article reviews conditions in the police magistrates' courts of New York City, as described in the report of the Commission appointed by Governor Hughes in 1908, and praises the legislation adopted in consequence of that report, resulting in remedying the unfortunate promiscuous mingling of prisoners at the detention pens and in the abolition of the "bridge" in front of the judge's bench. The view is expressed, however, that these reforms are insufficient; what is needed is to clothe the lower courts with larger authority and greater dignity.

See Political Crimes.

Direct Legislation. "The Referendum in Action." By Edwin E. Slosson, Ph.D. *Independent*, v. 69, p. 734 (Oct. 6).

A vivid description of the actual workings of Swiss election machinery.

Disarmament. "Peace and Disarmament." By Col. Richard Gdake. *McClure's*, v. 36, p. 113 (Nov.).

This great German military critic pleads earnestly for the reduction of armaments, as something essential to the peace of Europe and the supremacy of the white race.

Economics. "Professor Norton's Law of Progress." By Professor T. N. Carver of Harvard University. *Popular Science Monthly*, v. 77, p. 510 (Nov.).

Professor Carver calls Professor Norton's article in the September number of the foregoing journal (see 22 *Green Bag* 595) a notable contribution to economic theory, but he considers his proposition to be merely a part of the universal law of diminishing returns, and not a refutation of that law.

Professor Norton is declared to have apparently overlooked the importance of land and to have laid too much stress on labor, in his theory that means of subsistence do not increase less slowly than population, as this would hold true only so long as there were an abundant supply of new land bringing new funds of capital into being.

Elections. See Nominations.

Employer's Liability. "Modern Conception of Civil Responsibility." By P. B. Mignault, K.C. 44 *American Law Review* 719 (Sept.–Oct.).

Read before the International Law Association (see 22 *Green Bag* 595). Particularly good as showing the extent to which the principle of workmen's compensation has been adopted, normally and reasonably rather than as the result of revolution, in French and English jurisprudence.

Executive Power. "President Taft and the Extra-Constitutional Function of the Presidency." By Samuel J. Kornhauser. *North American Review*, v. 192, p. 577 (Nov.).

There has been a popular tendency of late years, says this author, to regard the President as entitled to exercise authority over Congress in matters of legislation, and the author opposes this view as subversive of the Constitution, and quotes from the writings of great statesmen of the past to show the dangers of usurpation of a despotic sway over Congress by the Presidency. He thinks that President Taft is being done an enormous injustice by those who oppose him for his failure to exert himself more vigorously, especially with reference to tariff legislation in the first year of his administration.

The paper is sound in its view that the Constitution does not authorize the President to mould legislation, but the author is evidently of that class of writers who adopt the narrower construction of the advisory powers granted the President by the Constitution. Vigorous, persistent assertion by the President of his desires as to matters of legislation, and threats to exercise the veto power, are hardly to be called extra-constitutional, so long as he withholds from lobbying or coercion.

Federal and State Powers. "Wilson *versus* the 'Wilson Doctrine'." By Edward Lindsey. 44 *American Law Review* 641 (Sept.-Oct.).

In this sound and admirable article, the so-called "Wilson doctrine," closely akin to Mr. Roosevelt's "New Nationalism," is studied with reference to the writings of James Wilson, and the outcome is not only a vindication of the memory of that great statesman, but also a crushing refutation of the fallacy of the federal government possessing "inherent" powers not enumerated in the Constitution. That Wilson did not originate a doctrine at variance with the common intellectual property of the American people of his time, and that his theory of a government of enumerated powers is wholly consistent with the view taken by the United States Supreme Court in *Kansas* v. *Colorado*, is here convincingly set forth. By way of conclusion,—

"We see therefore that there is no justification in Wilson's writings for saddling upon him any theory of inherent governmental power under the Constitution of the United States. This is clear from his general theories of government, from what he wrote of the Constitution itself and even from the very argument correctly understood, which is cited as evidence that he held the doctrine of inherent power. Such a conception of Wilson's views arises from erroneous interpretations and misunderstandings of passages in his works."

Government. "The Co-operative Nature of English Sovereignty—III." By W. W. Lucas. 26 *Law Quarterly Review* 349 (Oct.).

This installment of a learned and important series of papers is concerned primarily with the co-operative nature of the peace, judicial, and exchequer functions of the Crown. Continued from 26 *L. Q. R.* 54, 247 (see 22 *Green Bag* 182, 537).

China. "China—A Permanent Empire." By Gilbert Reid, Director-in-Chief of the International Institute of China. *World's Work*, v. 21, p. 13674 (Nov.).

Egypt. "The Misgovernment of Egypt." By A. J. Butler. *Nineteenth Century*, v. 68, p. 587 (Oct.).

Laying stress on the paramount importance of British control, and fixing a great deal of blame upon Sir Eldon Gorst, the British Agent in Egypt.

India. "The Native States of India." By Professor John Westlake, K.C. 26 *Law Quarterly Review* 312 (Oct.).

A review of "The Native States of India," by Sir William Lee-Warner. Professor Westlake does not favor the view that international law applies to the relations of these states with one another and with the Empire. With characteristic penetration, he suggests the wisest policy for the British Government in dealing with the claims and jealousies of the semi-sovereign principalities.

"Indian Unrest." By Sir A. H. L. Fraser, late Lieut.-Governor of Bengal. *Nineteenth Century*, v. 68, p. 747 (Oct.).

"There seems to be great reason to believe that the situation in India has very much improved."

"Lord Minto's Viceroyalty." *Edinburgh Review*, v. 212, no. 434, p. 501 (Oct.).

A review of the Governor-General's administration, possibly more appreciative than critical, but aiming at impartiality.

Ireland. "Nationalism and Nationality in Ireland—II." By Col. Henry Pilkington, C.B. *Contemporary Review*, v. 98, p. 458 (Oct.).

Latin America. "The Promise of Latin America." *Quarterly Review*, v. 213, no. 425, p. 451 (Oct.).

The civilization of Latin America is here analyzed with discernment in an extended study, and the national and social characteristics of the different republics are reviewed.

Persia. "A Year of Constitutional Persia." By Zawwar. *National Review*, v. 56, p. 306 (Oct.).

See Direct Legislation, Executive Powers, Federal and State Powers, History, Interstate Commerce, Nominations, Party Politics, Race Distinctions, Socialism.

History. "The Electoral Commission as the Arbiter of Conflicting Claims to the Presidency." By E. Countryman. 44 *American Law Review* 701 (Sept.–Oct.).

An attempt to review the Tilden-Hayes electoral controversy with impartiality. The author supported Mr. Hayes in that election, and has never admired Mr. Tilden nor his methods, but he thinks Mr. Hayes should have declined an honor dishonestly and illegally bestowed. The three Associate Justices who joined in the decisions are unfavorably criticized.

Insurance. See Suretyship.

International Law. See Disarmament, Government, International Servitudes, Newfoundland Fisheries Arbitration, Prize Law.

International Servitudes. "A Note on the Hague Award in the Atlantic Fisheries Arbitration." By James Edward Hogg. 26 *Law Quarterly Review* 415 (Oct.).

A brief *résumé* showing how the Tribunal exploded the theory of international servitudes which was urged by counsel for the United States. But though this country did not win its contention that it had a right to concur in the framing of fishery regulations, it nevertheless, through the theory of "obligatory relation," achieved the right to have something to say about their reasonableness. "Instead of the anomalous and inconvenient right *in rem* which was claimed, the United States have secured a normal and practical right *in personam*."

[The Tribunal, by defining an international servitude as an express grant of a sovereign right as opposed to that of a "purely economic" right, seems to have squarely decided that a fishing right cannot be a servitude. The distinction in the minds of the Tribunal seems to have been that between a public and a private right. While fishing is not a sovereign or public right, the regulation of fishing is, and it might be possible to treat a grant of such a right as a cession of the police power over certain fisheries. The dilemma may perhaps be avoided if we suppose the Treaty of 1818 not to be fairly subject to construction as an express grant of sovereign power, but simply of a fishing privilege in which no such power can be involved except by remote implication. And the Tribunal went on record as firmly opposing the recognition of any international servitude not resting on the express evidence of an international contract. There may consequently be a loophole for those learned text-writers who have been saying that fishing rights in foreign territorial waters may constitute servitudes. But it would now appear that they cannot be servitudes without an express grant of a right clearly sovereign. If such a grant exists, possibly it would be more nearly correct to call a fishing privilege a right annexed to or growing out of a servitude, than a servitude itself. —*Ed.*]

Interstate Commerce. See Federal and State Powers, Monopolies, Rate Regulation.

Labor. "Strikes; I." By R. A. Reid, D.C.L. 30 *Canadian Law Times* 749 (Oct.).

The earliest recorded instances of strikes are here said to include the strike among the flute players in the Temple of Jupiter described by Livy, the strike of the bakers of the Roman province of Magnesia, the exodus of the Israelites from Egypt, etc. Roman laws regarding strikes are mentioned, and modern English and Canadian legislation legalizing strikes is briefly described.

"The American Working Man." By "Politicus." *Fortnightly Review*, v. 88, p. 604 (Oct.).

"The various tests applied to production and consumption, to wages and savings, confirm each other. They show a marvelous industrial expansion in the United States, and an alarming industrial decline in Great Britain. They show conclusively that the British working man is ill-employed, ill-paid, and poor, if compared with his exceedingly prosperous American colleague."

"The Newport Dock Dispute." By T. C. Tobias of the Irish Bar. 26 *Law Quarterly Review* 377 (Oct.).

The English law relating to intimidation, violence, and conspiracy is here discussed.

See Employer's Liability, *Osborne* case.

Legal Evolution. "The Lawyer and the Community." By Woodrow Wilson. *North American Review*, v. 192, p. 604 (Nov.).

(See 22 *Green Bag* 585 for address before the American Bar Association).

Legal History. "The Influence of Biblical Texts upon English Law." By John Marshall Gest. 59 *Univ. of Pa. Law Review* 15 (Oct.).

Shows perhaps a tendency to overrate the Biblical influence and to underrate other historical influences, in those instances where there seems to be some conformity of the common law to Biblical teachings. The article has however a good literary savor.

"Burgage Tenure in Mediæval England—II." By M. de W. Hemmeon. 26 *Law Quarterly Review* 331 (Oct.).

The continuation of a very scholarly and informing essay on a neglected phase of the feudal system (see 22 *Green Bag* 538).

"Hallam and the Indemnity Acts." By T. Bennett. 26 *Law Quarterly Review* 400 (Oct.).

These acts, affecting the position of Nonconformists in the eighteenth century, are chiefly of antiquarian interest. While Hallam's Constitutional History is commended, in general, for its accuracy, it is found to have erred in certain particulars and to have misled many later writers.

"Jurisdiction of the Inns of Court over the Inns of Chancery." By Hugh H. L. Bellot. 26 *Law Quarterly Review* 384 (Oct.).

See Government.

Marriage and Divorce. "Marriage, Divorce and Eugenics." By Montague Crackanthorpe. *Nineteenth Century*, v. 68, p. 686 (Oct.).

Arguing for the treatment of marriage not so much as a sacrament or civil contract, as an institution to be regulated for the moral, spiritual, and social welfare of the race. Legal phases of the subject are intelligently discussed, but no specific legislation is propounded.

Monopolies. "Business Enterprise and the Law." By Gilbert Holland Montague. *North American Review*, v. 192, p. 694 (Nov.).

The anti-corporation legislation adopted throughout the United States during the past generation is here considered to have been unsound and revolutionary. Repressive legislation should be directed "Not against the form of a business organization, nor yet against the power which its efficiency may develop, but only against the use of unlawful means of competition. . . . The principle which should guide all legislation upon this intricate subject was tersely expressed by the committee which drafted the Corporation Law of Massachusetts in 1903: 'So far as purely business corporations are concerned, and excluding insurance, financial and public service corporations, the state cannot assume to act directly or indirectly as guarantor or sponsor for any organization under corporate form. . . . The state should permit the utmost freedom of self-regulation, if it provides quick and effective machinery for the punishment of fraud. . . .'"

"How to Control the Trusts: Three Views." By William Dudley Foulke, Philip H. Farley, and the Editors of the *Outlook*. *Outlook*, v. 96, p. 364 (Oct. 15).

Mr. Foulke's remedy is giving the federal Bureau of Corporations price-fixing powers analogous to the rate-reviewing powers of the Interstate Commerce Commission, and he looks upon federal incorporation or a federal license system as inefficacious. Mr. Farley would compel corporations to publish semi-annual statements showing their net assets and net income, and under suitable conditions, where business has passed the pioneer stage, would apply the Massachusetts system of regulation of capitalization. The Editors of the *Outlook* believe that government regulation should be extended to all corporations using the public highways or controlling public necessities like fuel, light, and food, that clear statements of corporate finances or regulation of stock issues should be insisted on, and that the physical cost of corporate property should be recognized as a large element in determining its value, and a system of permissive federal incorporation or federal license is suggested as likely best to protect the interests of the public.

"De l'Influence Économique, Juridique, et Sociale des Trusts aux États-Unis." 37 *Journal du Droit International Privé* 1102.

"Who is to blame, in the last analysis, for this disturbance of economic equilibrium? It is undeniable that those to blame are, considered as a whole, the powerful ones in finance, industry and high commerce; for it is they who set the example in practical affairs, just as their wives do in matters of fashion. Seconded by the complacency of politicians, protected in the majority of cases by high customs duties and by elastic legislation, they have by their insolent success and their scorn of law developed in the nation a spirit of speculation, and have established false standards of luxury and of morality."

"What is the Essence of the Trust Evil?" By W. A. Coutts. 71 *Central Law Journal* 256 (Oct. 14).

"Is it not clear that the essence of the trust evil is the evil which appertains to all great aggregations of wealth, namely, the overwhelming power which the law confers upon the owner, whether the owner be an individual or a corporation?"

See Corporations.

Newfoundland Fisheries Arbitration. "Newfoundland and the Hague Fisheries Award." By Beckles Willson. *Nineteenth Century*, v. 68, p. 719 (Oct.).

The treatment is largely historical, showing how the fisheries dispute actually started. The award is considered with reference to its practical consequences, rather than in its legal aspect.

See International Servitudes.

Nominations. "Direct Primaries — A Needed Measure of Reform." By Darwin R. James, Jr. *Editorial Review*, v. 3, p. 1111 (Nov.).

"Direct Primaries—Vain Reform Tinkering and its Moral-Labor Saving Devices." By James L. Brewer. *Editorial Review*, v. 3, p. 1126 (Nov.).

Two articles on the affirmative and negative sides, respectively, of the question.

Osborne Case. See Party Politics.

Party Politics. "The New Politics—Parties and Men." By William Garrott Brown. *North American Review*, v. 192, p. 630 (Nov.).

A second article on the subject (see 22 *Green Bag* 658), wherein the author predicts that there will be two parties in this country, one the party of privilege, the other the party opposed to it; and he thinks this sure to be the result, whether the latter party is to be the Democratic party or is to be a new party organized by the Progressive Republicans. Roosevelt receives eloquent homage from this writer, but is conceived as lacking the characteristics necessary to a sound, safe leader of a progressive opposition party. There must be no one-man power, and proper leaders can come only through the awakening of "a widespread, an intelligent, and a stubborn patriotism."

"The Confusion of American Politics." By Sydney Brooks. *Fortnightly Review*, v. 88, p. 646 (Oct.).

The writer makes some acute and just comments on Messrs. Taft and Roosevelt, their methods and principles, but he betrays an undue bias in favor of that popular cult of exaggeration which the sensational magazine writers and Mr. Roosevelt have done so much to foster. Mr. Brooks greatly overestimates the devotion of the American people to this cult. "It is because he has returned from Europe more than ever the foe of Privilege that Mr. Roosevelt has stepped instantly back into the moral leadership not only of the Republican Party but of the American people." The results of the November elections, however, hardly confirm such a statement.

"American Affairs." By A. Maurice Low. *National Review*, v. 56, p. 271 (Oct.).

Reviewing the important part which the doctrine of state rights has played in American politics, this writer considers that a political issue has at last been found in the United States. He believes that state rights will be taken up by the Republicans, and that this issue will divide the party, new parties arising on the ruins, one favoring Mr. Roosevelt's "new nationalism" and the other Mr. Taft's "old nationalism." The way is prepared for a wholesale revolutionizing of parties, and parties will thus come to mean something.

England. "The Story of the *Osborne* Case." By Harold Cox. *Nineteenth Century*, v. 68, p. 569 (Oct.).

This article goes fully into the circumstances of the noted case of *Osborne* v. *Amalgamated Society of Railway Servants* (22 *Green Bag* 135), the decision in which has been highly distasteful to the Labor party in England, inasmuch as it has made it impossible for Labor members of Parliament to secure any remuneration for their services except through voluntary subscription.

"The Position of Trade Unions." By Harold Cox. *Quarterly Review*, v. 213, no. 425, p. 567 (Oct.).

The political demands of the English trade unions and the complexity of the situation growing out of the *Osborne* judgment are here set forth.

England. "Conservatism." *Quarterly Review*, v. 213, no. 425, p. 501 (Oct.).

We list this paper because some readers may be interested in its thoughtful historical review of the vicissitudes of political parties in England during the past hundred years, treated from the standpoint of one who believes that the Unionist cause can succeed only by steady adherence to conservative principles.

Patents. "Liability of the United States for Use of Patented Inventions; with special reference to the Act of Congress entitled 'An Act to Provide Additional Protection for Owners of Patents of the United States, and for Other Purposes,' approved June 25, 1910." By George A. King. *Chicago Legal News*, v. 43, p. 74 (Oct. 15), 10 *Phi Delta Phi Brief* 138 (Nov.).

This paper was read before the Patents Trademark, and Copyright Section at the recent annual meeting of the American Bar Association. It gives a very complete, detailed exposition of the purpose of the act and the import of its various provisions.

"Mechanical Equivalents in the Law of Patents." By Hugh K. Wagner. 71 *Central Law Journal* 275 (Oct. 21).

The writer finds the law on this subject in a somewhat confused state.

Penology. "Fifteen Years' Work in a Female Convict Prison." By the Countess of Bedford. *Nineteenth Century*, v. 68, p. 615 (Oct.).

Full of observations on the general subject of the crimes and punishments of women.

"Crimes and Their Treatment." By "Lex." *Westminster Review*, v. 174, p. 392 (Oct.).

Dealing largely in generalities, but evidently written by one who has intelligent sympathy for sound reform projects.

See Criminal Law.

Police Power. See Criminal Law, Public Health, etc.

Political Crimes. "Rebellion." By Henry W. Nevinson. *North American Review*, v. 192, p. 680 (Nov.).

The severity with which states punish the crime of rebellion inspires some readable reflections. The author evidently believes that political offenses should not be treated as rigorously as ordinary crimes; and he is in favor of guaranteeing the rights of war to rebels, in the same way as to belligerents.

Population. See Economics.

Practice. "How to Draw Notices of Mechanics' Liens." By Hervey J. Drake. 23 *Bench and Bar* 13 (Oct.).

Treated purely with reference to New York practice.

Prize Law. "Hospital Ships and the Carriage of Passengers and Crews of Destroyed Prizes." By A. Pearce Higgins. 26 *Law Quarterly Review* 408 (Oct.).

Procedure. "The Appellate Court's Congested Docket in the First District." By Orrin N. Carter, Justice of the Illinois Supreme Court. 5 *Illinois Law Review* 152 (Oct.).

"In my judgment Bacon's idea as to amending laws should be the plan adopted for procedural reform. He said: 'The work which I propound tendeth to pruning and grafting the law and not to ploughing up and planting it again; for such a remove I should hold indeed for a perilous innovation, but in the way I now propound the entire body and substance of the law shall remain, only discharged of idle and unprofitable or hurtful matter.' In these matters better results will be obtained if we 'carry the trowel to build, but not the torch to burn.'"

See Criminal Law.

Public Health. "Legal Aspect of Public Health Work in Illinois." By Henry Bixby Hemenway, M.D. 5 *Illinois Law Review* 157 (Oct.).

The general powers of the states are discussed at length with reference to constitutional law, and attention is paid to Illinois matters of purely local concern.

Public Policy. See *Osborne* Case.

Race Distinctions. "Negro Suffrage in a Democracy." By Ray Stannard Baker. *Atlantic*, v. 106, p. 612 (Nov.).

Discussing both the legal and practical aspects of the negro suffrage, the author is earnest in his advocacy of equal treatment for the white and colored races, in the spirit of the Fifteenth Amendment, though he is not opposed to restrictions of the suffrage which apply to both races alike.

Rate Regulation. "Shall Railway Profits be Limited?" By Samuel O. Dunn. *Journal of Political Economy*, v. 18, p. 593 (Oct.).

"Some consideration ought and must be given to their profits in determining what rates railways should be allowed to charge. But there should also be considered the nature of the services rendered; their value to the shippers receiving them; how the profits of the railways affected compare with those of other industrial concerns in the same territory; the density and nature of the traffic; how much the traffic can reasonably bear; how much other railways than those involved charge for similar services and earn on similar rates, etc. If, in view of these considerations, the rates seem unreasonably high *per se* they should be reduced; and if they seem unreasonably low *per se* they should be allowed to be advanced. The courts have held that railways cannot charge extortionate rates *per se*, even if they cannot otherwise make any profit; and it would seem that if they do make reasonable rates it is neither equitable nor expedient to reduce their rates merely because their profits are large. It would seem that the most effective way to get low rates would be not to provide that the reasonableness of a railway's rates should be measured by the amount of its profits, and that the greater its earnings grew the lower it would have to make its rates, but to provide, if some practicable way of carrying out such a plan could be devised, that the reasonableness of the profits should be measured by the reasonableness of the rates, and that the *lower* a road made its rates the larger should be the profits that it would be allowed to enjoy."

"Should Railway Rates be Increased?" By Harrison Standish Smalley, Assistant Professor of Political Economy in University of Michigan. *Independent*, v. 69, p. 806 (Oct. 13.).

The author thinks that the ten months allowed the Interstate Commerce Commission to suspend rates while their reasonableness is awaiting determination is not long enough; the time required will seldom, if ever, be less than eighteen months.

"How the Railroad Works with the Trust, III." By C. M. Keys. *World's Work*, v. 21, p. 13680 (Nov.).

The gist of this article is that the big shippers continue to be favored, and that the issue of fair rates can be met only by

shifting a burden from the small to the large shippers.

Real Property. See Legal History.

Socialism. "Socialism According to William Morris." By William Sinclair. *Fortnightly Review*, v. 88, p. 723 (Oct.).

State and Federal Powers. See Party Politics, Public Health.

Suretyship. "Contracts of Guaranty and Indemnity and Credit Insurance." By Karl E. Steinmetz. 44 *American Law Review* 736 (Sept.–Oct.).

An attempt to trace the true basis of distinction between contracts of guaranty and of suretyship. Contracts of credit insurance, it is pointed out, liability being contingent on loss rather than default, are contracts of indemnity rather than of guaranty and should be governed by the rules of insurance rather than of suretyship.

Tariff. "Can a Tariff Commission Succeed?" By Harrison S. Smalley. *North American Review*, v. 192, p. 595 (Nov.).

An able exposition of the practical difficulties of tariff revision by a commission, by an impartial economist. The author is careful to avoid the declaration that the plan cannot succeed. The article, however, strengthens one's conviction that the Republican party has a most formidable task on its hands, in allaying popular discontent with the tariff, and that its success in disposing of this problem can be only temporary at best, its continued existence in power depending really on the treatment of other political issues.

"Canadian Reciprocity With the United States." By J. Castell Hopkins. *National Review*, v. 56, p. 320 (Oct.).

Taxation. "The Income Tax in Georgia." By William A. Shelton. *Journal of Political Economy*, v. 18, p. 610 (Oct.).

A study of the workings of the income tax levied by Georgia during two years of the Civil War period.

United States Supreme Court. "The Supreme Court of the United States." By J. F. Haig. *Independent*, v. 69, p. 1038 (Nov.).

A short outline of the routine methods of the Court.

Workmen's Compensation. See Employer's Liability.

Miscellaneous Articles of Interest to the Legal Profession

Biography. "Chief Justice Fuller." By Robert P. Reeder. 59 *Univ. of Pa. Law Review* 1 (Oct.).

Not so much a study of the legal mind of the late Chief Justice as an outline of the general course of his decisions, as shown particularly by the dissenting opinions which he wrote.

"Taft and Roosevelt: A Composite Study." By Francis E. Leupp. *Atlantic*, v. 106, p. 648 (Nov.).

A study of the characteristics of both men, compared and contrasted, in the main sympathetic and fair.

"My Social Life in London." By Goldwin Smith. *Atlantic*, v. 106, p. 690 (Nov.).

Here we catch glimpses of the interesting personalities of Macaulay, Brougham, and Lord Lyndhurst, not to mention others famous in public life.

Canal Zone. "Canal Zone Laws and Judiciary." By Theodore C. Hinckley. 17 *Case and Comment* 220 (Oct.).

Criticism of Judges. "Criticism of the Judiciary—The *Dred Scott* Case Not Applicable." By Henry Edwin Tremain. *Editorial Review*, v. 3, p. 1102 (Nov.).

"It is neither 'intelligent scrutiny' nor 'candid criticism' to select *dissenting* opinions and *declare* dogmatically that *they* are 'unquestionably the correct view,' implying that the case at the bar was erroneously decided, unless such a naked declaration should be pursued in a lawyer-like way, along recognized lines, towards some other conclusion."

Ferrer. "The Life and Death of Ferrer." By William Archer. *McClure's*, v. 36, p. 43 (Nov.).

The English dramatic critic went to Spain to make a thorough investigation of the events caluminating in the execution of Ferrer. This first installment, bringing the story up to the arrest of Ferrer, is a human document of rare interest. An impartial estimate of Ferrer's character and opinions is offered, and while he is represented as an inoffensive man he is not treated as a martyr or a saint.

History. "A Diary of the Reconstruction Period; X, The Conduct of Impeachment." By Gideon Welles. *Atlantic*, v. 106, p. 680 (Nov.).

The extracts here printed contain a vivid contemporaneous account of the proceedings at the impeachment trial of President Johnson.

Pensions. "The Pension Carnival; II, Rolling up the Big Snowball." *World's Work*, v. 21, p. 13611 (Nov.).

A fanatical attack on the administration of the Pension bureau.

Political Corruption. "Political Reform in the Party." By William H. Taft. *Independent*, v. 69, p. 901 (Oct.).

This paper deals, in rather a humorous way, with the evil of municipal graft primarily. While written when Mr. Taft was thirty-two, it shows no fundamental difference of attitude from that of the President today, except that the cares of public life did not then weigh heavily on his shoulders and he was able to write with more exuberance and offhandedness.

Tariff. "The Mysteries and Cruelties of the Tariff; The Bulwark of the Wool Farce." By Ida M. Tarbell. *American Magazine*, v. 71, p. 51 (Nov.).

Tchaykovsky. "My Prison Story." By Nicholas Tchaykovsky. *Outlook*, v. 96, p. 493 (Oct. 29).

Telling of his arrest, imprisonment, and acquittal. It is not a dark picture, but it shows that the system of administering justice in Russia has many absurdities.

Wall Street. "The Masters of Capital in America: Morgan, the Great Trustee." By John Moody and George Kibbe Turner. *McClure's*, v. 36, p. 3 (Nov.).

The story of Morgan's career is brought in this first installment up to the year 1898. The portrait of Morgan is ruthlessly frank, but gives in the main a sympathetic, appreciative picture of the man. No effort is made to attach a forced, unnatural interpretation to great deeds in the world of finance. The authors have sought in this most readable article to write an impartial history of the manner in which Morgan won pre-eminence as a financier. The growth of the syndicate, and of the methods by which the name of Morgan came to be synonymous with sound, conservative banking and promotion are treated with an entertaining fullness of detail.

"It: The Sovereign Political Power of Organized Business." By Lincoln Steffens. *Everybody's*, v. 23, p. 646 (Nov.).

This second installment is devoted to the power exercised by the financial interests of Wall street in injuring the credit facilities of individuals or properties toward which they are not friendly. The author evidently believes that a credit monopoly exists in the United States, not yet held in check by legislation. Those who control great banking institutions possess an unfair advantage over outsiders seeking to finance meritorious enterprises.

Latest Important Cases

Banking and Currency. *Deed of Real Estate to National Bank not Void but Voidable.* N. Y.

Associate Justice Hughes handed down his first decision as a member of the Supreme Court of the United States on November 7, in the *Kerfoot* case. The opinion was marked by unusual brevity, the whole paper, with citations, taking up only about two printed pages. "But while the purpose of the transaction was not one of those described in the statute for which a national bank may purchase and hold real estate," said the Court, "it does not follow that the deed was a nullity and that it failed to convey title to the property. In the absence of legislation to the contrary, a conveyance of real estate to a corporation for a purpose not authorized by its charter is not void, but voidable, and the sovereign alone can object."

Any other finding, the decision holds, will lead to great confusion and injustice.

Conveyances. *Equity Will Interfere to Cancel Sale Induced by Fraudulent Representations of Purchaser.* N. Y.

Where the owner of vacant city property is induced to sell it by the representations of the buyer that he intended to build dwelling houses thereon, when his purpose was in fact to erect a public automobile garage, which would materially injure seller's adjacent property, an action may be maintained by the seller to cancel the deed and compel a reconveyance of the property, because of the sale having been induced by the purchaser's fraud in relation to a material and existing fact.

This was the decision of the New York Court of Appeals in *Adams* v. *Gillig* (reported in *N. Y. Law Jour.* Oct. 19), rendered Oct. 11, Chase, J., writing the opinion.

Corporations. *Indictment Not Necessary for Conviction of Crime—Jurisdiction of Inferior Courts.* Mass.

The notion that a corporation can only be criminally dealt with by indictment, however trivial the offense, was exploded by a decision rendered by the full bench of the Massachusetts Supreme Judicial Court, Oct. 18, in the case of *Commonwealth* v. *New York*

Central & Hudson River Railroad Co. The Court held that corporations are on a par with natural persons and may be dealt with by inferior courts upon complaints for offenses within their jurisdiction.

The Court declared that the trend of recent legal authorities has been to make corporations like individuals amenable to trial by criminal complaints where they cover the offenses charged. The district court had jurisdiction by virtue of the general provisions of Revised Laws, chap. 160, sec. 24, giving it the right to deal with "all crimes and offenses" less than felony, "except libels and conspiracies."

Criminal Law. See Corporations, Procedure.

Equity. See Conveyances.

Fifteenth Amendment. *Violated by Maryland Statute of* 1908—"*Grandfather Clause.*" U. S.

All devices in use in the South for the purpose of wiping out the colored vote were declared unconstitutional by Judge Thomas J. Morris, of the United States Circuit Court in the *Anderson* Case, lately decided at Baltimore. The original action which was brought against the Annapolis registers was based on their refusal to register three colored men because they could not comply with the provision which required them to have been able to vote in 1868, or if not then, that their ancestors must have been eligible to vote. Anderson, one of the colored men, could not have voted at that time because of his race and color, and Howard and Brown, two others, were denied registration because their father and grandfather, respectively, could not, on account of race and color, have so voted.

The Court said:—

"It is true that the words 'race' and 'color' are not used in the statutes of Maryland, but the meaning of the law is as plain as if the very words had been made use of; and it is the meaning, intention and effect of the law, and not its phraseology, which is important. . . .

"There are restrictions to the right of voting which might, in fact, operate to exclude all colored men which would not be open to objections of discriminating on account of race or color. As, for instance, it is possible that a property qualification might, in fact, result in some localities, in all colored men being excluded; and the same might be the result, in some localities, of an educational test; and it could not be said, although that was the result intended, that it was a discrimination on account of race or color, but it would be referable to a different test. But looking at the constitution and laws of Maryland prior to January 1, 1869, how can it be said with any show of reason that any but the white man could vote then —and how can the Court close its eyes to the obvious fact that it is for that reason solely that the test is inserted in the Maryland Acts of 1908? And is not the Court to take notice of the fact that during all the forty years since the adoption of the Fifteenth Amendment, colored men had been allowed to register and vote in Maryland until the enactment of the Maryland statute of 1908?"

Federal Circuit Court in Oklahoma Declines Jurisdiction—"Grandfather Clause" in State Constitution. Okla.

Holding that it had no jurisdiction to grant relief from the operations of the "grandfather clause" amendment to the Oklahoma constitution, the federal circuit court at Guthrie, Okla., on Nov. 1 dismissed the application of Daniel Sims, a former slave, who asked a writ of injunction that would permit him and other negroes to vote at the general election on Nov. 8. This decision made the grandfather clause operative for the recent election disfranchising several thousand negroes. An appeal has been taken.

Insurance. *Mortgagee Clause in New York Fire Insurance Policy—Notice of Loss by Mortgagee.* N. Y.

An interesting decision relating to the New York Standard Form Fire Insurance Policy and the usual mortgagee clause was recently handed down by the New York Appellate Division in the case of *Heilbrun* v. *German Alliance Insurance Co.* (reported *N. Y. Law Journal* Nov. 14, 1910). The policy contained the usual mortgagee clause, and the plaintiff was assignee of the mortgagee. There was no allegation in the complaint that the required notice of loss and sworn proofs of loss were ever given to the insurance company, either by the assured or the mortgagee, or this assignee plaintiff. The defendant demurred to the complaint because of the absence of such allegation.

It was held that "the mortgagee was under no obligation to furnish proof of loss or to give

any other or earlier notice of loss than that involved in the commencement of this action." Moreover, under the mortgagee clause, the insurance as to the interest of the mortgagee was not to be invalidated by any act or neglect of the assured mortgagor or owner. Accordingly, the Court said, "it was not therefore necessary to allege that he [the mortgagee] or the mortgagors had given such proofs of loss or to set up an express waiver thereof by the insurer."

The Court cites the conflicting decisions of other jurisdictions and states that the question has not previously arisen in New York.

There is a very strong dissenting opinion which goes over the authorities and arguments against the majority holding quite fully.

Juries. *Reversal on Technicalities—Jurors May Separate and Read Newspapers.* U. S.

A man's constitutional rights are not necessarily violated by a jury which is trying him on a charge of murder being allowed to separate and to read newspapers during the trial, was the holding of the Supreme Court of the United States Oct. 31, in *Holt* v. *U. S.* The Court also held similarly in regard to the refusal of a judge to send a jury out of the court room during arguments on the admission of evidence.

Furthermore, the Court laid down the rule that the act of requiring the accused to put on a coat, alleged to have been worn when the crime charged was committed, did not amount to "requiring a prisoner to testify against himself."

These points were made in the decision of the Court in refusing to interfere with the sentence of life imprisonment imposed by the federal circuit court of western Washington.

In announcing the opinion of the Court, Mr. Justice Holmes said that if the mere opportunity for prejudice and corruption was to raise a presumption that they exist, it would be hard to maintain jury trial under the conditions of the present day.

Marriage and Divorce. *Michigan Divorce Invalid in New York—Service by Publication on Defendant Outside the State.* N. Y.

In *Catlin* v. *Catlin*, noted in this department last month (22 *Green Bag* 655), the New York Supreme Court held a Nevada divorce void for want of jurisdiction. Somewhat to the same effect was the decision of the Appellate Division in *Tyson* v. *Tyson*, decided Nov. 3, wherein the New York Justices held that a Michigan divorce was invalid in which the defendant had been served by publication, during absence from the state.

South Dakota Divorce Invalid in District of Columbia—No Jurisdiction over Defendant Wife Outside the State. D. C.

A similar case arose in the District of Columbia, the Supreme Court of the District holding a South Dakota divorce invalid. The divorce which Judge Stafford refused to recognize was obtained by Milton E. Davis who in April, 1907, went to South Dakota, in December got his divorce, and three weeks later was married again. Judge Stafford held that inasmuch as Davis had "deserted his wife and left this jurisdiction, it follows that the court of South Dakota has jurisdiction over her and no right to bind her by its decree."

Mortgages. See Insurance.

Orinoco Claims Case. *Award of Damages Quashed Because Arbitrator Exceeded Powers under Protocol between United States and Venezuela.* Hague Court.

The Orinoco Steamship Company, a New Jersey corporation, was granted certain exclusive privileges by the government of Venezuela, but the agreement was subsequently repudiated by President Castro. The steamship company instituted an action for $1,400,000 damages.

The case was eventually submitted to Dr. Charles Barge, who awarded the company $28,700. The company appealed to the American government, which refused to accept the decision on the ground that it was contrary to the principles of international law.

After prolonged negotiations it was agreed to submit the matter to the Hague Permanent Court of Arbitration. The Court rendered a decision Oct. 25 holding the Barge award null on four points, and awarding the American company $92,672 damages, with interest and costs.

The decision is important in that it recognizes the contention of the American Government that the exceeding of powers and essential error may be grounds for holding void an international award.

The Court allowed the United States

$7,000 on account of counsel fees and expenses of litigation, which also marks a new step in such matters.

Procedure. *Acquittal on Technicalities—Proof that Various Names in Indictment Purporting to Refer to Same Person Do in Fact Mean One and the Same Person Essential.* O.

The decision in *Goodlove* v. *State*, 82 Ohio St. 365, has been the subject of some sensational press comment, *Collier's Weekly* remarking that "the Ohio Supreme Court has recently turned another alleged murderer loose on a technicality."

James F. Goodlove was indicted for shooting, with intent to kill, "one Percy Stuckey, *alias* Frank McCormick." The defendant was convicted of manslaughter and sentenced by the Court of Common Pleas to fifteen years imprisonment at hard labor, the circuit court affirming the judgment. In his appeal, among other assignments of error, he alleges that the trial court should not have overruled his motion to direct a verdict of not guilty. The Supreme Court of Ohio, in a decision rendered by Crew, J., held this error fatal, on the ground that no evidence was introduced to show that Percy Stuckey and Frank McCormick were one and the same person. To quote:—

"In the case now before us not only is there a total absence of evidence that Percy Stuckey and Frank McCormick were one and the same person, but there is not in this case from beginning to end a scintilla of evidence even tending to show, or that would suggest, that any such person as Percy Stuckey ever had an existence. There was, therefore, in this case a total failure of proof as to an essential allegation and material part of the offense charged in the indictment, and such defect not being one of mere variance that is excused or rendered harmless by the curative provisions of section 7216, Revised Statutes, it was and is necessarily fatal and the motion to direct a verdict in this case should have been sustained."

There was no dissenting opinion, Summers, C.J., and Davis, Shauck, and Price, JJ., concurring. It is difficult, nevertheless, to see any justification for the decision. The contingency of double jeopardy would seem too remote and fanciful to deserve serious consideration. Counsel for the appellant properly argued that an acquittal of the charge of killing of John Brown would not be a bar to a prosecution for the killing of James Brown. But this was an instance of John Brown *alias* James Brown, something very different.

See Juries.

Professional Misconduct. *Impeding and Obstructing Administration of Justice.* N. Y.

The respondent in *Matter of Sanford Robinson*, decided by the New York Appellate Division in October, upon consideration of the peculiar facts and circumstances disclosed in the case, was subjected to the penalty of suspension for one year from the practice of law by the decision of the Court, rendered by Ingraham, P.J. It was held that where an attorney advised a person to avoid the service of a subpoena issued out of a court of the United States and the latter thereupon refused to see the marshal and subsequently departed for Canada and the subpoena was not served, the facts that thereafter the said attorney was indicted by a federal grand jury under sections 5398, 5399 of the U. S. Revised Statutes, was tried, convicted and sentenced to pay a fine as punishment, were relevant in determining what discipline should be imposed for the offense. (Reported in *N. Y. Law Journal*, Oct. 27.)

Real Property. See Conveyances.

Waters. *"Scenic Beauty" Case—Æsthetic Enjoyment Only Without Physical Taking Held a "Beneficial Use"—Appropriation.* U. S.

Judge Robert E. Lewis, in the United States District Court at Pueblo, Colo., granted the Cascade Town Company a permanent injunction Oct. 4 prohibiting the Empire Water and Power Company from using water for the purpose of generating power, where the water formed the chief scenic attraction of the mountain cañon at the mouth where the town is situated. Cascade lies at the base of Pike's Peak.

The town company resisted the power company on the ground that in playing its part in making scenic beauty, the water is already being put to beneficial use within the meaning of the law, and therefore is not subject to condemnation proceedings. This contention was sustained by the court, of the defendant, that there could be no beneficial use where there was in fact no use, the water not being handled and used, being overruled.

The Editor's Bag

REX v. *CRIPPEN*

THE speed with which the *Crippen* case was disposed of by the English courts, in a manner which could leave no doubt that the accused enjoyed a fair trial, excited the general admiration of the American bar. Our lawyers, however, have not shown the same unanimity as to the practicability of conducting trials for murder with equal speed in this country. There has been a tendency to lay stress on the contention that the English methods are not adapted to American courts. It is doubtless this very sentiment which blocks progress in this country, and resting as it does on the shakiest foundation, gives rise to unreasoning opposition to reforms of procedure which leading professional organizations are coming to demand.

The difficulties of copying the procedure followed in the Crippen trial are more apparent than real. We do not wish to imply that English methods could be exactly copied in the courts of this country. But the spirit, if not the actual details of those methods, could be imitated with entire safety. The England of today is a democratic country, and those who say that the American people would not submit to the methods of an English court are thinking of the England of yesterday. The powers of an English court do not exceed the narrow limits within which the common law has hedged its authority, to protect the rights of every individual, and in this country there would be nothing derogatory to that same common law, or to the institutions that have grown out of it, in empowering our courts to handle their business with increased dignity and dispatch.

The practice of indiscriminately allowing challenges on the vaguest and most trivial pretexts could be abolished by the passage of a satisfactory practice act, and no one would suffer injustice through the removal of this formidable instrumentality of delay. Motions for continuances could be ruled upon with greater firmness, and with keener attention to the expeditious disposal of causes, without any just complaint that the judiciary is exceeding its province. The introduction of testimony of doubtful relevancy, serving to protract the trial needlessly, and unnecessarily long-winded arguments by counsel, are evils for which a remedy that does not contravene the Sixth Amendment is obvious. Likewise the plea of insanity, and the testimony of handwriting and medical experts, are matters which can be dealt with by legislation, supported by proper rules of court, in such a manner as materially to lessen if not wholly to overcome these evils, without danger of violating constitutional provisions safeguarding

the rights of accused persons. The bench in England is no more superior to the Constitution than with us, and there could be no menace to our free institutions in swifter and surer justice.

Until a generation ago, England was suffering, as we are, from the evils of an archaic and needlessly artificial procedure. The speed with which the evil was discovered and the promptitude with which it was remedied, are difficult to understand in this country, where the obstacles to reform seem infinitely various and complicated. But England was not the only common law country to undertake the reform. Canada and Australia followed suit, and the present position of the United States, in its blind worship of the older procedure, is anomalous among free Anglo-Saxon peoples. The existing system serves to benefit no one, except those lawyers pecuniarily interested in burlesquing the administration of justice and in lowering the standards of professional ethics, and is a form of despotism to which the American people should not longer submit.

Once invest our judiciary with the power which will enable it to determine causes speedily on their merits, and the other evils incident to the present system will rapidly disappear. It will be unnecessary to appoint additional judges, for the courts will quickly catch up with their arrears, and the evil of congested dockets, serving, perhaps, more than any other to deprive the accused of his constitutional right to "a speedy and public trial," will exist no longer. The subject is one which bar associations need to urge more insistently than ever on the attention of legislatures. The initiative of the bar is the chief and perhaps the only agency through which the needed reforms can be brought about.

CONTEMPTS BY NEWSPAPERS

ONE of many instructive incidents of the Crippen trial was the summary infliction of a heavy fine for contempt on one newspaper which had published matter relevant to the merits of the case. In this country this power of the court is but rarely exercised, but there is nothing in our law or institutions to prevent its being employed with nearly if not quite the same vigor. A few heavy fines might do something toward lessening the abuse of the trial of cases in advance of the actual determination of the merits, by our great metropolitan press, and would lend increased dignity to the administration of the criminal law in this country.

INSANITY AS A GROUND FOR DIVORCE

IN the hearing of testimony before the English Divorce Commission, expert witnesses were recently heard for and against the advisability of making permanent insanity a ground of divorce. Sir Montague Crackanthorpe offered the opinion that it was dangerous to the public welfare for the state to encourage the renewal of married life between a sane and an insane person, and that it was for the public good that the marriage-tie be severed under such conditions. If that is sound reasoning, it would seem to follow that the police power of the state should assert itself to dissolve marriage when either party can be proved to be permanently insane. We believe that this would be going too far, and that with regard to insanity, at least, the common sense view is that the happiness of the parties and purity of the marriage relation are to be considered paramount to the interest of the state in the issue of such marriages. It

might be well to make marriages voidable on the ground of permanent insanity, at the election of those who wish to be released from the bond, without forbidding continuance of the marriage relation to such as do not desire separation. In some of our states insanity is an absolute ground for divorce, in others there is considerable opposition to the proposal. But if marriages are to be voidable for consanguinity between the forbidden degrees, for impotence, or for insanity existing at the time of marriage and unknown to the other party, as is recommended by the Committee on Marriage and Divorce of the Commissioners on Uniform State Laws, permanent insanity arising after marriage would seem to be an analogous ground for divorce, and one which should be recognized by the law not less than those other grounds, all of which likewise really relate to the competency of the parties to fulfill the marriage relation.

A TELEPHONE IS A TELEGRAPH

JUDGES perhaps fall into the mistake occasionally of employing a somewhat comical inaccuracy of language, which, however, leaves their meaning absolutely clear. One such instance has been brought to our attention by a correspondent, who writes:—

> The Court of Appeals of New York has solemnly determined that a "telephone is a telegraph in all essential particulars." 199 N. Y. 135. This is presumably founded on the famous decision of the railway conductor that "cats is dogs and rabbits is dogs, but turtles is insects and travels free."

What the Court actually said was this: "The business of a telephone company, in its broader aspects at least, is legally indistinguishable from that of a telegraph company, the telephone being a telegraph in all essential particulars"; and it went on to cite a decision in New Jersey which was to the effect that a corporation organized under an act to incorporate telegraph companies might proceed to condemn lands for a telephone line although telephones are not mentioned in the statute. Certainly there is no absurdity in holding that a telephone may for some intents and purposes be practically equivalent to a telephone, and the *dictum* of the court is hardly to be understood as authority for the doctrine that black is white, or *vice versa*.[1]

A JUROR'S DEFINITION

EX-GOVERNOR HUGHES of New York, the new member of the Supreme Court of the United States, recalls an incident happening when he was a law-clerk in the office of Chamberlain, Carter & Hornblower.

A man was being examined by one of the firm with reference to his qualifications as a juror in an important case, involving a considerable sum of money.

"You understand," said the lawyer, "what is meant by a preponderance of evidence?"

"Yes, sir," replied the other, promptly.

"Let me have your idea of it."

"I understand it, I tell you."

"Well, what is it?"

"Why, anybody can understand that."

"I would like to have your definition of it."

"I know what it is," replied the man, hotly. "When I tell you I know what a thing is, I know it. That's all there is about that."

"Well, what was the question I asked you?"

"You ought to know what that was. If you've forgot your own questions, don't try to get me to remember them for you!"

[1] See *Central N. Y. Tel. & Tel. Co.* v. *Averill*, 92 N. E. 206, 208.

"I don't want to hear any more of that kind of talk," interposed the Court. "Answer the questions addressed to you by the counsel."

"Judge, I did. He asked me if I knew what it was, and I said I did."

"Are you sure you understand what is meant by the term, 'preponderance of evidence?' " asked the Court, sharply.

"Of course I am, Judge."

"Define it, then."

"It's evidence previously pondered."

THE EXODUS VIEWED AS A STRIKE

IT is novel to think of the Exodus of the Israelites from Egypt as a *strike*, yet a contributor to the *Canadian Law Times* insists that it should be so regarded. To quote Dr. R. A. Reid:—

Investigation has demonstrated that the flight of the Israelites was nothing less than a national protest against the oppression of capital, and this exodus on examination will be found to possess all the essential and familiar elements of a strike. Their dissatisfaction and rebellion was due to an order of Pharaoh that all the Israelites should furnish their own straw wherewith to make bricks. It is not recorded how far the well-known aversion of the Jews to manual labor extended into the controversy, and we shall probably never know until we have learned by archæological discoveries, perhaps, the other or Egyptian side of the story. There can be no doubt about one thing, and that is that the Jews ceased work in a body, and while it is not certain that they did not resort to intimidation, or what we know today as the boycott, yet in the end the result was as effective through others' aid, for the Egyptians were effectively suppressed. The outcome of strikes in modern times in many instances illustrates this last feature, for one side or the other is worsted for the time being. History does not tell us whether or not a demand was made for an increase of wages in this instance, but it is quite certain that the Egyptians were unwilling to let the Jews go, for it is recorded that they followed them into the Red Sea. What happened as a result of the chase is a matter of common knowledge.

A GRAVE MATTER

A WESTERN correspondent sends us the following newspaper story:—

A young lawyer writes to a widow concerning a case which he has had for her deceased husband, and desiring to begin in terms of condolence, he starts out as follows: "I cannot tell you how I am pained to hear that your husband has gone to heaven. He and I were bosom friends, but now we shall never meet again."

There the story stops, but it seems as if there should be more. What did the widow write back? Something like this:

Dear Sir: If I agreed with you that we were never again to see my husband it would be terrible, but I am comforted by the thought that we shall both meet him again, though not, of course, in the place which you have in mind.

CHIVALRY

MYERS D. CAMPBELL of Kirksville is the lawyer who will be in the public eye at Lancaster, Mo., when the Alma Vaughn poisoning case is called for trial there during the May term. Mr. Campbell is to assist the state in its efforts to show that the defendant administrated strychnine to her husband, the late Professor J. T. Vaughn. In the first district of Missouri this slender young attorney is regarded as a giant at the bar. In the many newspaper stories that have been printed from the time of the grand jury investigation at Kirksville but little was said about Campbell, because at the time he was in ill-health and could not attend the proceedings. But when the May call occurs and the trial begins, there will be a great deal said concerning the state's assistant counsel. As a cross-examiner Campbell operates like a surgeon, cutting down until the sore spot is reached. He never gets tired, never loses sight of the point.

There is an illustration on the records of the Adair county circuit court. It was a breach of promise trial. The defense was undertaking to show that the young woman who

sued was not altogether partial with her affections. Campbell was employed to stand between the fair plaintiff and the defendant's sheckels. There was evidence on behalf of the defendant that once upon a time one Roy Mailverne, a smart and good-looking country youth, had kissed the plaintiff, and that she had not seriously objected. Roy was called in rebuttal to deny the base imputation. He did it vigorously—declared he never did such a thing, never even dreamed of it; could not imagine how such a wicked lie had gone abroad.

Campbell took the immaculate Roy in hand on cross-examination. Nobody had warned him as to the sort of man Campbell was. He had stood the direct with confidence, and flushed with triumph turned to the cross-examiner, who drowsily suggested:—

"Roy, you didn't steal into the kitchen where Miss M—— was making batter for flap-jacks and kiss her?"

"No, sir; I didn't."

There was a brief pause, during which the examiner looked at his half-burned cigar meditatively. The audience began to titter.

"Roy, you didn't steal up behind Miss M—— in the kitchen where she was—"

"I tell you I didn't kiss her at all!" said the witness, angrily.

"At no where and no time?" said the lawyer gently.

"At no where and no time!"

There was another pause, as the interrogator calmly knocked the ashes off his cigar, and studied the floor.

"Roy," he said, ingratiatingly, "if you had stolen into the kitchen and kissed Miss M—— when she was mixing the things for johnnie cakes you'd be too much of a gentleman to admit it before all this crowd, wouldn't you?"

In the laughter following the mild observation the witness failed to reach the significance of the question.

"Sure!" he replied, decidedly; "I ain't no Nannie tell-tale."

"That's all, Roy," said the examiner, pleasantly, "you may run along home now."

HELD HIS JOB

THE local government of a district in the Great Smoky Mountains, east of Knoxville, Tennessee, had been for a long time in the hands of the Democrats entirely with the exception of the Justice of the Peace, who was a Republican but who through his tact had won the friendship of the citizens and had retained his office for twenty years, no candidate ever having been put up against him.

Just before the last election an ambitious storekeeper succeeded in convincing many of the citizens that the entire local government should be in the hands of one party, and he was duly announced as the Democratic candidate.

The old Judge made no move, relying upon the illiteracy of the citizens and their respect for his power to help him out at the psychological moment. The morning of Election Day he mounted a barrel in front of the town tavern and announced that he was going to make his first and last speech of the campaign.

"Fellow citizens," he said, "I know you alls and you alls knows me. I know that you alls is all moonshiners, and you alls knows that I've saved every one of you from going to the penitentiary at least twenty times in the last twenty years, for you alls breaks the law as regular as the corn crop comes around.

"Now I see plainly what you alls is trying to do—you want to turn me out. Well, mebbe you alls can, but I want to tell you this: I've got the Constitution of the United States and the Laws of the State of Tennessee locked up in my office, and if you alls don't re-elect me I'll burn 'em up and we will all go to Hell together."

He was re-elected unanimously.

SOME PECULIAR LAWS

IN the United States we pass so many laws each year that it is not surprising that the authorities forget to enforce many of them. We have, in fact, a perfect passion for making new laws, and if any one complains that conditions have not been improved, we assure him that he must be mistaken, complacently pointing to the statute books.

In Chicago, recently, an ordinance regulating the length of hat-pins created much outcry—though the reason for objection is not clear to a mere man. Chicago women would doubtless start a revolution if they lived in Lucerne, where a law forbids women wearing hats of more than eighteen inches diameter, or the wearing of foreign feathers and artificial flowers. If one wishes to wear ribbons of silk and gauze, a license must be procured, which costs eighty cents a year. Norway not long ago passed an act to the effect that any woman wishing to wed must first present

to the authorities a certificate showing that she is competent in the arts of cooking, sewing, knitting, and embroidery.

Germany has an intelligent and practical method of dealing with men who ill-treat their wives. Instead of sending them to jail for a continuous period, as is done in this country, and thus depriving the family of the man's wages for that time, the German offender is arrested on Saturday afternoon, as he leaves his work, and held in prison until time for work on Monday morning. This plan is followed until he has served the number of days of his sentence. This is a scheme worthy of serious consideration by authorities everywhere. During the period which the German offender spends the week-ends away from his home, his earnings are handed over to his wife.

In Belgium they place a premium on marriage by allowing a married man two votes at an election, as against the single man's one. In Madagascar, one must be a father or pay for the default. If a man is unmarried or childless at the age of twenty-five, he must contribute annually $3.75 to the support of the state, and each woman who has remained single or is childless at twenty-four is taxed $1.80 per year.

In Austria a heavy fine is imposed upon any actor who wears a military or ecclesiastical costume on the stage. In Germany such costumes may be worn, but the actors will find themselves in a serious situation if they are not absolutely correct down to the last loop and button.

USELESS BUT ENTERTAINING

Judge—"Why didn't you seize the thief when you found him?"

Policeman—"How could I? I had my club in one hand and my revolver in the other!" —*Fliegende Blaetter.*

"Say, paw," queried little Sylvester Snodgrass, "what's a test case?"

"A test case, my son," replied Snodgrass, Sr., "is a case brought in court to decide whether there's enough in it to justify the lawyers in working up similar cases."

—*Lippincott's.*

A long-winded, prosy barrister, says a contemporary, was arguing a technical case recently before one of the judges of the High Court. He was drifting along in a desultory way when the judge yawned suggestively. "I sincerely trust that I am not unduly trespassing on the time of the Court?" said counsel, with a suspicion of sarcasm in his voice. "There is a difference," replied the judge, "between trespassing on time and encroaching on eternity."

—*Law Notes* (London).

The case concerned a will, and an Irishman was a witness. "Was the deceased," asked the lawyer, "in the habit of talking to himself when alone?"

"I don't know," was the reply.

"Come, come, you don't know, and yet you pretend that you were intimately acquainted with him?"

"The fact is," said Pat, dryly, "I never happened to be with him when he was alone."

—*Pittsburg Observer.*

A colored man was brought before a police judge charged with stealing chickens. He pleaded guilty and received sentence, when the judge asked how it was he managed to lift those chickens right under the window of the owner's house when there was a dog in the yard.

"Hit wouldn't be no use, judge," said the man, "to try to 'splain dis thing to yo' all. Ef you was to try it you like as not would get yer hide full of shot an' get no chickens, nuther. Ef yo' want to engage in any rascality, judge, yo' better stick to de bench, whar' yo' am familiar." —*Human Life.*

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

The Legal World

The United States Supreme Court

The Supreme Court of the United States convened at noon on Monday, Oct. 11, important changes having taken place in its membership in consequence of the death of Chief Justice Fuller and Associate Justice Brewer, the resignation of Associate Justice Moody, and the appointment of Associate Justice Hughes. The oath of office was administered to Mr. Justice Hughes on the second day, reducing the three prospective vacancies to two.

The docket at the opening of the term

comprised 725 cases, among them some of the most important, perhaps, with which the Court has had to deal for years.

The first month of the new term was occupied, in part, by the arguments in the *Missouri River* rate cases, on the constitutionality of the Carmack amendment to the Hepburn rate law, and in the *Kentucky Blanket Grants* case. The Court on Oct. 17 refused to grant a rehearing of the *Missouri River Rate* cases and the *Denver Rate* cases (see 22 *Green Bag* 419). The result is to put into effect the order reducing the class rates between Mississippi River crossings and Missouri River cities on freight originating at Atlantic seaboard points, and that reducing freight rates on class articles from Chicago and St. Louis to Denver.

The Court affirmed the decision of the United States Circuit Court in *Matter of Hoffstot* (see 22 *Green Bag* 417), without rendering an opinion, sustaining the decision of Judge Holt that the writ of *habeas corpus* will not be granted, after interstate rendition proceedings, if the petitioner was physically present in the demanding state at the time when the crime was committed.

The *Standard Oil* and *Tobacco Trust* cases have been assigned for rehearing on Jan. 3.

The series of corporation tax cases has also been restored to the calendar for reargument in January.

A number of other important cases are also set for rehearing. These include the *Gompers contempt* case, to be heard Jan. 16, the *Employer's Liability* cases, to be heard Nov. 28, the *Panama libel* appeal case against the *New York World*, the 2-cent passenger rate cases from Missouri, and the litigation between the states of Virginia and West Virginia over the question of the settlement of the debt due the former from the latter commonwealth, the last of which is to be argued Jan. 16.

Personal

Mr. Justice Oliver Wendell Holmes, of the United States Supreme Court, and Professor John William Burgess, dean of the faculty of political science in Columbia University, received the honorary degrees of Doctor of Laws from the University of Berlin, at its centenary celebration on October 12.

"I cannot say too much for the juvenile court system and the probation system which you have here in America," said Chief Justice Hans Gmelin, of the Supreme Court of Württemberg, Germany, on his recent visit to the United States. "We are far behind in the former system, and there are many lessons which we can learn from the Americans."

Charles Montague Lush, K.C., has been appointed a Judge of the English High Court, in place of Mr. Justice Jelf, whose resignation took effect on October 6. Mr. Montague Lush was born in 1853, and is the fourth son of the late Lord Justice Lush. Early in his career at the bar he wrote a well-known treatise on "The Law of Husband and Wife." He took "silk" in 1902, and during the eight years and more he has been a King's Counsel he has occupied a foremost place at the common law bar.

"I do not agree with many of your fellow citizens that capital punishment should be abolished," said Judge Kungpah T. King of the Supreme Court of Justice, Pekin, China, during his recent visit to this country to attend the Washington Prison Congress, "but I do think that the punishment of a crime by death should be as humane as possible. For that reason one of my recommendations on my return to China will be the adoption of the system of electrocution rather than our present system of beheading. I have heard considerable of your system of juvenile courts but you must realize that in China we have very little need of them. Our children are taught from their earliest days the honor of their parents, and a father's wish is law to his children. I do not think there will ever be great need of a juvenile court in China, even in the city of Pekin."

The Vermont Bar Association

The thirty-second annual meeting of the Vermont Bar Association was held at Montpelier Oct. 4–5. President C. A. Austin's address dealt with "Marriage and Divorce." He reviewed the laws on divorce from the earliest times, saying that a system of separation of husband and wife has always existed, and that the problem is social, and can be aided but little by legislation. The Association endorsed a bill allowing covenant, debt and assumpsit or any two of them to be joined in a single action for the same cause. The Committee on Jurisprudence suggested a modification of the fellow servant doctrine, but no action was taken. The following new officers were elected: President, Hon. James M. Tyler of Brattleboro; first vice-president, Rufus E. Brown of Burlington; second vice-president, Porter H. Dale of Island Pond; third vice-president, Edwin Lawrence of Rutland; secretary, J. H. Mimms of St. Albans; treasurer, E. M. Harvey of Montpelier; librarian, C. H. Senter of Montpelier.

Railway Rate Regulation

Investigation by the Interstate Commerce Commission into the proposed advances of freight rates in eastern trunk line territory, was resumed in October at Washington, D. C., after an adjournment of the hearing from New York City. Counsel for the railroads expressed entire willingness to rest their case on statements made by President James McCrea of the Pennsylvania Railway; President Daniel Willard of the Baltimore & Ohio, and President William C. Brown of the New York Central lines.

Western railroads continued the presentation of evidence in Chicago before the Interstate Commerce Commission through September and October in support of their contention that a general advance in freight rates is necessary to maintain the standard of service demanded by the Government and the people. Commissioners Clements, Clark and Lane conducted the hearings. It took the shippers only a few hours to introduce evidence, but an imposing mass of statistics and testimony went into the record for the railroads. The shippers were represented by a number of attorneys who confined their efforts largely to attacking the railroad evidence rather than introducing original testimony for themselves. The hearings were concluded on Nov. 1. Arguments will be heard by the Commission at Washington on Dec. 14, and after due deliberation, the Commission will announce what it is generally considered will be the most important decision ever emanating from it.

Fifty or more of the country's leading railroad lawyers who met at Portsmouth, N. H., last summer (see 22 *Green Bag* 549), to discuss the interstate commerce law resumed the same conferences in New York City Oct. 25–28. After a long discussion, covering a part of every day's session, they decided to attack the Mann-Elkins act. The conference was secret, and it may be surmised that the attack will be made on the constitutionality of one of the following provisions of the law which are said to have been discussed: the provision by which rates lowered to meet water competition may not be increased except as specifically stated in the act; the clause in section 4 (the long and short haul clause) giving the Interstate Commerce Commission power to relieve from the operation of that section; the long and short clause as a whole; section 9, which has to do with the maintenance of agents at all stations and the supplying by them of information to all shippers concerning freight schedules; and section 12. The exact course of procedure has been left to a committee of seven lawyers to be appointed by Col. Henry L. Stone, General Counsel for the Louisville & Nashville railroad, who presided at the conference.

Government and Public Law

The special session of the Colorado legislature adjourned Oct. 19 after lasting seventy-one days. An initiative and referendum bill, a primary bill, a registration bill and a railroad commission bill were passed.

The Republican majority in the New Mexico constitutional convention have decided that the judges of the Supreme Court and the members of the proposed corporation commission shall be elected by the people; that the initiative shall be left out of the constitution, and that the referendum in a modified form and employers' liability shall be incorporated.

The newly constituted Imperial Senate of China met for the first time on Oct. 3. A constitutional assembly of two hundred members has also been inaugurated. In the Senate on Oct. 31 Prince Yu Lang, a member of the Grand Council, stated that the entire nation from the highest to the lowest was agreed upon the necessity of the early establishment of a general parliament. The Senate, or Tzu Cheng Yuan, recently voted to memorialize the throne to that effect, and the Prince's speech is taken to signify that the throne will accede to the request.

The overturn of the monarchy in Portugal was accomplished with speed and with comparatively little bloodshed, in such a manner as did credit to the humanity of the revolutionary leaders. The ministers turned over their bureaus to the provisional government at once. The latter was constituted with Theophile Braga, poet and philosopher, as President, Dr. Alfonso Costa, lawyer and professor, as Minister of Justice, Dr. Bernadino Machado, a wealthy former professor of philosophy, as Minister of Foreign Affairs, Dr. Antonio Luiz Gomes, Minister of Public Works, and Dr. Antonio Jose d'Almeida, Minister of the Interior. The opening days of the new *régeme* were marked by pronounced anti-clerical activity, but the government soon settled down into its normal routine.

Necrology — The Bench

Ferguson, W. P.—At Shenandoah, Ia., Oct. 15, aged 67. Judge of superior court; dean of the Page county bar.

Flinn, Silas W.—At Milton, Vt., Oct. 3, aged 44. City court judge.

Fox, James D.—At St. Louis, Oct. 6, aged 65. Chief Justice of the Missouri Supreme Court; born in Frederickstown, Mo., Jan. 23, 1847; state circuit judge for some years; elevated to Supreme Court in 1902; lived in Jefferson City.

Hockman, John H.—At Defiance, O., Oct. 13, aged 54. Probate judge.

Larrabee, James M.—At Gardiner, Me., Oct. 24, aged 77. Judge of municipal court.

Mason, L. F.—At Vidalia, La., Oct. 9, aged 60. Former state secretary of Louisiana; district court judge.

Meily, Frank E.—At Lebanon, Pa., Oct. 2, aged 55. County judge.

Noyes, Charles J.—At Los Angeles, Oct. 16, aged 69. Speaker of Massachusetts House for three terms; former state senator; later special justice of South Boston district court.

Perry, John.—At Algoma, Wis., Oct. 25. County judge.

Putnam, Arthur A.—At Uxbridge, Mass., Oct. 21, aged 81. District court judge; one of oldest members of Harvard Law School Association; orator and writer.

Reininger, Robert.—At Tiffin, O., Oct. 15, aged 76. Lawyer of Charles City, Iowa.

Rodecker, Alfred W.—At Peoria, Oct. 4, aged 66. County judge.

Stanley, W. E.—At Wichita, Oct. 13, aged 62. Ex-Governor of Kansas; had served as county attorney in several counties; declined appointment to Supreme bench.

Steele, Robert W.—At Denver, Oct. 12, aged 53. Chief Justice of Colorado Supreme Court; born in Lebanon, O., and brought up in Dayton, O.; in the Colorado labor wars in 1904 he handed down a dissenting opinion in the decision which gave the Governor the right to suspend the writ of *habeas corpus*.

Swift, Harlan J.—At North Evans, N. Y., Oct. 6, aged 67. Past department commander G. A. R., in New York state; former county judge.

Topham, James G.—At Newport, R. I., Oct. 4, aged 88. Prominent Mason.

Tree, Lambert.—At New York, Oct. 9, aged 78. Former state circuit judge in Illinois; Minister to Belgium and Russia under Cleveland; one of incorporators of National American Red Cross; president of the Chicago Law Institute; long prominent in "Silk Stocking Democracy" of Chicago.

Van Doren, Alfred B. D.—At Long Branch, Oct. 3, aged 70. City recorder.

Whitson, Edward N.—At Spokane, Oct. 15, aged 58. U. S. circuit judge; former mayor of North Yakima; auditor of Yakima county.

Necrology—The Bar

Bartholomew, Horace B.—At Minersville, Pa., Oct. 24, aged 45. Highly esteemed member of Schuylkill county bar.

Bolles, H. Eugene.—At Boston, Oct. 28, aged 57. Former assistant counsel for the New York & New England Railroad Company; antiquarian and collector.

Carpenter, B. W.—At Pittsburg, Oct. 15, aged 59. Active in political affairs.

Coburn, Lewis L.—At Chicago, Oct. 23, aged 75. Founder and first president of the Chicago Union League Club; pioneer lawyer and publicist of that city; was instrumental in organizing the Athanæum.

Coffey, Joseph W.—At San Francisco, Oct. 1.

Dana, William B.—At Mastic, L. I., Oct. 10, aged 82. Owner, founder and editor of the *Financial Chronicle*.

Darling, Joseph K.—At Chelsea, Vt., Oct. 25, aged 77. Former state's attorney for Orange county; member of both branches of Vermont legislature; father of Gen. Charles K. Darling of Boston, clerk of United States Circuit Court.

Devine, J. Benjamin.—At Lawrence, Mass., Oct. 9, aged 39.

Dolliver, Jonathan P.—At Fort Dodge, Ia., Oct. 15, aged 58. Representative, Congressman and Senator; celebrated campaign orator; became very popular because of his Insurgency on the Payne-Aldrich tariff bill; staunch defender of President McKinley.

Gilford, Thomas B.—At New York, Oct. 6, aged 94. Descendant of an old New York family; probably oldest alumnus of Columbia University.

Grout, Gardner K.—At Saginaw, Mich., aged 73. One of the pioneer builders of Saginaw; lawyer of fifty years' practice.

Hill, David B.—At Albany, Oct. 20, aged 67. Ex-United States Senator and former Governor of New York; as a lawyer handled many important cases; as a politician showed a genius for organization and detail; helped to advance Tilden to the Governorship and worked hard for his election to the Presidency; long state Democratic leader in New York.

Kent, William.—At Tuxedo, aged 52. Well known New York attorney and clubman.

Mann, Charles W.—At Somerville, Mass., Oct. 18, aged 55. Prominent in Meriden and Bridgeport, Conn.

McKelleget, Richard J.—At Cambridge, Mass., Oct. 17, aged 57. Noted criminal lawyer.

Schieffelin, George R.—At New York, Oct. 24, aged 74. Member of old New York family; prominent for fifty years.

Tallmadge, David F.—At New Haven, Oct. 10. Member of the New York bar; stumped Pennsylvania in interests of Samuel J Tilden.

Tweedy, Samuel.—At Belle Island, Ct., Oct. 7, aged 64. Skillful trial lawyer; graduate of Yale and the Columbia Law School.

Ward, Sylvester L. H.—At New York, Oct. 25, aged 63.

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